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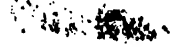
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THE
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VOLUME 46,

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SOUTHEASTERN REPORTER, VOLUME 46.

JUDGES

OF THE

COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME.

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COURT RULES.

SUPREME COURT OF NORTH CAROLINA.

Amendment to Rule 27.*

Add at the end of Rule 27:

When testimony is admitted, not as substantive evidence, but in corroboration or contradiction, and that fact is stated by the court when it is admitted, it will not be ground for exception that the judge fails in his charge to again instruct the jury specially upon the nature of such evidence, unless his

attention is called to the matter by a prayer for instruction; nor will it be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted.

Adopted March 16, 1904.

Amendments to Rules 28, 52, and 53.†

28. Printing Records—What to be Printed— Pauper Appeals.

Fifteen copies of the entire transcript sent up in each action shall be printed, except in pauper appeals, and in these latter the court desires the counsel for the appellant to furnish a sufficient number of printed or typewritten briefs for the use of the court, giving a succinct statement of the facts applicable to the exceptions, and the authorities relied on. Should the appellant gain the appeal the cost of the same shall be taxed against the appellee.

The printed transcript shall be in the order required by rule 19 (1), and shall contain the marginal references and index required by rule 19 (2) and 19 (3), though, for economy, the marginal references in the manuscript may be printed as subheads in the body of the record and not on the margin. The transcript shall be printed immediately after docketing the same unless it is sent up ready printed.

52. Petition to Rehear—When Filed.

A petition to rehear may be filed at the same term, or during the vacation succeeding the term of the court at which the judgment was rendered, or within twenty days after the commencement of the succeeding term. If such petition is ordered to be docketed by the justices to whom it is submitted under rule 53, such justices may, upon such terms as they see fit, make an order restraining the issuing of an execution or the collection and payment of the same until the next term of said court, or until the petition to rehear shall have been determined.

53. Petition to Rehear—What to Contain.

The petition must assign the alleged error of law complained of, or the matter overlooked, or the newly discovered evidence, and allege that the judgment complained of has been performed or secured. Such petition shall be accompanied with the certificate of at least two members of the bar of this court who have no interest in the subject-matter and have never been of counsel for either party to the suit, and each of whom shall have been at least five years a member of the bar of this court, that they have carefully examined the case and the law bearing thereon and the authorities cited in the opinion, and they shall summarize succinctly in such certificate the points in which they deem the opinion erroneous.

The petitioner shall endorse upon the petition the names of two justices, neither of whom dissented from the opinion, to whom the petition shall be sent by the clerk, and it shall not be docketed for rehearing unless both of said justices endorse thereon that it is a proper case to be reheard: Provided, however, that when there have been two dissenting justices it shall be sufficient for the petitioner to designate only one justice, and his approval in such case shall be sufficient to order the petition docketed. The clerk shall endorse on the petition the date on which it was received, and it shall be delivered by him to one of the justices designated by the petitioner. There will be no oral argument before the justice or justices thus designated, before it is acted on by them, and if they order the petition docketed there shall be no oral argument thereon before the court (unless the court of its own motion shall direct an oral

*For rule as originally adopted, see 29 S. E. vii.
46 S.E.

†For rules as originally adopted, see 29 S. E. viii, 1.

argument), but it shall be submitted upon the record at the former hearing, the printed petition to rehear and a brief to be filed by the petitioner within ten days after the petition is ordered to be docketed and a brief to be filed by the respondent within twenty days after such order to docket. Such briefs shall not be the briefs on the first hearing, but shall be new briefs, directed to the errors assigned in the petition, and shall be printed. If not printed and filed in the prescribed time by the petitioner, the petition will be dismissed, and for default in either particu-

lar by the respondent the cause will be disposed of without such brief.

The petition may be ordered docketed for a rehearing as to all the points recited by the two certifying counsel (who cannot certify to errors not alleged in the petition), or it may be restricted to one or more of the points thus certified, as may be directed by the justices who grant the application. When a petition to rehear is ordered to be docketed notice shall at once be given to counsel on both sides by the clerk of this court.

Adopted October 28, 1903.

SUPREME COURT OF APPEALS OF WEST VIRGINIA.

It is ordered that Rule XII of this Court be and it is amended and re-adopted so as to read as follows:

No petition for a re-hearing will be entertained unless presented within the term at which the decision is announced, nor, in any case, later than thirty days after the date of the decision of the case in which it is presented, (unless as otherwise authorized by

law,) and no re-hearing will be allowed, unless one of the judges who concurred in the decision shall be dissatisfied with the conclusion reached; and no petition for a rehearing will be entertained by the Court in any case, unless the reasons therefor are printed and filed with the petition; but if the decision complained of is announced within fifteen days of the close of the term, the printing may be dispensed with.

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STATE v. CASTLE et al.

(Supreme Court of North Carolina. Dec. 19,
1903.)

MURDER — EVIDENCE — SELF-DEFENSE — IN-
STRUCTIONS—NECESSITY OF RETREAT.

1. Where, on a prosecution for murder, it appeared that accused, who was foreman of a lumber camp, had shot two of the hands during a difficulty commenced by the latter, evidence that the foreman had not sent them sufficient dinner on the day of the killing—it being his duty to have dinner sent to them, and with which they were charged on the employer's books—was erroneously admitted, and calculated to prejudice the jury against accused.

2. On a prosecution for murder, evidence that defendant drank liquor was inadmissible, as defendant's character could not be proved by particular facts or conduct.

3. Two laborers employed in a lumber camp having been creating a disturbance, the foreman, accompanied by another, went to their room, and, on entering, said, "Here is your time," whereupon one of the laborers rose with a pistol, cursing. The foreman's associate grabbed the pistol, and the other laborer rose with a knife. The laborer with the pistol was trying to shoot, and the foreman's associate held the pistol, when the foreman pulled his revolver. The laborer with the knife made a cut at the foreman's associate, whereupon the foreman shot the other laborer twice. Turning, he found the laborer with the knife facing him with drawn knife, and he shot him twice. On a prosecution for murder, the court was requested to charge that if, when the foreman approached the deceased and handed one of them his time, they drew deadly weapons and used threatening language, or attempted an assault, the foreman was justified in meeting force with force in order to protect himself and his companion from harm, and that; if the foreman was where he had a right to be, he was not required to retreat to the wall, though, if he stepped back when the knife was drawn within reach of him, and was impeded so that he could not get out of range of the knife he did retreat to the wall. Held, that the instruction was correct, under the testimony.

4. Where, on a prosecution for murder, the court charged that defendant was justified in meeting force with force, it was error to add, "But you are to judge of the force necessary, and not the prisoner," since the jury should merely find whether he did more than a reasonable man should have done.

5. Two laborers employed in a lumber camp having been creating a disturbance, the foreman, accompanied by another, went to their room, and, on entering, said, "Here is your time," whereupon one of the laborers rose with a pistol, cursing. The foreman's associate grab-

bed the pistol, and the other laborer rose with a knife. The former laborer was trying to shoot, and the foreman's associate held the pistol when the foreman pulled his revolver. The laborer with the knife made a cut at the foreman's associate, whereupon the foreman shot the other laborer twice. Turning, he found the laborer with the knife facing him with drawn knife, and he shot him twice. Held that, on a prosecution for murder, it was error to charge that it was incumbent on defendant to first use gentle and mild means, and that if he used more force than was necessary, and the deceased could have been ejected without it, he would be guilty of murder in the second degree, since the instruction made the right of self-defense turn on the necessity for the force used, without reference to whether it reasonably appeared necessary.

6. The instruction was erroneous because, in view of the evidence, there was no way in which defendant could have resorted to mild and gentle means.

7. It was error to charge that, if the provocation were great, the crime would be but manslaughter, but if slight, and the killing done out of proportion to the provocation, it would be murder in the second degree; there being no slight provocation in evidence.

8. It was error to charge that if defendants went to the room of deceased to discharge them, and they entered into a sudden quarrel and killed the deceased men, they would be guilty of manslaughter; there being no evidence of a sudden quarrel.

9. Where, on a prosecution for murder, the defense is self-defense, and the court instructs that the burden is on defendants to prove the existence of facts necessary to mitigate or excuse the homicide, he should also instruct that defendants were not called upon to introduce other testimony, but could rely on the state's evidence, for mitigation of the homicide or for an acquittal.

10. On a prosecution for homicide, where the defense was self-defense, an instruction that it was incumbent on defendant to satisfy the jury that "these circumstances and facts have been shown to your satisfaction" was erroneous, as calculated to leave the impression that defendants were required to introduce independent evidence to mitigate or excuse the homicide, instead of being entitled to rely on the state's evidence.

11. Two laborers employed in a lumber camp having been creating a disturbance, the foreman, accompanied by another, went to their room, and, on entering, said, "Here is your time," whereupon one of the laborers rose with a pistol, cursing. The foreman's associate held the pistol when the foreman pulled his revolver. The laborer with the knife made a cut at the foreman's associate, whereupon the foreman shot the other laborer twice. Turning, he found the laborer with the knife facing him with

drawn knife, and he shot him twice. *Held*, that the jury would have been warranted in finding that the foreman was endeavoring to discharge his duty, and that the conduct of the laborers was such as to create in his mind a reasonable apprehension that they would execute their threats, and that he was justified in using such means as were necessary to get rid of the troublesome servants.

Appeal from Superior Court, Burke County; E. B. Jones, Judge.

John E. Castle and others were convicted of murder in the second degree, and they appeal. Reversed.

A. C. Avery, S. J. Ervin, and Edmund Jones, for appellants. The Attorney General, for the State.

CONNOR, J. The defendants were convicted of murder in the second degree, and from a judgment upon the verdict appealed to this court.

The testimony tended to show that the defendant Castle was in charge as local manager of a lumber camp constructed and operated by the William Ritter Lumber Company at the terminus of its railway at Camp Creek, in Burke county; that he had charge of the railway and all of the incidental work, including a boarding house where the hands ate and slept, and in which the homicide occurred. At the time of the homicide there were more than 60 or 70 men in the camp. Forty or 50 of them slept in the main building. They took their supper and breakfast in a hall called the "dining room." There was another room, called the "lobby," which was used by the hands as a public sitting room. The board of the hands was furnished by the lumber company under the supervision and direction of the defendant Castle. The deceased men, Dockery and Fortner, were employed by the lumber company.

John Roberts, a witness for the state, testified: That they quit work in the evening at 6 o'clock. That Dockery stopped at 12, and went into camp. Supper was served about 7 o'clock. The camp was in charge of the defendant Castle. Two colored men did the cooking. The sleeping apartments were upstairs. The lower part of the main building was used as a dining room, and a part of it as a lobby. There was a hall upstairs, and bedrooms on either side. The defendant Castle discharged hands for disorder. Each "boss" was held responsible for his hands, and had the power to discharge them. The witness had some talk with Castle about not having dinner that day. He asked who was drinking at the camp, and the witness told him the Fortner boys and Dockery were drinking some. There was a rule that no drinking should be allowed in camp. The witness, under objection, was permitted to say that Castle drank himself, to which the defendant excepted. It was further in evidence that dinner was sent to the hands in the woods, being prepared by

the cooks, and that the hands were charged by Castle, for the company, a stipulated price per meal for their dinner sent them, which was "docked out" of the daily wages of the men. The state proposed to show by John Roberts that sufficient dinner was not sent to his hands on the day of the homicide. The defendant objected, the objection was overruled, and the defendant excepted.

C. H. Buchanan testified that the deceased were drinking before and after supper; that he heard no hollering by them out on the porch, but could hear them cursing all over the lobby, and heard shooting once or twice upstairs. A day or two afterwards he saw where one ball went through the floor of Dockery and Fortner's room into the lobby; heard them cursing about the time they came into supper, using profane and indecent language. They were making a noise, and Castle asked them several times to stop. Castle got the time of the deceased men from Roberts; said he did not see why the boys wanted to do that way; that they could get their money without doing that way; that, when Garland came, he asked Castle where the boys were, and Castle said, "Upstairs." Castle asked Garland what were Mortimer's orders. Garland said Mortimer's orders were to write out discharges and tell them to go away; said, "Send them away quietly;" to deputize all of the men he wanted. Castle asked Garland who would be good men, and he named several. Garland was in the employment of the lumber company. The defendants went to the room of the deceased. Castle had a lantern in his left hand, and an envelope in his right hand. All went upstairs; went into Dockery and Fortner's room. Castle, Garland, and Lunsford walked in. Castle walked in first, on the right side. Then Garland walked in on the left side. Castle handed Dockery an envelope, and said, "Here, boys, is your time." Dockery said something. Never understood what he said. All stood up. "Fortner was sitting on the left of the bed, as we went in." Dockery had a knife in his hand—hawkbill. Fortner had a pistol in his right hand, sitting on the bed, with his feet hanging down, holding the pistol with the muzzle towards the door; and, as Garland stepped in, Fortner turned his pistol up, by turning over his hand. Garland grabbed at the pistol, and said, "What are you going to do with that pistol?" Fortner arose and grabbed the pistol with both hands, and they entered into a scuffle with the pistol. As Garland took hold of the pistol, he raised up. Dockery raised up with his knife and struck at Garland two strokes. Fortner and Garland were struggling over the pistol. The witness thought he cut Garland.

Stokes Pendland testified: That he was commissary clerk, and was at the camp on the night of the homicide. That Dockery came in about 3 o'clock, and said he quit be

cause they gave or sent out no dinner. The witness asked him if he wanted him to go up to the lobby and have some dinner cooked, and he said he did not want any dinner at that time. He and Riddle went out and took a drink of liquor. Dockery came back and asked the witness to show him a knife. The witness went and got out knives, and he bought one. He said he had not had any dinner, and, if Castle charged him with three meals, he would kill him at supper. He repeatedly made those threats. In the evening, up to supper time, he was drinking considerably, and said he had two kinds of liquor. He bought a hawkbill knife, and said that was the kind he wanted; that he had used a knife like that before. That evening about 5 o'clock the witness went to Riddle, and asked him to talk to Dockery and try to get him quiet. He said that Dockery said all he wanted was his money. The witness told him if that was it, he would phone Mortimer, and see that he got his money. After this conversation, Castle came where the witness was. The witness told Castle that he was going to have some trouble, and related the threats—that Dockery had said he would kill him if he charged him for three meals. The witness went to supper, and warned Castle as to the threats. The gong rang, and they started into supper. He saw Fortner. He and Dockery were cursing and using some tough language. "We sat down to the table. There were between fifty and sixty of us. Castle asked the boys to keep quiet. After he called the roll, he went back into his office. Dockery kept on using the language until all had gone out except a few of us. His language was very vulgar." The witness went back to the commissary. "Met Fortner and Dockery in the hall. They were taking a drink of whiskey. One of them said, 'We have got the whole damned thing bluffed.' Think it was Dockery." The witness said, "Boys, if you have got the thing bluffed, I would go up and go to bed." That was the last the witness saw of them. They were shooting and making all sorts of noise upstairs, like knocking over things. The conduct of the deceased men was such as to make the hands leave, and they said if it was such as to be overlooked they would leave.

J. W. Staney testified that he was at supper, and heard the deceased use the language stated by other witnesses. He left because of the language they used. He heard a noise upstairs. They came downstairs. Their language was very vulgar.

Zeb Huskins testified that he saw the deceased in the hallway, going towards their room. "Dockery had a knife, and Fortner had a pistol. Fortner said, 'I thought you were that — John Castle.' Dockery caught me by the shoulder and pulled me into the room, and asked me if I had seen anything of that — Castle. He said, if he could see the — that night, this would do

the work for him. He then jumped off the bed and shot down through the floor. Dockery said, if he could see the —, he would cut him to death. He said that he had cut one to death, and they penned him for that. He said he was going to cut another — if he could see John Castle that night, and, if they penned him for that, he was going to quit."

There was much other testimony of the same character. The testimony in regard to the homicide, as gathered from the several witnesses, is substantially as follows: The defendants, together with several others, went to the room of the deceased for the purpose of giving them their time and discharging them. Fortner, with a pistol in his right hand, started to raise up off the bed, and cursed them. Garland grabbed the pistol with his left hand. Fortner raised up straight. So did Dockery, with a knife in his hand; Fortner trying to shoot. Garland was holding the pistol. Castle pulled out his revolver. Dockery made a cut at Garland with his knife, and, as he did so, Castle shot Fortner. He shot him twice. As he turned, Dockery had his knife drawn, facing Castle—his arm drawn in a cutting position. Castle shot him twice.

The first exception relates to the testimony of John Roberts that sufficient dinner was not sent to his hands on the day of the homicide. This testimony was clearly irrelevant, and was calculated to prejudice the defendant Castle; it being his duty to have dinner sent to the hands, for which, under his direction, they were to be charged on the books of the company, to be deducted from their wages. To charge that he did not send proper dinner, or a sufficient quantity of dinner, was calculated to prejudice the jury against him, and should not have been admitted.

The second exception is directed to the testimony that Castle drank liquor. It is not suggested that he was drunk on the night of the homicide. If the purpose of the testimony was to attack his character—and we do not see how it could have been admitted for any other purpose—it was incompetent. He did not put his character in evidence, and certainly the state could not introduce evidence for that purpose upon the question of his guilt. When he went upon the stand he put his general character in issue as a witness, and the state might have proved that such character was not good. It could not, however, introduce evidence of particular facts or conduct on his part. It is well settled that, for the purpose of attacking general character, the party seeking to do so can only prove common report or reputation. *State v. Laxton*, 76 N. C. 216; *State v. Boswell*, 13 N. C. 209; *State v. Bullard*, 100 N. C. 486, 6 S. E. 191; *State v. Hawn*, 107 N. C. 810, 12 S. E. 455.

"The defendants asked the court to charge the jury that if, when Castle approached the deceased, and handed one of them his time,

and gave notice of discharge, they immediately drew deadly weapons and used threatening language, or attempted to make a deadly assault on Castle or Garland, who accompanied him, Castle was justified in meeting force with force necessary to protect himself and companion from bodily harm; that, if Castle was where he had a right to be or it was his duty to be, he was not required by the law to retreat to the wall from a deadly assault, though if he stepped back when Dockery had drawn a knife within reach of him, and was impeded, so he could not get out of Dockery's reach, by John Lunsford, he did retreat to the wall." The court gave these instructions, adding to each of them the words, "But you are to judge of the force necessary, and not the prisoner," to which the defendants excepted. We think that the prayers as asked were correct propositions of law, in the light of the testimony, and that the court below should not have added the words complained of. While it is undoubtedly true that the jury are the judges of the force which reasonably appeared necessary to be used to repel the assault, or, to put it more accurately, they are to put themselves in the place of the prisoners, and say whether or not, from the testimony, the force used was such as a reasonable man, under like circumstances, would have used, yet it is not correct to leave the guilt or innocence of the defendants to depend upon the absolute necessity of the force used. "Where one is drawn into a combat of this nature by the very instinct and constitution of his being, he is obliged to estimate the danger in which he has been placed, and the kind and degree of resistance necessary to his defense. To do this, he must consider not only the size and strength of his foe, how he is armed, and his threats, but also his character as a violent and dangerous man. It is sound sense, and we think sound law, that, before a jury shall be required to say whether the defendant did anything more than a reasonable man should have done under the circumstances, it should, as far as can be, be placed in the defendant's situation, surrounded with the same appearances of danger, with the same degree of knowledge of the deceased's probable purpose which the defendant possessed. * * * The jury must ascertain the true character of the combat, for if, from the nature of the attack, there was reasonable ground to believe there was a design to destroy his life or commit a felony upon his person, the killing the assailant would be excusable homicide." *State v. Turpin*, 77 N. C. 477, 24 Am. Rep. 455.

The court charged the jury: "Yet it was incumbent upon him to use first gentle and mild means, and if he and those with him used more force than was necessary, or unreasonable or violent force, such as deadly weapons, and you find they could have been ejected without such violent force, the defendants would be guilty of murder in the

second degree." To this instruction the defendants excepted. The defect in this instruction consists in the fact that the judge makes the right of self-defense to turn upon the necessity for the force used, without reference to the question whether it reasonably appeared to be necessary to use such force as the defendants resorted to. The right of self-defense depends upon the use of such force as is necessary, or reasonably appears to be necessary, whereas his honor directed the jury to consider only the question of necessity. We think there is also error in this instruction because, taking all of the testimony to be true, the doctrine of *mollior manus* does not apply. The defendant Castle had a right to go into the room for the purpose of giving them their time and notifying them of their discharge. All of the testimony shows that as he entered the room these men were armed with deadly weapons, and immediately upon his entering the room the difficulty began. There is no phase of the testimony which tended to show that the defendants could have resorted to gentle and mild means in performing their mission.

His honor further instructed the jury: "If the provocation be great, it will be but manslaughter; but if the provocation be but slight, and the killing be done out of all proportion to the provocation, it will be murder in the second degree." The error in this instruction consists in assuming that the jury could find that there was slight provocation. If the jury found that there was any provocation, it consisted in a deadly assault by the deceased upon the defendants; and it would be difficult to conceive how the jury, in the light of all the evidence, could find that the means used by the defendants was "out of all proportion to the provocation."

He again charged the jury: "If the defendants went to the room of the deceased for the purpose of discharging them, and not for the purpose of conflict or fight, and they entered into a sudden quarrel and fight, and killed Dockery and Fortner, they would be guilty of manslaughter." There is no evidence in this case that the defendants entered into a sudden quarrel with the deceased. Assuming that the jury did find that the defendants went to the room of the deceased for the purpose of discharging them, which was entirely lawful, and not for the purpose of having a conflict or fight, there was no word used from which the jury could infer a sudden quarrel. The testimony tended to show that one of the deceased had a pistol, and the other a hawkbill knife; that, when Garland undertook to disarm Fortner of his pistol, Dockery attempted to use his knife upon Garland or Castle while Garland was struggling with Fortner. With these conditions surrounding them, we can see no theory upon which the defendants can be guilty of manslaughter. If the jury found that they went there for a lawful purpose, and in the prosecution of such purpose they were

suddenly assaulted in the manner testified to by the witnesses, and they used such force as was or reasonably appeared to them to be necessary, the jury taking into consideration the character of the deceased, the frame of mind in which they had been and were at the time, the threats of one of them, and all the other testimony, we think the defendants were entitled to an instruction that it was excusable homicide. Of course, if the jury should find that the defendants Castle and Garland went there for the purpose of provoking a difficulty, and not for the bona fide purpose of discharging their duty, and in the prosecution of such purpose they killed the deceased, they would be guilty of manslaughter, at least; and, if the jury should further find that the deceased made no assault upon them, they would be guilty of murder, at least in the second degree.

The defendants further except to his honor's charge for that he repeatedly said to the jury that the burden was upon them to prove to their satisfaction the existence of the facts necessary to reduce the grade of the offense, or to mitigate or excuse the homicide. Undoubtedly the general rule as stated by his honor is correct, but we think that he should have gone further, and said to the jury that, if the facts and circumstances accompanying the homicide were given in evidence by the state's witnesses, the defendants were not called upon to introduce other testimony, but could rely upon the state's evidence for mitigation of the grade of the homicide or for an acquittal. See *State v. Willis*, 63 N. C. 26.

His honor said to the jury in conclusion: "But it is incumbent upon the defendants to satisfy you that these circumstances and state of facts have been shown to your satisfaction." We think that this was calculated to leave the impression upon the minds of the jury that the defendants were required to introduce independent evidence to mitigate or excuse the homicide. As we have seen, if there was any evidence in the state's testimony which tended to establish the defense, it was the duty of the jury to consider it, as tending to sustain the plea of self-defense.

The testimony in this case shows a course of conduct on the part of the deceased which placed the defendant Castle, with the responsibilities resting upon him, and his duties not only to his employer but to the large number of men under his charge, in an exceedingly embarrassing position. He was in charge of a lumber camp of some 50 or 60 men. It was absolutely necessary to a discharge of his duty both to his employer and the men that such conduct as is testified to by the state's witnesses on the part of the deceased should be suppressed, and that persons conducting themselves as did the deceased should be discharged; and if the jury found (and we think they would have been fully justified in finding) that he was endeavoring to discharge his duty, and in doing so

the conduct of the deceased was such as to create in his mind a reasonable apprehension that they would execute their threats and continue in their course of conduct, he was not only justified, but it was his duty, to use such means as were necessary to rid the camp of such persons. It certainly was his duty to discharge them, and, to do so promptly, he had a right to go to their room for that purpose; and in view of what had occurred, and the conduct of the deceased in the dining room and after they had gone to their room, it was but common prudence for him to carry a sufficient number of men to prevent or repress any further violence. His language upon entering the room, "Boys, here is your time," is entirely consistent with the lawful purpose on his part. In the deadly encounter which immediately followed, and in which the homicide was committed, we think that the defendants were entitled to the instructions asked by their counsel, and that the modification of them was calculated to prejudice them.

Upon the whole record, we think the defendants are entitled to a new trial.

(123 N. C. 755)

STATE v. TAYLOR.

(Supreme Court of North Carolina. Dec. 18, 1903.)

CRIMINAL LAW—FORMER CONVICTION—DISORDERLY CONDUCT—VIOLATION OF CITY ORDINANCE—ASSAULT—SUSTAINING PLEA OF FORMER CONVICTION—PRACTICE.

1. Where the court sustains a plea of former conviction after the jury has returned a verdict of guilty, the proper practice is to strike out the verdict and sustain the plea as upon a demurrer by the state; and to enter a judgment of not guilty on the verdict as rendered is improper.

2. A conviction of violating a city ordinance punishing the disturbance of the good order and quiet of the town by fighting, etc., is not a bar to a prosecution by the state for an assault.

3. Where the trial court sustains a plea of former conviction and enters a judgment of not guilty, without striking out the jury's verdict of guilty, it may, on reversal, proceed to enter judgment of conviction.

Appeal from Superior Court, Edgecombe County; Ferguson, Judge.

J. M. Taylor was prosecuted for an assault with a deadly weapon, and from the judgment of acquittal the state appeals. Reversed.

The Attorney General, for the State.

CONNOR, J. The defendant was indicted at the September term, 1903, of the superior court of Edgecombe county, for an assault with a deadly weapon. The record states that he pleaded "Not guilty." The case on appeal states that the defendant "admits the assault, but contends and introduces evidence tending to prove that no deadly weapon was

used. * * * The defendant pleads former conviction, and offers in evidence the record of the mayor's court of the town of Tarboro, which shows that in August, 1902, a warrant was issued by the mayor against the defendant charging that he 'did unlawfully violate an ordinance of the town of Tarboro, to wit, Ordinance No. 10, section 1, by fighting and disturbing the peace, contrary to said ordinance, against the statute in such cases made and provided, and against the peace and dignity of the state.' The defendant was arrested upon said warrant, and judgment rendered as follows: "After hearing the evidence, and it appearing to the court that the defendant pleads guilty, it is considered and adjudged that the defendant pay costs, \$2.85."

Ordinance No. 10 is in the following words: "No person or persons shall be permitted to disturb the good order and quiet of the town by fighting, making loud noises, using profane, bolsterous and indecent language or in any other manner, under a penalty of twenty five dollars." The mayor testified, "I issued this warrant under Ordinance No. 10, and tried the defendant for disturbing the peace of the town by fighting, exactly as set out in the warrant. There was no evidence of any disturbance by making loud noises or using profane, bolsterous, or indecent language. The evidence disclosed no disturbance or noise except the act of striking the said Will Pope. * * * The warrant shows what I tried Taylor for." At the close of the evidence the defendant asks the court to charge the jury "that upon the record on evidence the defendant has been tried and convicted of a simple assault for the offense under investigation." The court declined to give the charge asked, but reserved its opinion. The jury returned a verdict of guilty of a simple assault. The solicitor prayed the judgment of the court. The court announced that, having reserved its opinion as to whether the plea of the defendant of former conviction is good upon the record of the mayor's court introduced in evidence, he adjudges said record is sufficient to sustain the plea of former conviction, and therefore directed the clerk to enter a judgment of "Not guilty," and directed that the defendant be discharged. The state appealed.

The record proper, which controls when conflicting with the case on appeal, states: "The jury upon their oath say that the said J. M. Taylor is not guilty, in manner and form as charged in the bill of indictment, of an assault with a deadly weapon, but is guilty of a simple assault, and thereupon it is ordered by the court that the said J. M. Taylor go without day" (the court holding the plea of former conviction as set out in the case on appeal to be good).

The record presents a singular condition of the case. There is a verdict of guilty of an offense of which, by reason of the form of the indictment, the court has jurisdiction. *State v. Fesperman*, 108 N. C. 770, 13 S. E.

14, and cases there cited. The verdict is left standing as rendered with a judgment of "Not guilty." His honor, having, upon consideration of the question of the sufficiency of the evidence to sustain the plea, decided against the state, should have stricken out the verdict and sustained the plea as upon a demurrer by the state, from which an appeal could be taken. The confusion in the record arises from the failure to observe the procedure pointed out by this court in several cases. *Smith, C. J.*, in *State v. Pollard*, 83 N. C. 597, discusses the authorities, and says: "It is true, double pleading is allowed only in civil cases under the statute of Anne, as was said by Pearson, C. J., in *State v. Potter*, 61 N. C. 338, and the jury could not be impaneled to try at one time more than the issue of a single plea; but the difficulty is obviated by allowing the second plea, and a jury trial on it, after the verdict on a preceding plea, and the reasonableness of this practice commends itself to our approval." The court in *State v. Respass*, 85 N. C. 535, 45 Am. Rep. 700, approves the practice pointed out in *Pollard's Case*. *State v. Washington*, 89 N. C. 535, 45 Am. Rep. 700: "Regularly, the two pleas of former conviction and not guilty should be tried separately, since the plea of former conviction implies an admission of the criminal act and is inconsistent with an absolute denial. But the practice of trying them together has become not unusual, and is often convenient." *State v. Winchester*, 113 N. C. 641, 18 S. E. 657.

For the purpose of disposing of this appeal we assume that the solicitor demurred to the evidence offered to sustain the plea, and that the court overruled his demurrer. Thus viewing the case, we think that his honor was in error. It is well settled that a town ordinance cannot make criminal or prescribe a punishment for acts which are indictable at common law or by statute. *State v. Austin*, 114 N. C. 855, 19 S. E. 919, 25 L. R. A. 283, 41 Am. St. Rep. 817; *State v. Stevens*, 114 N. C. 873, 19 S. E. 861. It is equally well settled that they may pass ordinances prohibiting disorderly conduct, and impose a penalty for their violation, etc., and that Ordinance No. 10 of the town of Tarboro is valid. It is substantially like the one set out in *State v. Cainan*, 94 N. C. 880. *Merrimon, J.*, says: "The ordinance mentioned in the warrant has reference to and forbids such acts and conduct of persons as are offensive and deleterious to society, particularly in dense populations, as in cities and towns, but do not per se constitute criminal offenses under the general law of the state. * * * The purpose of the ordinance is to promote good morals, the decencies and proprieties of society, and prevent nuisances and other criminal offenses which might result from the acts and conduct prohibited." In *State v. McNinch*, 87 N. C. 567, *Ashe, J.*, says: "His honor seems to have had in his mind the crime of nuisance at common law, but the

ordinance of the city was evidently intended to create different offenses from that. It was a police regulation, adopted not merely to secure the citizens of the city against annoyance, but to prevent the evil example of such immoral conduct."

By section 3820 of the Code the violation of a town ordinance is made a misdemeanor, jurisdiction whereof is vested in a justice of the peace. Section 3818 confers upon the mayor the jurisdiction of a justice of the peace "In all criminal matters arising under the laws of the state or under the ordinances of said city or town." The warrant issued by the mayor was sufficiently definite. *State v. Merritt*, 83 N. C. 677. "A justice of the peace, and as well the mayor, has jurisdiction of a violation of a town ordinance because it is a misdemeanor, and the punishment thereof cannot exceed a fine of \$50 or imprisonment for thirty days." *State v. Calnan*, supra.

The offense for which the defendant is indicted in the superior court is a violation of the law of the state—an assault with a deadly weapon. This brings us to the question whether the two prosecutions were for the same offense. *Ruffin, J.*, in *State v. Nash*, 86 N. C. 651, 41 Am. Rep. 472, thus states the law: "To support a plea of former acquittal, it is not sufficient that the two prosecutions should grow out of the same transaction, but they must be for the same offense—the same both in law and in fact." "A single act may be an offense against two statutes, and, if each requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." *State v. Stevens*, supra; *State v. Robinson*, 116 N. C. 1046, 21 S. E. 701. Disorderly conduct, of which it is the duty and province of municipal authorities to take cognizance, may not, and often does not, involve an assault. When it does so, the ordinance is directed against the disorderly conduct, and the law of the state is directed against the breach of the peace. *Bleckley, C. J.*, in *McRae v. The Mayor, etc.*, 59 Ga. 168, 27 Am. Rep. 390, says: "Many transactions which are made penal by the general law of the state may at the same time afford material for a proper police ordinance. The state may deal only with the central element of the transaction, which is fringed all around with adjuncts that ought to be prohibited by ordinances, as highly mischievous to the quiet of municipal society. In the country such adjuncts might not need repression, for there they might be comparatively harmless. In a city we think a man may fight in a way to violate an ordinance without being guilty of an assault and battery."

The defendant was tried before the mayor for a misdemeanor in violating the ordinance. It may be that he was not guilty upon the evidence. However this may be, the offense

of which he was convicted was different from an assault, for which he is indicted. *Robbins v. People*, 95 Ill. 175. The demurrer of the solicitor should have been sustained.

As the verdict upon the plea of not guilty has not been set aside, we see no reason why the court may not proceed to judgment. *State v. Battle*, 130 N. C. 655, 41 S. E. 66.

Error.

(134 N. C. 101)

GRIFFIN v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. Dec. 18, 1903.)

CARRIERS—INJURIES TO PASSENGERS—COMPLAINT—INCONSISTENT CAUSES OF ACTION—SUBMISSION TO JURY—ISSUES.

1. Plaintiff alleged that he was a passenger on defendant's train, and that he was injured by the premature starting of the train while he was attempting to alight. In an amendment to his complaint, he charged, in addition, that the injury resulted from the negligence of the porter of the train in commanding plaintiff to alight before the train had stopped, etc. *Held*, that such causes of action were inconsistent, and necessarily could not both be true, and hence it was error for the court to submit the case on the single issue as to whether plaintiff was injured by defendant's negligence as alleged in the complaint, without requiring a finding as to which version of the accident alleged was true.

Clark, C. J., dissenting.

Appeal from Superior Court, Halifax County; Moore, Judge.

Action by Hiram Griffin against the Atlantic Coast Line Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Thos. N. Hill, Day & Bell, and Geo. B. Elliott, for appellant. Walter E. Daniel, E. L. Travis, and Claude Kitchin, for appellee.

CONNOR, J. This action was prosecuted by the plaintiff for the recovery of damages alleged to have been sustained while in the act of alighting from the defendant's train. The plaintiff, at the appearance term, filed his complaint, alleging that on the day therein named he purchased a ticket of defendant's agent at Kelford to Palmyra—both stations being on defendant's road—and boarded the train, delivering his ticket to the conductor; that, when the train stopped at Palmyra, plaintiff proceeded to get off, and, while in the act of stepping off, without notice or warning to him, the engineer carelessly, negligently, and wantonly moved the train suddenly, giving a jerk to the cars, by which the plaintiff was thrown to the ground, breaking his wrist and otherwise injuring him; that the defendant's agent in charge of the train negligently and carelessly failed to give him a reasonable time in which to get off the train; and that by reason of his injuries he sustained damage. The defendant denied the material allegations of the complaint, and, for a further defense, said that when the train was ap-

proaching the station at Palmyra, and before it had stopped, the plaintiff negligently jumped and alighted from the train, and in doing so fell and was injured, while the train was still in motion, and before it stopped, and that he thereby assumed the risk of being injured, and his negligence was the proximate cause of his injury. The defendant also set up contributory negligence. At November term, 1902, the plaintiff, by leave of the court, amended his complaint, and alleged that when the train got near Palmyra the porter called said station, and, as the train drew near thereto and slowed down, the plaintiff got up from his seat, and went to the door of the car, to be ready to get off when it stopped; that when the train got to the station, and was moving very slowly, having nearly stopped—the plaintiff believing it had stopped—the porter, who had also come to the door, and was standing on the platform, told the plaintiff to get off, and that, in obedience to the direction of the porter, and believing by reason thereof that it was the time and place to do so, he stepped off the train, and was violently thrown to the ground, sustaining the injuries set forth. The defendant denied the material allegations of the amended complaint.

Without objection, his honor submitted the following issues: Was the plaintiff injured by the negligence of the defendant as alleged in the complaint? Did the plaintiff contribute to his injury? And an inquiry as to damages.

As said by Mr. Justice Douglas in *Tucker v. Satterthwaite*, 120 N. C. 1, 118, 27 S. E. 45: "We are not inadvertent to the long line of decisions laying down the rule that the refusal of the court to submit an issue tendered by either party cannot be reviewed by this court unless exception is taken in apt time, nor do we wish to be understood as reversing or modifying it. * * * What we now say is that section 395 of the Code is mandatory—binding equally upon the court and upon counsel; that it is the duty of the judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising in the pleadings; and that in the absence of such issues, or admissions of record equivalent thereto, sufficient to reasonably justify, directly or by clear implication, the judgment rendered therein, this court will remand the case for a new trial." In *Pearce v. Fisher* (at this term) 45 S. E. 638, two defendants were sued for injury alleged to have been sustained, one as landlord, and the other as a tenant, of a part of the hotel in which the plaintiff's goods were stored. The following issue was submitted: "Was the plaintiff injured by the defendants, or either of them, as alleged in the complaint?" The jury answered the issue: "Yes." Mr. Justice Walker says: "How can this court decide, from the verdict as thus rendered, whether the jury intended to say

that the plaintiff was injured by both of the defendants, or only by one of them? To construe the verdict either way would be the merest conjecture. The answer of the jury to the issue would be just as appropriate if only one of the defendants had caused the injury as it would be if by joint action they had caused it. * * * Issues should not be submitted in such a way that when they are answered it will be left doubtful as to what the jury have found with respect to the liability of the parties." It is true, in the case cited the defendant excepted to the issue. In this case it will be seen that the allegations in the original complaint and the amended complaint are based upon entirely different, if not contradictory, statements of the plaintiff's cause of action. The first says that as he was proceeding to alight from the train the engineer gave a sudden jerk, which threw him violently to the ground, etc. If the jury found this to be true, he was clearly entitled to recover. The authorities in this court are uniform to that effect. The other cause of action consists of the allegation that as the train approached Palmyra he was told by the porter to alight; that the train had slowed down, and was moving slowly, having nearly stopped—he believing that it had stopped—and that the porter, standing on the platform, directed him to get off; that in obedience thereto he did step off, and, because of the fact that the train was moving more rapidly than he had supposed, he was thrown to the ground and injured. Now, certainly, both of these allegations cannot be true, nor is it so contended. In one view of the case, the plaintiff was injured by the negligence of the engineer, the porter taking no part in the transaction. In the other view, he was injured by the negligence of the porter, the engineer being entirely free from blame. We have held that the two causes of action may be joined in the complaint, and appropriate issues submitted to the jury presenting each phase of the controversy. *Simpson v. Lumber Co.* (at this term) 45 S. E. 469, and cases therein cited. The exception of the defendant to the amendment must therefore be overruled.

We do not deem it necessary to discuss the exceptions to the charge, because, if the issues had presented each cause of action separately, many of the exceptions to the charge would not have arisen. Such error as may have crept into the charge is attributable to an effort to present the case to the jury in two contradictory aspects under one issue. The principles governing the rights and duties of passengers on railway trains have been so frequently and recently decided by this court that it would seem unnecessary to repeat them. If the jury found from the evidence that the facts alleged in the original complaint were true, and further found that there was no contributory negligence, the plaintiff would be entitled to recover. The same may be said

in respect to the second cause of action. But surely they could not answer both issues affirmatively.

The plaintiff testifies as follows: "I was sitting in the car, and the porter came through and called out, 'Palmyra Station.' I got up and walked to the door just as it got to the station. I stood in the door until it about hit the station, and it ran by the station, and temporarily stopped. As it ran by the station, the porter, who was standing on the platform of the car on the other side of me, came back and told me to get off. To the best of my belief, the train had stopped. As I was in the act of stepping off the second step from the bottom, it jerked and threw me out." This testimony, if true, entitles the plaintiff to recover. But it does not correspond with the allegation in the original complaint, in which no suggestion is made that he alighted from the train at the direction of the porter. The gravamen of that allegation is that the defendant's agent carelessly failed to give him a reasonable time in which to get off the train, and that almost immediately after stopping, before the plaintiff could possibly alight, he carelessly and negligently started the train. Nor does the testimony correspond with the allegation in the amended complaint, the gravamen of which is that the porter carelessly and negligently told him to get off the train, and that by reason thereof he believed that it was the time and place to get off, and that he could safely do so. He stepped off, and was violently thrown to the ground. The inference which we draw from this allegation is that, at the time the porter told him to alight, the train was moving too rapidly for him to do so safely, but that he relied upon the porter's judgment, and, believing that he could safely alight, was thrown from the train. While we recognize the well-settled principle that pleadings are to be construed liberally, with a view to substantial justice between the parties, it is equally well settled that the proof must conform substantially to the allegation. As was said by this court in *Parsley v. Nicholson*, 85 N. C. 209: "The rules of pleadings at common law have not been abrogated by the Code of Civil Procedure. The essential principles still remain, and have only been modified as to technicalities and matters of form. The object of pleading, both in the old and the new system, is to produce proper issues of law and fact, so that justice may be administered between the parties litigant with regularity and certainty." The cause of action stated in *Simpson v. Lumber Co.*, supra, was the negligent conduct of the defendant in the discharge of its contractual duty to the plaintiff. It is allowable for the plaintiff to allege different acts of negligence, or that the negligence was committed in different ways. "It makes no difference, with respect to the plaintiff's right to recover, whether the burning was caused by a defective engine, or by setting on fire combustible material carelessly left by the defendant on

its right of way." So in this case the same legal result would follow with respect to the plaintiff's right to recover, and the measure of damages, whether the injury was caused by the negligence of the engineer or of the porter. But as we have said, it could not be, in view of the allegations, the negligence of both. The issues should have been so submitted that the attention of the jury would have been directed to the testimony in both aspects of the case, so that, under proper instructions from the court, they would have answered the issues accordingly as they believed the evidence. If they had answered the first issue, in respect to the defendant's negligence, "Yes," and the second issue, in respect to contributory negligence, "No," that would have ended the controversy. If, however, they had answered the issues in respect to the first allegation in the negative, they would then have proceeded to consider the issues directed to the second allegation.

To the end that the cause may be submitted to a jury with issues drawn in accordance with this opinion, a new trial must be had. New trial.

CLARK, C. J. (dissenting). Concurring in the view of the court that "the same legal result would follow with respect to the plaintiff's right to recover and the measure of damages, whether the injury was caused by the negligence of the engineer or of the porter," it seems to me that it is immaterial which it was, and no detriment was caused by the jury not finding specifically which servant of the company was to blame. The defendant was to blame in either case, and that is all the plaintiff is called upon to prove. The jury have found the fact on which the plaintiff's right to recover depends, to wit, that he was injured by the negligence of the defendant in alighting from its cars at Palmyra at the time mentioned, and being thrown to the ground. The plaintiff could state the circumstances in his complaint in the different phases to meet the proof that might be offered. *Simpson v. Lumber Co.* (at this term) 45 S. E. 469. But that does not require an issue as to each, but the one issue "whether the plaintiff was injured by the negligence of the defendant as alleged in the complaint" should be sufficient, especially since the defendant did not ask for another issue, nor except to those submitted. Had the party been killed, and his personal representative had alleged, from uncertainty of evidence, the different phases besides the two in this complaint that he got off on the right-hand side of the car, and on the left-hand side, off the front end of the car, and off the rear end, and several other variant circumstances, must there be an issue on each? It seems there is but one issuable fact—the injury, by the negligence of the defendant, at the time and place—and the difference in statement of the attendant circumstances is merely evidential matter. I think there was no error committed by the judge below.

(134 N. C. 108)

LAMBERTSON et al. v. VANN.

(Supreme Court of North Carolina. Dec. 18, 1903.)

WILLS — CONSTRUCTION — EXECUTORS — POWERS — OPERATION OF REAL ESTATE — CREDITS — COMMISSIONS — REFERENCE — FINDINGS OF REFEREE — APPEAL — CONCLUSIVENESS.

1. Where testator directed the horses and mules on his plantation to be kept on the farm and used in the same manner and for the same purposes as if he were living, and provided that they should not be sold unless in the discretion of the executor it should be deemed best for the children, and directed the executor to rent the children's portion of the land from year to year, and manage the same for their best interest, so long as he was engaged in carrying out the provisions of the will, etc., the executor was empowered to carry on farming operations on the land during his administration of the estate.

2. Where the final accounting of an executor was referred, and the referee's findings of fact, objected to, were adopted by the court, such findings are conclusive on the Supreme Court on appeal.

3. Where an executor was authorized to conduct certain farming operations on testator's land pending settlement of the estate, and by reason of a failure of crops for a particular year the tenants threatened to abandon the same, and the executor found it necessary to take charge of them, and for this purpose bought the tenants' interest therein, he was properly credited with the amounts paid out for the purchase of such interest.

4. Where an executor expended a certain sum for building barns, stables, and other houses which were permanent improvements on land belonging to testator's children, and necessary for the proper cultivation of the land which the executor was required to cultivate during settlement of the estate, he was entitled to commissions on such expenditure.

5. Where during the settlement of an estate it became necessary to sell certain personal property, and the executor bid in the same for the benefit of testator's children, to be used in the cultivation of their land which he was required by the will to cultivate, and thereafter the property not consumed was delivered to a receiver and sold by him, the executor was entitled to credit on his account for the amount paid for the property, and not for the amount for which it was sold by the receiver.

Appeal from Superior Court, Northampton County; Winston, Judge.

Action by Lucy B. Lambertson and others against Albert Vann, executor of the estate of W. A. Lambertson, deceased. From a judgment settling the account, the executor and Lucy B. Lambertson and others appeal. **Affirmed.**

Peebles & Harris, for plaintiffs. T. W. Mason and Gay & Midyette, for defendant.

CONNOR, J. This action is prosecuted by the widow and children of W. A. Lambertson, deceased, against the defendant, as executor, for the purpose of having a construction of the will and for other relief.

Lambertson died in March, 1888, leaving a last will and testament in which he appointed the defendant, Vann, as his executor. The material parts of the will are as follows: In item 2 the testator directs that all the cotton now on the home farm and Clark place, and

such other personal property as is not specially exempted from sale by the will, be sold, and the proceeds applied in the due course of administration to the payment of the debts, and distribution afterwards as provided in said will. The testator directs that the horses and mules now on the home place where he lived should be kept on said farm and used in the same manner and for the same purposes as if he were living, said horses and mules not to be sold unless, in the discretion of the executor, it was deemed best for the children. He directs his executor to rent out the children's portion of the land from year to year, and manage the same for the best interests of the children, so long as he is engaged in carrying out the provisions of the will. He gives to his wife, for and during the term of her life, the house and all the outbuildings connected therewith on the home place, together with land enough to constitute one-third in value of his land, to be allotted as dower, and after her death he gives the said land to his children now born, or to be thereafter born, in fee. He gives to his children, Brownie A. and Willie V., all the remainder of the home tract and Clark place not assigned as dower to his wife; and to his afflicted sister, for life, all the interest that he owns in the home place of his father, and after her death to his children in fee. The residue of the property he gives to his wife and children in equal portions. The defendant duly qualified as executor and entered upon the discharge of his duties.

The cause was referred to Walter Daniel, Esq., and he filed his report at fall term, 1897, of the superior court of Northampton county. Among other facts found by him are the following: That the defendant continued to act as executor until 1893, when a receiver was appointed, and the defendant turned over to him the management of the estate and such personal property as was then on hand, for which he took the receipt of the receiver; that the defendant, upon assuming the duties as executor, made an agreement with the widow of the testator to carry on the farming operations upon the land belonging to the estate in the same manner that they had been carried on during the life of the testator, dividing the proceeds upon the basis of one-third to the widow and two-thirds for the benefit of the children; that the farm was operated under said agreement from 1888 to 1892, inclusive, at which time the widow and the executor put an end to the said arrangement, and the executor, during the year 1893, conducted the farming operations on the land belonging to the children in excess of the dower; and that between September 10, 1892, and February 25, 1893, the executor built on the land belonging to the children certain farm buildings and outhouses for which he paid \$496.04. The referee finds that this was a necessary expenditure and a permanent improvement, and allows him credit for the same, but allows no commissions thereon.

On December 28, 1892, the executor sold certain personal property, and bid in, for and on account of the children, certain articles to the amount of \$690.74. The referee declined to allow him this amount, but does allow him the amount for which said property was afterwards sold by the receiver, to wit, \$454.88. The executor filed his annual account of the said estate, and also of his farming operations, and the referee from said account states an account which is incorporated in his report. In his account the referee allows no commissions on certain items fully set forth in the report, nor does he allow interest on certain amounts or commission on amounts paid overseer, nor amount paid for board of overseer, nor on interest thereon.

Upon the facts found, the referee finds the following conclusions of law: That the executor was empowered under the will to conduct and carry on the farming operations; that the widow was entitled to one-third of the net profits of the said farming operations, and certain payments made to her in excess of said profits are charged against her distributive share of said estate, which is ascertained to be one-fourth thereof; that the amount which she owes the executor is not a lien on the estate in his hands belonging to the children; that the children are entitled to two-thirds of the net profits up to 1893, and to the whole of the profits for that year (1893), and to three-fourths of the estate in the hands of the executor. He thereupon proceeds to state an account of the dealings of the executor with the estate and of his farming operations, separating the receipts and disbursements from the two sources. He finds a balance due the estate October 25, 1897, of \$1,963.72. Of this amount Mrs. Lambertson is entitled to \$490, leaving due the children \$1,472.79. Of the latter amount he has paid \$1,253.61, leaving a balance due the children October 25, 1897, \$219.18. From the operation of the farms he finds that there was a balance on hand of \$1,429.86. Of this amount Mrs. Lambertson is entitled to one-third, \$426.62, leaving due the children \$953.24. This amount, with interest, and sales of the crop for 1893, aggregate \$2,040, from which he deducts disbursements and commissions amounting to \$677.37, leaving a balance due the children of \$1,312.83, of which amount he has paid to the receivers \$783.13, leaving \$527.70 due the children October 25, 1897. The two accounts aggregate an indebtedness to the children of \$746.88. To the report the plaintiffs filed a very large number of exceptions, the second, eleventh, and fifteenth of which were abandoned before his honor, who proceeds to overrule the others, from the first to seventy-first, inclusive. It is difficult to distinguish between those exceptions which point to conclusions of fact and those which point to conclusions of law. His honor states that a large number of the exceptions are pointed to items based upon the contention that the executor was not au-

thorized to cultivate the farms. His honor adopted the conclusion of law as found by the referee, that under the provisions of the will the executor was authorized to carry on the farming operations, and we concur with his honor's ruling in that respect. We think it clear from the terms of the will that the testator intended that his executor should carry on the farming operations and manage the same to the best interest of the children in the same manner and for the same purposes as if he were living. This is shown by the direction that the horses and mules on his farm were not to be sold unless in the discretion of the executor it was deemed best for the children. The exceptions to the referee's findings of fact, which are adopted by his honor, are conclusive upon this court. We have carefully examined the accounts stated by the referee in the light of the testimony before him, and we see no reason for disturbing his manner of stating the accounts. It is done with great care and intelligence.

The plaintiffs insist that the executor should not be credited with amounts paid out for the purchase of the tenants' interest in the crops. The referee makes no specific finding in respect to this matter; but it appears from his accounts that he has found as a fact that his dealings in that respect were correct. It is impossible for us to say from the accounts and testimony whether the purchase made by the executor of the tenants' interest in the crops operated as a loss to the estate. It would seem that the estate suffered no loss by reason of this course pursued by the executor. It appears that during the year 1889 the tenants threatened to abandon the crops, and the executor found it necessary to take charge of them, and for that purpose bought the interest of the tenants. It is in evidence that the year 1889 was a bad crop year. One witness says, "Never knew a worse." And we cannot fail to take note of the fact, as a part of the history of the state, that the year 1889 was one of the most disastrous known among our farmers. It would hardly have been possible to have operated the farm without some loss, and it would have been impossible to have anticipated such disasters as came to the farming operations of the defendant and all other persons in Eastern North Carolina. It is difficult, looking backward, to adjust these accounts without danger of doing injustice to the parties. We see no reason for disturbing the conclusions to which the very intelligent referee has come in dealing with this matter. His honor approved his findings of law and fact in that respect.

The referee found that the expenditure of \$496.04 for building on the children's land two barns, nine stables, and a two-story frame house for the overseer, a hen house, and a tobacco house were necessary, and were a permanent improvement to the property. He allows the executor for these items, but declines to allow him commissions for

this disbursement. The defendant excepted to this ruling, and his honor sustained the exception, allowing defendant commissions on the disbursement. We concur with his honor's ruling in that respect.

The referee charged the defendant with the total amount of sales of personal property made December 23, 1892, \$694.74. This property was delivered to the receiver and sold by him in January, 1894, for \$454.88. The referee credited the defendant with the amount for which the receiver sold the property, and to this the defendant excepted. His honor sustained the exception, and credited him with the amount at which he bought in the property. It seems that in January, 1892, when the widow and executor put an end to the arrangement by which the lands were cultivated jointly, for the purpose of ascertaining the value of the widow's interest in the personal property, a sale thereof was made, and the defendant bought it in for the children at \$694.74, this property consisting of horses and mules, farming implements, forage, etc., necessary for the cultivation of the farms. The same property was delivered to the receiver, except that part which had been consumed in the use. We concur with his honor's ruling in that respect. We can see no reason why the executor should suffer loss for the depreciation. We therefore adopt his honor's ruling.

His honor also sustained certain exceptions to the report of the referee in regard to commissions upon some small amounts, and we see no reason for disturbing his ruling in that respect.

The other exceptions of the defendant were overruled. A large number of the exceptions filed by the plaintiffs are to conclusions of fact, and, having been overruled by his honor, are conclusive upon us.

This litigation began in 1893. It would seem that it is to the interest of all the parties that it come to an end. We have a record on the plaintiffs' appeal of 165 pages, and on the defendant's appeal of 120 pages, a large part of which is repetition. We have 86 exceptions addressed to items ranging from 30 cents to \$500. We have the assignments of error on the part of the plaintiffs, making no distinction between exceptions to matters of law and matters of fact. We have endeavored, with a great deal of labor, to carefully examine the questions in controversy. We see no reason for disturbing the conclusions to which his honor came. His honor states that "by consent of both plaintiffs and defendant the court took the papers in this case to consider the same, and this judgment is rendered out of term by consent of all of the parties." It is evident that his honor gave it a careful consideration, and we see no reason for disturbing his conclusions. We think that upon the plaintiffs' appeal the judgment should be affirmed.

Affirmed.

Defendant's Appeal.

The defendant in this case filed a number of exceptions, his honor sustaining a portion of them and overruling the balance. We have carefully examined the record, and we find no error in the action of the court in respect to the defendant's exceptions. The judgment upon the defendant's appeal must be affirmed.

We cannot refrain from saying that a volume of much smaller size and more clearness of statement would have enabled us to give the case a much more satisfactory investigation with much less cost to the parties.

Affirmed.

(124 N. C. 92)

MORROW v. ATLANTA & C. AIR LINE RY. CO.

(Supreme Court of North Carolina. Dec. 18, 1903.)

CARRIERS—PERSONS BOARDING TRAIN TO ASSIST PASSENGER TO BOARD IT—RIGHTS—DUTIES OF CARRIER—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

1. A person going on a train for the purpose of assisting a passenger to board it, when such assistance was needed and was not furnished by the company, was not a trespasser.

2. In the absence of any rule prohibiting a person from going on a train to assist a passenger to board it, a conductor having notice of a person going on the train for such purpose must detain it a reasonable length of time to enable the person to render the necessary assistance and to leave it in safety.

3. Whether a conductor in charge of a train had notice that a person who entered it at a station did so merely for the purpose of assisting a passenger to board it, *held*, under the evidence, for the jury.

4. Whether one who stood near the steps of a coach as a person entered it merely for the purpose of assisting a passenger to board the coach was the conductor in charge of the train, or some other employé charged with the duty of providing for such person's safety while exercising the right of assisting a passenger, *held*, under the evidence, for the jury.

5. Whether a person who entered a train for the purpose of assisting a passenger to board it was given reasonable time to leave the train before it started, *held*, under the evidence, for the jury.

6. A person who, after boarding a train at a station to assist a passenger to board it, alights from the train while traveling at the rate of three to four miles an hour and with its speed steadily increasing, is guilty of contributory negligence as a matter of law, precluding a recovery for the injuries sustained.

Appeal from Superior Court, Gaston County; Neal, Judge.

Action by Chas. R. Morrow, by next friend, against the Atlanta & Charlotte Air Line Railway Company. From a judgment dismissing the action, plaintiff appeals. **Affirmed.**

A. G. Mangum, for appellant. Geo. F. Basson and F. H. Busbee & Son, for appellee.

WALKER, J. This action was brought by the plaintiff to recover damages alleged to have been caused by the defendant's negligence.

On the night of the 27th of August, 1902, the plaintiff, his wife, Thomas Carson, and two other persons, went to the defendant's depot at Gastonia, with the plaintiff's sister, Mrs. York, and her six children, the oldest of whom was 15 years of age and the youngest 4 years of age, for the purpose of assisting them in boarding the train, which they intended to take that night for a distant point. When the train arrived, about 11 o'clock p. m., and after the passengers for that station had alighted, the plaintiff and Thomas Carson immediately assisted Mrs. York and her children to get on the train, but before they could find a vacant seat for them the train started, and Carson ran to the door and then to the platform, and jumped off the train without injury. When the plaintiff, who followed him, was alighting from the steps of the platform with his hand on the railing, or, to use his own words, when he let his feet down from the steps, there was a sudden jerk of the car upon which he had been standing, which broke his hold; his foot struck a pile of mail sacks which had been left on the ground near the crossing, and about 150 feet from the usual place where passengers alighted, and plaintiff was thereby thrown under the cars and severely injured. As he and Carson and Mrs. York and her children boarded the car, an employé of the defendant, who had on a uniform and held a lighted lantern in his hand, was standing near by and could see them as they got on the train. The plaintiff's wife bid Mrs. York and her children good-by, and remained outside and said nothing to the plaintiff, her husband, or to Carson, her brother-in-law. The latter was wearing his "everyday clothes." None of defendant's employés offered to help Mrs. York to get on the train. It was usual and customary to give signals before starting the train at that place by ringing the bell or by proclamation of the conductor, namely, "All aboard," but neither the plaintiff nor Carson heard a signal of any kind that night, though the usual signals might have been given without being heard, as there were eight or nine cars in the train. The train moved off before any of the passengers who got on at Gastonia could be seated. Plaintiff did not see the conductor, or he would have told him that he intended to board the train in order to help his sister, but he expected that the usual signals would be given and that he would have time to leave the train with safety. When the plaintiff fell from the train, it was running at the rate of "not more than 3 or 4 miles an hour." It had been customary for persons to be assisted in boarding the train at Gastonia by their friends or escorts, and it had frequently been done. One of the plaintiff's witnesses

testified as follows: "I was the hotel porter and went to the depot that night to meet the train, and saw a railroad man with a lantern standing near the steps when the passengers were alighting. I don't know whether or not it was the conductor, or who it was. He had a lantern. All the employés have lanterns. I thought he was the conductor, but cannot swear to it." This is a sufficient recital of the leading or material facts necessary to an understanding of the case. At the close of the plaintiff's evidence the defendant moved to dismiss the action, or for judgment as in case of nonsuit, under the statute. The motion was allowed, and the plaintiff excepted and appealed.

The first question presented is whether there was any sufficient evidence of defendant's negligence which should have been submitted to the jury, for when a plaintiff's action is dismissed or he is nonsuited, under the provisions of the statute, the truth of the evidence is thereby admitted, and the plaintiff is entitled to have it considered in the strongest and most favorable light for him, and to have the benefit of every reasonable inference or deduction that can be drawn therefrom for the purpose of sustaining his cause of action. If the evidence tends to establish any state of facts entitling plaintiff to recover, no matter how the combination of those facts may be made, the plaintiff has a right to have the case submitted to the jury, for they might find just that state of facts. This principle is so well settled that it does not now require the citation of any authority to support it. In some respects this case is like that of *Whitley v. Railroad*, 122 N. C. 987, 29 S. E. 783. It was there held that a person who goes upon the train of a railroad company for the purpose of accompanying and assisting one of its passengers is not a trespasser, and is entitled to the protection of the company if the company's conductor in charge of the train has notice of his presence. The plaintiff's counsel in that case contended that such a person was a licensee, and, under the circumstances, entitled to "the consideration, care, and protection of the defendant," and the defendant's counsel, as the court then understood his position, did not seem to deny this contention of the plaintiff's counsel, but insisted that he had no right to receive from the company that same degree of attention and protection that would be due to a passenger. The court declined to discuss this contention of the defendant, but simply held that, whatever his precise status was, he was in any view entitled to protection and some degree of consideration for his safety. It is certainly not unlawful for one person to assist another to board a train for the purpose of taking passage thereon, when the situation of the passenger and the circumstances make it necessary, and especially so when no such assistance as is required by the passenger is of-

ferred by any employé of the company. We need not decide whether it is the duty of carriers of passengers on railways, or their servants, to inform themselves of the presence of such persons on their trains, and to provide rules and regulations for that purpose, for that question is not necessarily involved in this case. It is sufficient at least to fix the company with liability that the conductor of its train, or other person in charge of it, has actual notice of the fact that a person who is not a passenger has gone upon its train for the purpose of rendering assistance to one of its passengers. If a person could ever be justified in giving such assistance, we think the plaintiff was in this case—assuming the truth of the evidence, as we must do—for Mrs. York had with her six children, all of them comparatively young, and was incumbered with several pieces of hand baggage and with some packages. She needed assistance, and the company did not furnish it. The plaintiff, therefore, was rightfully on the train. What, then, was the defendant's duty, if any, towards him? If its conductor had notice of his intention to go upon the train for the purpose of assisting Mrs. York, the plaintiff was entitled to reasonable time to render the necessary assistance to her and to leave the train in safety. It may be that railroad companies are authorized by law to provide by rules and regulations for such cases, but, in the absence of any such provision, the law does not prohibit a person from getting on a car, as the plaintiff did on this occasion. The only question, then, for decision is, was there any sufficient evidence to show that the defendant did know that plaintiff had gone upon the train to assist Mrs. York? We think there was. Whether it is sufficient to satisfy the jury and induce them to find the fact, is for them, and not for us, to decide. At the time the plaintiff and Mrs. York boarded the train, an employé of the company was standing near by in full view of them, so that he could see what was done and hear what was said. He must have seen that Mrs. Carson had so conducted herself towards the other parties as to indicate that Mrs. York and her children were the passengers, and that plaintiff and Carson were only assisting them. "Mrs. Carson bid Mrs. York and her children good-by," but said nothing to the plaintiff and Carson. This may have been slight evidence when considered by itself, but it was at least some evidence, and, when taken in connection with the other facts and circumstances testified to by the witnesses, was sufficient for the consideration of the jury. Whether the person who stood near the steps of the coach, as the plaintiff entered it, was the conductor, or some other employé of the defendant charged in law or in fact with the duty of providing for plaintiff's safety while exercising the lawful right of assisting one of the company's passengers, is a proper subject of inquiry for the jury, who, in passing upon it, will be

guided by the facts as they may find them from the evidence, and the instructions of the court upon the law. There being some evidence of notice to the company, if the jury should find from that evidence that the company did in fact have notice that plaintiff had gone upon the train to assist Mrs. York, we do not think that it could be successfully contended that there was no evidence that plaintiff did not have reasonably sufficient time to assist Mrs. York and then leave the train before it started. Indeed, it appears that without any delay, and certainly without any unnecessary delay, he and Carson assisted Mrs. York and the children to get upon the train, and that before they could find a vacant seat for them the train left the station. This fact, as to whether the plaintiff had sufficient time to render the assistance and then leave the train with safety, was one for the jury to pass upon, but we are constrained to say that there was some evidence which tended to establish it.

But even if there was evidence of the defendant's negligence in this case, we do not think there was any error in the ruling of the court below, because the plaintiff, upon his own showing, was guilty of contributory negligence which was the proximate cause of his injury. When he found that the train was in motion and its speed steadily increasing, he should have notified the conductor of his situation, so that the train could be stopped, or he should have waited until it reached the next station before he attempted to get off. His failure to do so, and his attempt to alight from the train, which was then running at the rate of three or four miles an hour, was such negligence on his part as defeats his right of recovery. The plaintiff in this respect is certainly not entitled to any greater consideration than a passenger.

In the case of *Burgin v. Railroad*, 115 N. C. 673, 20 S. E. 473, *Shepherd, C. J.*, for the court, says: "We think there can be no question as to the correctness of the ruling sustaining the demurrer. The general rule is that passengers who are injured while attempting to get on or off a moving train cannot recover for the injury. If the intestate, without any direction from the conductor, voluntarily incurred danger by jumping off the train while in motion, the plaintiff is not entitled to recover. In addition to the authorities cited by the court, there are a great number to be found in other jurisdictions which abundantly sustain the proposition that it is contributory negligence to attempt to alight from a moving vehicle, although, in consequence of the refusal of the carrier to stop, the passenger will be taken beyond his destination, unless he is invited to alight by some employé of the carrier, whose duty it is to see to the safe egress of the passengers from the conveyance. The mere fact that the train fails to stop, as was its duty, or as the conductor promised to do, does not

justify a passenger in leaping off, unless invited to do so by the carrier's agent, and the attempt was not obviously dangerous."

In *Johnson v. Railroad*, 130 N. C. 488, 41 S. E. 794, Clark, J., speaking for the court, and approving the charge of the court below, says: "The general rule is that a person who gets off a train while it is in motion is guilty of contributory negligence. It is the duty of the passenger, when he sees the train in motion, to ask for it to be stopped, and, if it is not done, he ought not to get off. To this general rule there are some exceptions, one of which is that if a passenger is commanded or invited by the conductor to get off while the train is in motion, and the train is going so slow that the danger of stepping or jumping off is not apparent to a reasonable man, and he does so and is injured, it would not be contributory negligence." The court, in *Johnson v. Railroad*, held that the evidence did not show conclusively that the plaintiff was guilty of contributory negligence so as to bring the case within the principle announced in *Neal v. Railroad*, 126 N. C. 634, 36 S. E. 117, 49 L. R. A. 684, as there was some evidence from which the jury might infer that the plaintiff had been led by the action of the conductor to believe that it would be safe for him to alight from the train; and, if the jury so found, the case would come within the exception to the rule that it is negligence to alight from a moving train.

The principle of the cases cited is affirmed in *Hinshaw v. Railroad*, 118 N. C. 1047, 24 S. E. 426. Indeed, all of the cases are based upon what was said by this court in *Lambeth v. Railroad*, 66 N. C. 494, 8 Am. Rep. 508, which has been conceded for many years to be a leading and controlling authority upon this question. See, also, *Denny v. Railroad*, 132 N. C. 840, 43 S. E. 847, and *Gordon v. Railroad*, 132 N. C. 565, 44 S. E. 25. Hutchinson, in his work on Carriers, § 641, states the doctrine to be that when a person attempts to get upon a railway train while in motion, without the necessity for doing so, induced by the conduct of the employees of the railroad company, and without an invitation to do so by its agent acting in the line of his duty, he is guilty of negligence per se, and precluded from the right to recover for the injury which may be thereby occasioned; and, even if the company had adopted the practice of receiving its passengers on its trains while in motion, it would be reckless conduct on the part of the company, or of those in charge of its trains, which, though, would not justify or excuse the equally reckless imprudence of the injured party.

We cannot see how the case of a passenger boarding a train while in motion can be distinguished in principle from the case of a passenger or other person, lawfully on the train, alighting from the train while it is moving. If one is negligent to the extent of barring his right of recovery, the other must

necessarily be negligent to the same extent: *Burgin v. Railroad*, supra. In this case the plaintiff attempted to alight from a moving train, and was in the very act of alighting, when there was a sudden jerk of the train, which might have been expected under the circumstances, and he was thrown under the cars and injured. The train at the time was running with increasing speed, and the act of alighting from it at such a time was little, if anything, short of recklessness. It is unfortunate, indeed, that the plaintiff was thus injured, but it was due at least to his own misfortune, and not to any fault which can be imputed to the defendant as a direct cause of it. The plaintiff's act, according to his own version of the facts, was the proximate cause of the injury. This seems to us to be well settled as the law of such a case. By his evidence the plaintiff shows affirmatively, and beyond any dispute or controversy, if his evidence is to be taken as true—and it must be so regarded upon a demurrer to it—that his own negligence was, in law, the cause of the injury he sustained, and the rule laid down in *Neal v. Railroad*, supra, and *Bessent v. Railroad*, 132 N. C. 974, 44 S. E. 648, applies.

Although our decision that the plaintiff's own negligence was the proximate cause of the injury is in itself sufficient to sustain the ruling of the court below, we have discussed the question of the defendant's negligence, as that of the plaintiff's negligence could not have arisen unless there was negligence on the part of the defendant. It was necessary, therefore, to determine first whether the defendant had been negligent in causing the injury to the plaintiff. *Gordon v. Railroad*, supra.

The ruling of the court below upon the motion to dismiss was right. No error.

(134 N. C. 66)

FEATHERSTON et al. v. CARR et al.

(Supreme Court of North Carolina. Dec. 18, 1903.)

LANDLORD AND TENANT—ACTION FOR RECOVERY OF PREMISES—INJUNCTION RESTRAINING EXECUTION—PROPRIETY.

1. A married woman leased certain premises for two years, with privilege of renewal for three years more, her husband joining in the lease, but failing to acknowledge it. She sued an assignee of the lease for defaulted rent, alleging an agreement by him to pay an increased rental, which he controverted. She secured judgment, from which the assignee appealed, giving, under Code, § 1772, a bond to secure one year's rental, etc., and afterwards a sufficient additional bond. The landlady then began monthly suits for each installment of rent as it fell due, recovering judgments and issuing executions, until this litigation was enjoined as vexatious, the injunction being affirmed by the Supreme Court. When the two-year term expired, she began suit to recover the premises, relying on Code, § 1834, which provides that a married woman's lease for more than three years shall not be valid unless executed by her and her husband, and proved and acknowledged by them, as required with deeds. Held, that

an order restraining execution on the landlady's judgment in this latter action was not within the rule authorizing the former injunction, and was erroneous.

Appeal from Superior Court, Buncombe County; E. B. Jones, Judge.

Action by Clara M. Featherston and another against Patrick Carr and others. From an order permitting the prosecution of, but enjoining execution in, another action, plaintiffs appeal. Reversed.

See 44 S. E. 592.

Locke Craig, for appellants. Merrick & Barnard, for appellees.

WALKER, J. The feme plaintiff leased to Carr & Ward the premises on South Main street, in the city of Asheville, which are described in the contract, for two years, with the privilege of renewing the lease, upon the same terms and conditions as are contained in the original agreement, for three additional years, should they so desire at the termination of the lease, provided that Carr & Ward should give to the lessor "sixty days' notice of their intention, prior to the expiration of the lease, should they decide not to take, and retain the said property for the additional period of three years." The lessees agreed to pay \$900 per annum, in equal monthly installments, as rent, the installments to be paid in advance on the first day of each and every month. There are other conditions and stipulations in the lease, and it was specially provided therein that, if the lessees failed to pay any installment of rent when it should be due, or should fail to perform any of the conditions or stipulations of the contract for a period of five days after the lessor had given them notice of their omission or neglect, the lessor should have the right to re-enter and take possession of the premises, notice to them and all other formalities being waived in case of any default. The feme plaintiff's husband joined with her in the lease, but the execution of the same was not acknowledged by him, though her acknowledgment and privy examination were taken. The defendants, Carr & McIntyre, are occupying the premises under an assignment of the said lease to them by the receiver of the assets of Carr & Ward, and a further agreement between them and the feme plaintiff made in the latter part of July, 1901, to the effect that they should continue to hold the premises under the lease to Carr & Ward, and in accordance with its terms and conditions, upon the payment of an increased rent of \$100 per month. This is the plaintiffs' allegation, the defendants alleging that they were to pay only \$900 per annum, as provided by the lease to Carr & Ward, and that they did not contract to pay the increased rent. In August, 1901, or about that time, the feme plaintiff instituted summary proceedings before a justice of the peace, under the statute, for the possession of the premises and the recovery of the rent

then due, alleging that the defendants had failed to pay the rent. The justice gave judgment for the plaintiff, and the defendants appealed to the superior court, and executed a bond in the sum of \$1,350, to secure one year's rent and the damages, as required by the statute (Code, § 1772), in order to stay the execution, and this bond was afterwards increased by the superior court by \$1,200. The two bonds for \$2,550 are apparently sufficient in amount to secure the rent, at the increased rate, and the damages for two years from the beginning of the lease, and the costs. On the first or second day of each succeeding month after the first suit was brought the plaintiff instituted suits before a justice of the peace for the recovery of the installments of the rent which had matured, obtained judgments, and issued execution thereon, and further threatened to continue the institution of similar suits at the beginning of each month thereafter during the continuance of the lease. Thereupon the defendants, their first appeal having been duly docketed, moved in the superior court, upon affidavit in that case, to restrain the plaintiff from proceeding under the executions issued upon the judgments already rendered, and from instituting any further proceedings for the recovery of rent alleged to be due under the lease; and the plaintiff, at the hearing of the said motion, was by the order of the court enjoined "from instituting or prosecuting any other or further suits against the defendants for or on account of the rents sued for in the action, and from issuing or having issued any execution or executions on the judgments heretofore rendered in the cause now pending on appeal." The plaintiff appealed from said order, and this court affirmed the decision of the lower court at the last term upon the grounds stated in the opinion. *Featherstone v. Carr*, 132 N. C. 800, 44 S. E. 592. After the expiration of the two years, the plaintiff instituted summary proceedings before a justice of the peace against the defendants for the possession of the premises. Upon motion of the defendants in the original case, which was pending in the superior court, Judge Moore ordered that the plaintiff be permitted to prosecute her new action to judgment, but enjoined her, until the hearing of the cause then pending in the superior court, from issuing any execution upon her judgment for the possession of the premises. The plaintiff excepted to this order, and appealed.

The question presented by her appeal, therefore, is whether Judge Moore should have granted the injunction, and upon this question we are with the plaintiffs. The first order of injunction, the one which we affirmed (132 N. C. 800, 44 S. E. 592), was issued to protect the defendants from a multiplicity of suits and to prevent vexatious litigation, and our decision was put upon the ground that all of the matters in controversy between the parties arose out of the lease,

and that the question which was involved in the first suit was the same in principle as the one presented in the next and all subsequent suits, though the latter were brought to recover different installments of rent. The particular allegation in these suits was that the lease had been forfeited, and the right of the lessor to re-enter had accrued by reason of the failure of the defendants to pay the rent, and therefore the only matters in controversy were the right to the possession of the premises, and the right to recover the different installments of rent as they successively became due and payable. All of these matters, it was held, could be settled in one suit, and, in order to carry out the spirit and purpose of our present system of procedure, it was decided that, as the plaintiff's rights were fully secured by the bond of the defendants, she should be required to desist from proceeding under the judgments and executions already obtained and from bringing new suits, as such action on her part tended to harass the defendants, without any real benefit to the plaintiff which upon any principle of equity she was entitled to enjoy, as the rights of the parties could easily be determined in the one action, and that she was in no danger of loss or damage. We adhere to this view of the case, as it was then presented to us, but we do not think that the present appeal involves any such question as we then decided, but one that is quite different in fact and in law. The last suit brought by the plaintiff was for the possession of the premises, and was founded, not upon the fact that there had been a default in the payment of the rent, but upon the allegation that the lease itself had expired by its own limitation, it being a lease for two years only, under the provisions of the statute that no lease or agreement for a lease by a married woman of her lands and tenements to run for more than three years shall be valid, unless the same be executed by her and her husband, and proved and acknowledged by them, and her privy examination taken, as required by law in the case of probate of deeds of married women. Code, § 1834. We deem it unnecessary to decide the question raised by the plaintiff as to whether the lease had expired, for we are of the opinion that in any view of the case the last suit does not come within the range of the principle upon which the first injunction was granted and sustained by us. It is based upon an entirely new cause of action, which, in any possible development of it, could not subject the defendants to a multiplicity of suits or to vexatious litigation. If it is decided in that suit that the lease has expired, the plaintiff surely should be entitled to immediate possession of the premises. The plaintiff by no possibility can recover more than the possession of the premises, and the damages accrued since the expiration of the lease. It is an ordinary action to assert and enforce a right which has accrued since the

first suits were brought, and does not involve any element such as in those suits entitled the defendants to be protected by the restraining power of the court.

It appears in the record that the plaintiffs have recovered judgment in the last suit for the possession of the leased premises, and, so far as appears, no appeal has been taken by the defendants. There was some dispute between counsel in this court as to the correctness of the record in this respect, and as to whether the paper containing the recital of facts was properly a part of the record in the case, and for this reason we would not conclude the defendants by any decision upon those facts, as we think it can be avoided. We will say, though, that, if it is true that there has been no appeal from that judgment, that fact furnishes an additional reason why the injunction should not be continued and the plaintiffs restrained from issuing an execution for the purpose of being put into possession of the property. If the defendants have not appealed, and that judgment stands unreversed, it would seem that the fact of the expiration of the lease has been adjudicated, and that the defendants are estopped from longer asserting that it still subsists.

If the appeal of the plaintiff from the order of the court, affirming the ruling of the clerk upon the plaintiff's motion to modify the injunction of Judge Moore and to permit her to issue execution upon her judgment for the possession of the premises, is properly before us—and we think that it is not—we discover no error in the decision of the lower court upon that question. The clerk had no jurisdiction or power to amend or modify Judge Moore's order. The permission to issue execution in that order was manifestly intended to be granted only by the judge of the court, and not by the clerk. The latter is not "the court," in the sense of those words as used in the order.

There was error in the ruling of the judge by which the plaintiff was enjoined from issuing execution upon the judgment she obtained before F. N. Waddell, justice of the peace, for the possession of the premises in dispute, which judgment is described in the order. It will be so certified to the end that the injunction may be dissolved, and that such other and further proceedings may be had as are in accordance with the law.

Error.

(134 N. C. 86)

WHITSON v. WRENN.

(Supreme Court of North Carolina. Dec. 18, 1903.)

MASTER-INJURIES TO SERVANT—NEGLIGENCE — FALL OF TRUCK — OBVIOUS DANGER — KNOWLEDGE OF SERVANT—"LIABILITY" OF TRUCK TO FALL.

1. Plaintiff was employed to load trucks with lumber, placing it in a kiln, and to move the trucks from the kiln to the factory when the

lumber was dry. Plaintiff was directed to go behind or in the rear of the loaded trucks in removing them from the kiln, which was a safe way, but, instead of doing so, at the time he was injured, he went under the truck and applied the force or pressure from beneath, and by reason thereof the truck fell, causing the injury. *Held*, that the plaintiff's own negligence was the proximate cause of the injury.

2. Where a servant chooses to do the work, which it is his duty to do, by a method known to him to be dangerous, contrary to the directions of the master, the master is not liable for an injury caused thereby, whether the danger be obvious or not.

3. Where a servant was injured by the fall of a truck which it was his duty to move, and which fell by reason of his effort to move it, the master's responsibility does not depend on the "liability" of the truck to fall, since he is only required to provide against what he could reasonably have foreseen would result from any defect in the appliance.

Appeal from Superior Court, McDowell County; Long, Judge.

Action by Alney Whitson against T. F. Wrenn. From a judgment for plaintiff, defendant appeals. Reversed.

Avery & Ervin, for appellant. E. J. Justice, for appellee.

WALKER, J. The plaintiff was an employé of the defendant in his furniture factory, and while engaged in his work received injuries which he alleges were caused by the defendant's negligence. At the time he was injured he was loading trucks with lumber, and placing the same in the kiln for drying, and in moving them from the kiln, when the lumber was dried, to the factory. The evidence tended to show that each of the trucks was made of two pieces of lumber 6 to 10 feet long, 14 inches wide, and 2 inches thick, which were nailed together with 4-inch blocks between them at each end and at the middle, and near each end there were wheels. The trucks were about 6 feet long by 10 inches high, and were 8 inches wide, and when placed on the rails they would not stand without being held or supported, until they were partly loaded with lumber placed across them. There was no axle or connecting rod between these separate trucks. The trucks held about 4,000 feet of lumber, and when they were loaded the kiln was full from side to side and to within 18 inches of its top. The plaintiff was directed by the foreman or superintendent, in removing the loaded trucks from the kiln, to go behind or in the rear of them, and instead of doing so on this occasion he went under the truck, which he was attempting to remove, and applied the force or pressure from beneath, and by reason thereof the trucks fell and he was injured. It is not necessary to state any more of the testimony in order to present the points upon which the case is decided.

The defendant requested the court to give the following instruction: "If the jury find from the evidence that the plaintiff was di-

rected in removing the lumber from the kiln to go behind or in the rear of the trucks and apply pressure from behind or in the rear of the trucks in order to remove the same from the kiln, and you further find that this was a safe way, and that if it had been done the plaintiff would not have been injured, and you further find that the plaintiff, instead of adopting this method, went under the truck which was to be removed from the kiln and applied force from under and below the truck, and was injured in consequence of so doing, then the plaintiff's own negligence was the proximate cause of the injury, and you should answer the first issue 'No.'" The court refused to give this instruction as it was asked to be given by the defendant's counsel, but gave it with this modification, that, in order to answer the first issue "No," under the instruction prayed for, the jury must, in addition to the facts stated therein, further find that the method of applying the force to the loaded truck as used by the plaintiff, that is, by pushing the truck from beneath, "was obviously dangerous, and that plaintiff knew it, or could have known it by the exercise of due care." We do not think that the modification of the instruction by the court was correct. It can make no difference whether the method employed by the plaintiff for moving the truck was obviously dangerous or not. This is not the case of a servant who is ordered or commanded by his master, or by some one having authority over him, to perform a certain duty, when obedience to the order will be attended with obvious danger. It is the duty of the servant, it is true, to obey the orders given to him, unless obedience to them will be obviously dangerous, in which case he has the right, and it is his duty to himself, to disobey them. The law requires that he should do so, or suffer the consequences of his recklessness. Our case is the very converse of the one stated. Here the servant was ordered to do his work in a safe way, and he preferred to do it in another and what proved to be a dangerous way. Why should the master be liable if a servant acted in disobedience to his orders and was thereby hurt? It must be admitted that he was the author of his own injury. If it was necessary that the method adopted by him should have been not only in disobedience of his orders, but in itself dangerous, in order to visit upon him the consequences of his refusal to observe his master's directions, it surely is not required that it should have been obviously dangerous. It is quite sufficient to bar his recovery if he knew that his method was a dangerous one and chose to do his work in that way rather than in the manner pointed out by his master. Why should the danger be obvious if he had knowledge of it? If it had appeared that obedience to his master's orders as to the manner of moving the truck was obviously dangerous, he had a right to refuse to do the work, but even then he could not select another and

¶ 2. See Master and Servant, vol. 34, Cent. Dig. §§ 745, 759.

dangerous way to do it and charge his master with the consequence thereof, and especially if the danger of the method which he adopted was known to him at the time.

It is true that in *Lloyd v. Hanes*, 126 N. C. 362, 35 S. E. 612, this court said: "It is only where a machine is so grossly or clearly defective that the employé must know of the extra risk that he can be deemed to have voluntarily and knowingly assumed the risk." It will be observed that the reference to the obviousness of the defect in the machine is used by the present Chief Justice, in speaking for the court in that case, for the purpose of showing that the servant must be in some way charged with knowledge of the defect. It is the knowledge of the defect and the consequent danger to himself that bars his recovery, if the servant chooses the dangerous method of doing the work, instead of a safe one or that pointed out by the master, and it makes no difference how that knowledge is acquired, or whether it is actual knowledge or such as must be implied from the obviousness of the defect and the fact that the danger is not only apparent but manifest. In *Lloyd v. Hanes* the court was referring to the case of a servant who was acting under instructions from the master to use a dangerous machine or to do a particular act which was in itself dangerous, but which was not obviously so, and not to a case like ours, where the servant departed from the instructions he received from his master and chose to act upon his own judgment. The question involved in the case of *Lloyd v. Hanes* related to the voluntary assumption of risk which was incident to the service, and the court distinguished between the mere knowledge of a defect in the machine, which made it dangerous, and the voluntary assumption of risk by the servant; while the case at bar, so far as this particular instruction of the court is concerned, does not involve the doctrine of the assumption of risk so much as it does the disobedience of orders, which was the proximate cause of the injury to the plaintiff. The two cases depend upon entirely different principles.

The plaintiff in this case has simply done something which his master virtually told him not to do. He substituted his own will for that of his employer, and his case comes within the maxim, "Volenti non fit injuria." No man by his own voluntary and wrongful act can impose a liability on another, nor will he be permitted to take any advantage of his own wrong and willfulness. The doctrine that a servant is not negligent in undertaking the performance of a dangerous work for his master, unless there is obvious danger in it, is a correct principle, and is strikingly illustrated by several cases decided by this court. *Thomas v. R. R.*, 129 N. C. 392, 40 S. E. 201; *Allison v. R. R.*, 129 N. C. 336, 40 S. E. 91; *Patton v. R. R.*, 96 N. C. 455, 1 S. E. 863. A passenger who has been injured by alighting from a moving train, un-

der the direction of the conductor, may recover for the injuries received, unless the act itself was obviously so dangerous that in its careful performance the inherent probabilities of injury were greater than those of safety. *Hinshaw v. R. R.*, 118 N. C. 1047, 24 S. E. 426. But this principle has no place in this case. Instead of the plaintiff having been commanded to do a dangerous act, it is assumed in the instruction, and there was evidence to show, that he was ordered to do the particular work assigned to him in a safe way, but elected to do it in his own way, which turned out to be a dangerous one, and which actually resulted in his injury. The law, under such circumstances, refers the injury to his own fault, and not to any wrong on the part of his employer.

The instruction contained in plaintiff's third prayer should not have been given, as it was apt to mislead the jury. The defendant's responsibility to the plaintiff for any injury received while in the performance of his duty did not and could not depend upon the "liability" of the trucks to fall. Such an instruction as that given by the court in response to plaintiff's third prayer has been disapproved by this court in *Williams v. R. R.*, 119 N. C. 746, 26 S. E. 32. The employer is only required to provide against what he could reasonably have foreseen would result from any defect in the machine which he requires his servant to use, and not against the consequences of accidents that may or may not occur. It was therefore held, in *Williams v. R. R.*, supra, that where a servant was injured by the falling of a piece of timber, which was being raised by a rope fastened to it, it was error to charge the jury that the defendant, the master, was negligent if the rope was so fastened to the timber as to be "liable" to slip off, so that the timber would fall and injure the servant, who was at the time assisting in the work of raising it. There was error in modifying the defendant's prayer and in giving the instruction in response to the plaintiff's third prayer, for which there must be another trial.

New trial.

(134 N. C. 72)

CITY OF ASHEVILLE v. WEBB et al.

(Supreme Court of North Carolina. Dec. 18, 1903.)

MUNICIPAL CORPORATIONS—BOND ISSUES—
ELECTIONS—STATUTORY REQUIRE-
MENTS—NOTICE.

1. Although a city has a right to refund its bonded debt without submitting the question to popular vote, if it chooses to submit the same to popular vote in accordance with a special act of the Legislature, passed for the purpose, it must follow the method of submission prescribed by such act.

2. Priv. Laws 1903, p. 14, c. 6, authorized a city to issue bonds on the vote of the majority of the qualified voters at an election held in the same manner as elections for mayor and aldermen, and further provided that the first election

should be held whenever the board of aldermen might order the same, but, if the proposition was then rejected, subsequent elections could be held only "after 30 days' public notice." Priv. Laws 1895, p. 590, c. 352, revising the charter of said city, provided that elections of mayor and aldermen should be held under the rules prescribed for elections to the General Assembly. The general election law (Acts 1899, p. 658, c. 507) does not require any public notice of elections to the General Assembly. *Held*, that no public notice of the first election on the bond issue was required.

Appeal from Superior Court, Buncombe County; E. B. Jones, Judge.

Submitted controversy by the city of Asheville against C. A. Webb & Co. From a judgment for defendant, plaintiff appeals. Reversed.

Davidson, Bourne & Parker, for appellant.

MONTGOMERY, J. This is a controversy submitted without action under section 567 of the Code upon an agreed statement of facts. The defendants contracted to buy from the plaintiffs \$40,000 of bonds issued under the provisions of chapter 6, p. 14, of the Private Laws of 1903, and afterwards refused to receive and pay for the bonds on the ground that they were illegal, for the reason that the plaintiff had failed to give 30 days' public notice of the election which had been held upon the question as to whether the bond issue should be "approved" or "not approved." No notice of the election on the bond issue held on the 5th day of May, 1903, the regular election day of officers for the city of Asheville, and the time prescribed by law therefor, was published for 30 days prior to the said election. But a resolution was passed by the board of aldermen, a majority being present in regular session, in the following words: "Ordered by the unanimous vote of the board of aldermen present that an election be held at the time of the holding of the next regular election of officers of the city of Asheville in May, 1903, upon the question of issuing \$781,500 of refunding bonds in accordance with terms, conditions, and provisions of the act of the Legislature of North Carolina duly adopted on January 24, 1903, and entitled 'An act to authorize the city of Asheville to issue bonds to refund its debt.'" A majority of the qualified electors of the city voted in approval of the bond issue, and the result of the election was duly canvassed by the board of canvassers of the city of Asheville, and proclamation thereof made by the chief of police of said city within the time prescribed by law for the same.

Section 4 of the Acts of 1903 is in the following words: "Sec. 4. That said bonds shall not be issued nor said taxes levied until authorized by vote of a majority of the qualified voters of the said city at a public election to be held in the same manner as elections are or may hereafter be held in said city for the election of mayor and aldermen thereof, and at such election those who favor the issuing of said bonds and levying the taxes herein provided for shall vote ballots

with the word 'Approved' written or printed thereon, and those opposed to issuing said bonds shall vote ballots with the words 'Not Approved' written or printed thereon; and if any such election majority of the qualified voters of said city shall vote ballots with the word 'Approved' written or printed thereon, then the said mayor and board of aldermen shall, as may be required under the terms of this act, issue said bonds, and after their sale or exchange, or the sale or exchange of any portion thereof, as hereinbefore provided, levy a tax sufficient to meet interest and principal thereof when due, as hereinbefore specified. The first election under this act shall be held whenever the board of aldermen may order same, not less than thirty days after the date of said order, and if at such election a majority of the qualified voters of said city shall not vote in favor of issuing said bonds, then the board of aldermen of said city shall at any time, and as often thereafter as they deem best, not oftener, however, than once in any one year, order an election to be held under the rules and regulations prescribed by law for the election of mayor and aldermen of said city, and after thirty days' public notice thereof, and at each of such elections, the ballots shall be as hereinbefore directed; and if at any such elections the majority of the qualified voters of said city shall cast ballots in favor of the issuing of said bonds as aforesaid, then the said bonds shall be issued as may be required under the terms of this act by said mayor and board of aldermen, to be applied to the purpose and upon the terms and conditions hereinbefore stated in this act." The plaintiff's contention is that the act authorizing the issue of the bonds does not require a public notice of 30 days of the first election be given under section 4 of the act, and that the election, as held, was legally held, and that the bonds are valid; while the defendants contend that the failure to give such notice was a fatal defect, and the bonds are invalid and void. His honor held that the act had not been complied with in respect to the notice of the election, and that the refunding bonds were invalid and void, and that the defendants were not required to take and pay for the same. Judgment was entered accordingly.

It will be seen upon the reading of the above-quoted section of the act that public notice of the holding of the first election is not required. A public notice of 30 days of subsequent elections on the same question in case the first should be adverse to the bond issue is made necessary by the act. The order of the board of aldermen seems to have been considered by the General Assembly as a sufficient notice of the first election to be held under the act. The plaintiff, without submitting the question to a vote of its registered voters, had the right to refund its bonded indebtedness; but, as it preferred to submit the question to a vote of the people under an act of the General Assembly passed

for that purpose, the method prescribed by the act must be followed. *Wadsworth v. City of Concord* (at this term) 45 S. E. 948. And the only question, as we have seen, submitted to us in this case is whether the act of assembly above referred to requires a 30-days public notice of the first election held under section 4 of the act. His honor, as we have said, thought it was. We do not concur in that view. In section 4 of the act of 1903 the election was required to be held in the same manner as elections were or might be hereafter held in that city for the election of mayor and aldermen; and under section 10, c. 352, p. 590, of the Private Laws of 1896—an act to amend, revise, and consolidate the charter of the city of Asheville—elections for mayor and aldermen were required to be held under the same rules as were prescribed, or might be thereafter prescribed, for the election of members of the General Assembly (the powers and duties in such rules and regulations conferred upon and directed to be exercised by the sheriffs being conferred upon the marshal of the city, etc.). Under the general election law (chapter 507, p. 658, Acts 1899) we find no requirements of any public notice of an election for members of the General Assembly. It is required by section 14 of that act that the county board of elections shall make publication of the names of the persons elected as registrars of voters for townships, wards, or precincts at the courthouse door immediately after such appointment, and that is the only requirement of any public notice concerning the election for members of the General Assembly that we find in the act. We are therefore of the opinion that the act of 1903, under which the election was held, did not require any public notice of the election. It does not appear from the facts agreed that there was a publication at the courthouse door of the names of the persons who were selected as registrars of voters, and it may not be out of place to add here that, if notice of the appointment of the registrars of voters in the several wards of Asheville were not published at the courthouse door immediately after they were appointed, in conformity to section 14, c. 507, p. 663, of the Acts of 1899, and that omission is known to the defendants, the bonds might be invalid in their hands. *Duke v. Brown*, 96 N. C. 127, 1 S. E. 873; *Claybrook v. Commissioners*, 117 N. C. 456, 23 S. E. 360; *Debnam v. Chitty*, 131 N. C. 657, 43 S. E. 3.

Reversed.

(123 N. C. 746)

STATE v. REGISTER et al.

(Supreme Court of North Carolina. Dec. 18, 1908.)

MURDER — EVIDENCE — TESTIMONY OF ACCOMPLICE — SUFFICIENCY — INSTRUCTIONS — JURY — SPECIAL VENIRE — DRAWING JURY — OBJECTIONS — WAIVER.

1. Code, § 913, provides that the Governor shall have power to appoint any judge to hold special terms of the superior court in any coun-

ty, and section 914 provides that when it shall appear to the Governor, by certificate of a judge or board of county commissioners, that there is such an accumulation of criminal or civil actions as require a special term, he shall order one, etc. *Held*, that where the commission for a special term recited an accumulation of criminal business as a reason therefor, the court was not restricted to the trial of indictments found before that term.

2. Code, § 1739, provides that the names of veniremen drawn from the box, who are freeholders, shall constitute a special venire. *Held*, that a finding of the trial court as a fact that a certain number of persons whose names were drawn were not freeholders, and that the remainder were, was binding on the appellate court on appeal, and fatal to an exception to quash the venire on the ground that in determining who were freeholders the court consulted the tax lists of the county, officers of the court who were not sworn, and other sources.

3. The defendant was not entitled to except to the rejection of the veniremen.

4. Defendant could not complain of the court's action, he not having exhausted his peremptory challenges.

5. Though it is the better practice to swear officers and others giving opinion as to whether persons drawn are freeholders, the conduct of the judge was not prejudicial to a defendant.

6. The trial court's finding as a fact, in a criminal case, that certain jurors were indifferent, is not reviewable on appeal.

7. Sup. Ct. Rules 32, 34 (43 S. E. v), require an appellant to set forth in his brief the several grounds of exceptions and authorities relied on, etc. *Held* that, where on appeal in a criminal case certain exceptions are omitted from the briefs of appellant, they will be taken as abandoned.

8. Under Code, § 977, providing that a principal felon and an accessory before the fact may be indicted and tried together, where a principal was tried on a special venire, his accessory before the fact might be indicted and tried at the same time.

9. An objection that the accessory could not be tried on a special venire was of no avail on appeal where the jury had been passed on, and each juror accepted before objection made and without exhausting peremptory challenges.

10. On a prosecution for murder a witness testified that one of defendants told him and the other defendant that a colored man staying with S. had money, and that he wanted them to hold up the colored man and get the money. *Held*, that it was proper to admit the evidence of such witness before the examining magistrate to the effect that the first defendant had during the same conversation stated that a brother of S. had some money, and that it would be no trouble to get it, and that he could take some men and go there and get it, both statements being part of the same conversation.

11. Inasmuch as an intent to commit robbery was the purpose of the crime charged, the evidence was competent as evidence of a different offense of the same kind.

12. The evidence was admissible as a declaration of defendant in the nature of *res gestae*.

13. On a prosecution for murder, evidence of a conversation between defendant and a certain person the week after the murder, and which tended to show defendant's connection with the crime, and which was corroborative of the testimony of such other person, was properly admitted.

14. On a prosecution for murder there was testimony showing that one of defendants had procured the other to make a journey to the home of deceased and there murder him, and that the former defendant had given the other certain canned goods when the slayer started. A witness testified that the defendant who did the killing bought some canned goods of him the day before the killing. *Held* that, for the purpose of aiding the witness in fixing the date,

It was proper to allow him to state that it was on "Tuesday or Wednesday" that he heard of the defendant who did the killing being at the place where it was in evidence he had spent the night of the murder.

15. On a prosecution for murder it was not error to exclude an indictment against a witness for the state which would merely have shown, if admitted, that he had been charged with the murder, his whole testimony establishing his participation therein.

16. On a prosecution for murder the court charged that the jury must carefully consider the testimony of a certain witness as he stood before the jury as an accomplice, declined to charge that it was dangerous to act exclusively on the testimony of an accomplice, and that the jury should require confirmatory testimony, or to charge that the unsupported testimony of an accomplice must produce entire belief; but the court did charge on reasonable doubt, telling the jury that, while they might convict on the testimony of the accomplice, they should be cautious in so doing. *Held*, that the court's conduct was proper.

17. A conviction may be had on the unsupported testimony of an accomplice.

18. The appellate court cannot entertain a motion for new trial on the ground of newly discovered testimony in a criminal case.

Appeal from Superior Court, Columbus County; Moore, Judge.

J. B. Register and another were convicted of murder in the first degree, and they appeal. *Affirmed*.

John D. Bellamy, C. M. Bernard, and Donald McRacken, for appellants. Lewis & Schulken and the Attorney General, for the State.

CLARK, O. J. The prisoner Jabel B. Register is indicted and convicted of murder in the first degree, and H. B. Register, his father, is indicted in the same bill, and convicted of being an accessory before the fact. The evidence of the state, if believed, showed that on Saturday afternoon, March 28, 1903, Jabel met Cross Edmundson and told him his father (H. B. Register) wished to see him; that together they went up to the house of H. B. Register, who told them that Jim Staley, a colored man staying with Jesse Soles, had between \$1,000 and \$2,000, and he wanted them to "hold up Jim Staley and get his money, and kill him, if necessary"; that H. B. Register furnished them with two guns he had ready, and some canned goods in a tow sack, and under H. B. Register's direction they left, about 10:30 at night, to go down to commit the robbery; that the place where Jim Staley resided being some miles off, after traveling part of the way they lay down in the woods and slept till next morning, when they resumed their journey, and then spent the day near a stillhouse till about dusk, when they started to Jesse Soles' house, where Jabel Register went up to the window and fired both barrels through the window into the house, killing Jesse Soles and Jim Staley; he then entered the room, remained a while, came out, and left; the house was soon afterwards in a blaze, and

Cross Edmundson, when three or four miles away on their return, asked Jabel what it meant, and after some hesitation he replied that "he reckoned his papa and Jesse Soles were having a settlement." The only direct evidence is that of Cross Edmundson, the accomplice, which is full, minute, and dramatic in its details. There were witnesses, and proof of sundry circumstances, which, if believed, strongly corroborated Edmundson at sundry points in his narrative. The prisoners were tried at a special term, the commission reciting in the ordinary form that there was such an accumulation of criminal business as rendered a special term necessary. Code, § 914. The prisoners moved for a continuance on the ground that, this bill being found at that special term, it was not part of the accumulation of criminal business specified in the commission as a reason for ordering such special term, and hence the judge had no power to try them; and the prisoners excepted.

The first exception is to the refusal of this motion, and is without merit. The power of the Governor to order special terms is not restricted to instances where there is accumulation of business, nor when such fact is recited as a reason in the commission is the power of the judge restricted to the trial of indictments found before that term. Code, § 913; *State v. Lewis*, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247, 11 L. R. A. 105; *State v. Turner*, 119 N. C. 841, 25 S. E. 810.

The second exception is for the refusal of the motion to quash the venire on these facts: The judge ordered a special venire of 200, and the names were drawn from the box in open court as provided by section 1739 of the Code, which provides that "the names so drawn (being freeholders) shall constitute a special venire." The court undertook to ascertain whether those whose names were so drawn were freeholders or not, "and ascertained from the tax list of the county, the officers of the court, and other sources, that 37 (of 237 names so drawn) were not freeholders," and the names of these 37 were not placed on the venire, leaving 200. The case on appeal further says that the officers and others from whom such information was had were not sworn, but that it appeared that the names of none of the 37 were on the tax list of 1902 as owners of realty; that there was no suggestion or evidence that any one of them was a freeholder; that there was no objection or exception to this mode of proceeding, nor any request that the officers or other persons giving information be sworn; and the judge found at the time, as a fact, that none of the 37 was a freeholder, and that the 200 were freeholders. This finding of fact is binding on us, and is fatal to the exception. Besides, the prisoners made no exception at the time, nor can they except to the rejection of a juror; since their right is "to reject, not to select," and, moreover, they are in no position to complain, for they

¶ 17. See Criminal Law, vol. 14, Cent. Dig. § 1134.

did not exhaust their peremptory challenges. The practice of drawing the venire from the box in open court was specially commended in *State v. Brogden*, 111 N. C. 656, 16 S. E. 170. Other cases are *State v. Moore*, 120 N. C. 570, 28 S. E. 697; *State v. Dixon*, 131 N. C. 808, 42 S. E. 944; *State v. Utley*, 132 N. C., at page 1032, 43 S. E. 820. In *State v. Cody*, 119 N. C. 908, 26 S. E. 252, 56 Am. St. Rep. 692, the court said, "It is not error in the trial judge, when ordering a special venire, to direct the sheriff to summon only freeholders," and in the present case the judge ascertained that fact himself, instead of leaving it to the sheriff to determine. There was, and could be, no prejudice to the prisoners in what was done, but it will always be better practice to swear the officers and others giving information on such occasions.

The able counsel of the prisoners who entered these two exceptions doubtless did so out of abundant caution, not relying upon them himself, but being uncertain "how they might strike the court."

The third exception is to the indifference of two jurors who the court, as the "trier of the facts," found as a fact were indifferent. Such finding is not reviewable. *State v. De Graff*, 113 N. C. 688, 18 S. E. 507; *State v. Potts*, 100 N. C. 457, 6 S. E. 657; *State v. Greene*, 95 N. C. 611; *State v. Collins*, 70 N. C. 241, 16 Am. Rep. 771.

The fourth, fifth, and sixth exceptions are omitted from the brief of the prisoner's counsel, and therefore we take it they are abandoned (Rules 32 and 34, 131 N. C. 831, 43 S. E. 7), but at any rate they are without merit. The fourth exception was to the trial of H. B. Register by the special venire, on the ground that a special venire can be drawn only in capital cases, but the Code (section 977) provides that the principal felon and an accessory before the fact may be indicted and tried together. Further, the jury had already been passed upon, and each juror accepted, before the objection was made, and without exhausting the peremptory challenges. It is a conclusive presumption in such case that the jury is unobjectionable. *State v. Pritchett*, 106 N. C. 667, 11 S. E. 357; *State v. Potts*, supra; *State v. Freeman*, 100 N. C. 429, 5 S. E. 921; *State v. Jones*, 97 N. C. 469, 1 S. E. 680. The fifth and sixth exceptions were to the proper rejection of incompetent hearsay evidence.

The seventh exception was to the evidence of Cross Edmundson, in his statement before the justice of the peace, that on the aforesaid March 28, 1903, H. B. Register had said that Bill Soles, brother of Jesse Soles, and who lived near him, had two or three thousand dollars, and it would be no trouble to get it; that he could take two or three men and go there in his absence and make his wife get it. This was competent, for the testimony showed that it was part of the conversation in which H. B. Register was giving in-

structions as to "holding up" and robbing "the negro staying with Jesse Soles, who had between one and two thousand dollars." Edmundson had detailed the other part of the conversation, and it was proper to admit this. Besides, the intent to commit robbery was involved in this trial, and, this being so, evidence of different offenses of the same kind would be competent. *State v. Weaver*, 104 N. C. 758, 10 S. E. 486; *State v. Parish*, 104 N. C. 679, 10 S. E. 457; *State v. Walton*, 114 N. C. 783, 18 S. E. 945; *McLain*, *Crim. Law*, §§ 415, 416. This declaration of H. B. Register was competent against him as a part of the *res gestæ* at the time he procured the witness to aid his son to commit murder for the sake of the robbery.

The eighth exception is omitted from the brief of prisoners' counsel, and is clearly without merit, being to the admission, against H. B. Register only, of a conversation between him and Edmundson a week after the murder. It strongly tended to show H. B. Register's connection with the crime, and was corroborative of Edmundson's testimony. *State v. Staton*, 114 N. C. 813, 19 S. E. 96.

One Richardson testified that Jabel Register bought some canned goods at his store between sunset and dark on Saturday, March 28, 1903, the day before the killing. Edmundson had testified that he and Jabel had similar canned goods, furnished by H. B. Register on starting out that night. For the purpose of aiding Richardson in fixing the date, and for that purpose alone, he was properly allowed to state that it was on Tuesday or Wednesday that he heard of Jabel Register and Edmundson being at Nelson Toon's, where it was in evidence they had spent the night of the murder. This was the ninth exception, but it is not urged as error in the brief.

The tenth, eleventh, twelfth, and thirteenth exceptions are essentially one, as stated in the brief of prisoners, and are directed to the admission, as evidence against H. B. Register only, of a letter shown to be in his handwriting, tending to show an attempt to manufacture or suggest statements that a witness should make in his interest. The fourteenth exception is omitted from brief of prisoners, and, besides, requires no discussion; which last is also true of the fifteenth exception, which is to the exclusion of the bill of indictment against Cross Edmundson. It would have shown merely, if admitted and had been competent, that he had been charged by the grand jury with the murder, and his whole testimony went directly to establish his participation therein, being present, aiding and abetting. The court charged, as requested: "The jury must carefully consider the testimony of Cross Edmundson, and give it such weight as it may be entitled to. He stands before the jury as an accomplice"—but declined to further charge that "it is dangerous to act exclusively on the testimony of an accomplice, and the jury shall require

confirmatory testimony before they convict," or to further charge that "the unsupported testimony of an accomplice must produce entire belief" in the minds of the jury before they can convict. This refusal is the basis of the sixteenth, seventeenth, and twentieth, twenty-first, twenty-fourth, and twenty-fifth exceptions. In lieu thereof the court charged fully and carefully on "reasonable doubt," and told the jury that, while they could convict upon the uncorroborated testimony of an accomplice, "they should be cautious in convicting" upon such evidence, and left to them, under proper instructions, the evidence offered in corroboration, carefully calling to their attention the effect of evidence offered only as corroborative, and distinguishing its effect and application from substantive testimony. It has been often held that there may be a conviction upon the unsupported testimony of an accomplice, and the charge of the court that while the jury can convict upon such testimony, yet they should be "cautious" in so doing, is quoted from *State v. Miller*, 97 N. C. 484, 2 S. E. 363, and is in line with all our authorities. *State v. Rowe*, 98 N. C. 629, 4 S. E. 506; *State v. Stroud*, 95 N. C. 626; *State v. Haney*, 19 N. C. 390; *State v. Wier*, 12 N. C. 363. Here, indeed, there was much testimony tending to corroborate the testimony of Edmundson.

The eighteenth and nineteenth exceptions, in regard to the modification of the prayer as to the alibi attempted to be proved by Jabel Register, cannot be sustained. The prayer, as amended, is a correct statement of the law. The twenty-second exception is a "broadside" exception to the charge, and cannot be considered. Besides, the charge is in itself very full, careful, and impartial, and the prisoners have no cause to complain.

There is no twenty-third exception in the record or the briefs.

The prisoners also moved this court for a new trial for newly discovered testimony, but such motion can only be made in civil actions. Our precedents are uniform that this court has no jurisdiction to entertain such motion in criminal actions. *State v. Jones*, 69 N. C. 16; *State v. Starnes*, 94 N. C. 981; *State v. Gooch*, Id. 1006; *State v. Starnes*, 97 N. C. 423, 2 S. E. 447; *State v. Rowe*, 98 N. C. 630, 4 S. E. 506; *State v. Edwards*, 126 N. C. 1051, 35 S. E. 540; *State v. Council*, 129 N. C. 513, 39 S. E. 814.

After the fullest consideration, we find no error.

(134 N. C. 116)

BUNCH v. ELIZABETH CITY LUMBER CO.

(Supreme Court of North Carolina. Dec. 18, 1903.)

CONTRACTS—CONSTRUCTION—SALES OF TIMBER—INTEREST OF PURCHASER—TERMINATION—TIME OF EXERCISE—REASONABLE TIME—OPTIONS—NEGLECT TO USE—LEASES—ESTATE OF LESSEE.

1. A bare lease vests no estate in the lessee, but gives him only a right of entry until he

has actually entered and accepted the grant, when the estate is vested in him, and he becomes possessed of his term.

2. Under a contract conveying all the timber cut on certain land, and allowing the grantee five years within which to cut and remove the same, whether viewed as a lease or as a conveyance of the timber, and whether the title passes upon the execution of the conveyance, or not until the timber is cut and removed, the right of the grantee to cut and remove the timber terminates with the five-year period mentioned in the instrument, and he then has no further interest therein.

3. Where a contract conveying timber, and giving the grantee five years within which to cut and remove the same—"said term to commence from the time said party of the second part begins to manufacture said timber into wood or lumber"—specifies no particular time for the commencement of such manufacture, the law will imply a reasonable time.

4. Thirteen years is, as a matter of law, an unreasonable time for cutting and removing timber under a contract conveying such timber, and giving the grantee five years from the time he should begin to manufacture the same in which to cut it.

5. In trespass for cutting timber, the complaint was drawn on the theory that the contract for cutting the same had expired, and defendant's entry was therefore tortious. The complaint also asked that plaintiff be declared the owner of the timber cut and converted, and that the contract be declared of no effect, because of its expiration. There was an allegation that defendant's assertion of a right to the timber was a cloud on plaintiff's title, but there was no prayer of the complaint in accordance therewith. The only issue submitted to the jury related to plaintiff's damages and defendant's counterclaim, and the judgment of the court was for the damages assessed, and nothing else. *Held*, that the action was not an equitable one, and did not impose on plaintiff the necessity of offering to restore the consideration received for the contract as a condition of relief.

6. Money paid for an option to cut timber during a certain period cannot be recovered back by the purchaser of the option or his assignee merely because he fails to take advantage of the option.

On petition for rehearing. Dismissed.

For former opinion, see 42 S. E. 1040, 131 N. C. 830. See, also, *Monds v. Lumber Co.*, 42 S. E. 334, 131 N. C. 20.

The contract discussed in the opinion was construed and passed upon in *Gay Manufacturing Co. v. Hobbs*, 38 S. E. 26, 128 N. C. 46, 83 Am. St. Rep. 661. In setting out its terms, the court there says: "The contract was entered into on the 26th of April, 1887, between Noah Hollowell and his wife and the plaintiff; and it was set forth therein that for the consideration of \$200—one half to be paid on the execution and delivery, and the other half to be paid in twelve months—Hollowell and wife had sold and conveyed to the plaintiff 'all the timber then there, fourteen inches across the stump when cut, on fifty acres of Hollowell's land.' It was further stipulated in the contract that Hollowell was to pay all taxes, dues, assessments, etc., on the land and on the timber, and that there was allowed to the plaintiff 'the full term of five years within which to cut and remove the timber hereby conveyed; said term to

commence from the time said party of the second part begins to manufacture said timber into lumber."

Pruden & Pruden and Shepherd & Shepherd, for petitioner. W. M. Bond, for respondent.

WALKER, J. This is a petition to rehear the above-entitled case, which was decided by a per curiam order at August term, 1902, and is reported in 131 N. C. 830, 42 S. E. 1040. This case and *Monds v. Lumber Co.*, 131 N. C. 20, 42 S. E. 334, were argued at the same time, with the understanding, as the court then thought, that the former case should abide the decision in the latter; but counsel inform us now that the two cases were argued together only for the sake of convenience, as the facts and principles of law involved in each of them are substantially the same, and it was not intended that the plaintiff in this case should be concluded by the decision in the *Monds Case*, in which no petition to rehear is filed. We accept this statement of counsel as to the real understanding of the parties, and will proceed to consider the errors alleged in the petition.

The contention is that the petition should be heard as if an opinion had been filed in the case substantially like the one in the *Monds Case*, the necessary changes being made to suit the facts wherein they may differ from those in the latter case; and, this being done, the petitioner assigns as errors that in the *Monds Case*, which is based upon the authority of *Mfg. Co. v. Hobbs*, 128 N. C. 46, 38 S. E. 26, 83 Am. St. Rep. 661, and *Rumbough v. Mfg. Co.*, 129 N. C. 9, 39 S. E. 581, the court construed the contract between the parties as a lease, and therefore void for uncertainty as to the time of its beginning, whereas, in fact and in law, there was a sale outright of the timber; the contract being executory as to the right to cut and remove it, which continued until abandoned in some way by the purchaser. It is also alleged that the court erred in deciding that the action was not of an equitable nature, and in its essence like a suit in equity to remove a cloud from the plaintiff's title, whereas the court should have held that the plaintiff had come into a court of equity for relief, and should be compelled to return the \$200 paid to him at the time the contract was made by the Gay Manufacturing Company; the defendant having succeeded to all its rights and equities by virtue of the deed of the latter company to it.

It is a mistake to suppose that the court, in *Manufacturing Co. v. Hobbs*, supra, decided that the contract must be construed as a lease of the timber trees, or as a term for years. The court merely stated that it so far partook of the nature of a lease as to require the application of the same rule of law in determining its validity as would apply in the case of leases or terms for years, and that, as in such cases there must be

a certain beginning and a certain end, the contract is void, as no definite time is fixed for the beginning of the term. 2 Blk. 143, 318. A bare lease does not vest an estate in the lessee, but only gives him a right of entry, which is called his interest in the term (*interesse termini*); but when he has actually entered, and thereby accepted the grant, the estate is then, and not before, vested in him, and he is possessed, not properly of the land, but of the term for years; possession or seisin of the land remaining still in him who has the freehold. 2 Blk. 144. While some of the cases in this and other states liken a contract of the kind we are construing to a lease, it may be true that it should not be technically so construed, but that it should be regarded as a conveyance of the timber, or an interest or estate in the timber, upon condition that, if it is not cut and removed within a given time, the interest or estate so conveyed shall revert in or revert to the grantor. While we are inclined to adopt this as the better interpretation, and the one more perhaps in consonance with the intention of the parties, as disclosed by the language employed by them, yet we think that, however the contract may be considered with reference to the interest or estate of the defendant's assignor, the result in this case must be the same; and even if the title in the trees vested the very moment the contract was delivered, and by virtue of it, as an executed contract of sale, that title has been lost by inaction or failure to comply with the condition upon which it was conveyed, or, more exactly speaking, by failure to cut the timber within the time limited by the contract. There appears to be some diversity of opinion to be found in the cases as to when the title to the timber passes—whether immediately upon the execution of the instrument of conveyance, or not until the timber is cut and removed—in a case like this, where the time limit extends not only to the cutting, but to the removal. This distinction, if well taken, can make no practical difference in the construction of the contract under consideration, as we hold that the time for cutting and removing the timber, as fixed by the contract, had expired before this suit was brought; and it is therefore immaterial whether we decide that the title never passed out of the plaintiff, as the timber was not cut within the time, or reverted to him at the end of the allotted time by reason of the failure to comply with said condition. In neither view of the matter can the defendant succeed in this action.

We are not inadvertent to the fact that some courts, whose decisions are entitled to the highest respect, have held that the title passes to vendee, if we may so call him, and remains in him notwithstanding the expiration of the time fixed for the cutting and removal of the timber, so that, if he enters upon the land to cut the timber, his vendor may sue him in an action in the nature of

trespass quare clausum fregit, and recover damages for breaking the close, though he cannot recover in an action in the nature of trespass de bonis asportatis, or for the value of the timber so cut and removed, after the time has run out. We cannot adopt this principle as the one which should determine the rights of the parties in such cases, and especially are we unable to do so in this case, in view of the language of the contract under construction, which we think evinces most clearly a contrary intention. We must carry out the declared purpose of the parties, if it has been sufficiently disclosed by them in their agreement; and that, in our opinion, has been done in the case in hand.

We cannot conclude, after a careful examination of the terms of the contract, that the parties conveyed the timber with a proviso limiting the time within which it should be cut and removed, and intended thereby that after the expiration of that time the defendant's assignor should still have an interest or title in the timber, but without the right of exercising any control or dominion over it, unless by committing a trespass upon the land. Such a meaning would have to be very clearly expressed before we would feel at liberty to adopt it as the one contemplated by the parties. We prefer to rest our decision in this case upon that construction of the contract which is in our judgment more in accord with a reasonable view of the rights of the parties under it, rather than upon one which will go beyond what is necessary to effectuate the intention, and produce such an anomalous result.

If an estate in the timber was conveyed by the contract, treated for the purpose as a deed, it must be commensurate only with the purpose and object of the conveyance, namely, to enable the defendant's assignor to cut and remove the timber within the five years, and it should endure no longer. At the expiration of that time the estate in so much of the timber as has been cut and removed would revert to the vendor, or at least the timber would become his absolute property.

If it is merely an executory contract, whereby title to so much of the timber as should be cut within the time limited would pass to the defendant's assignor, then the title to so much as should not be cut and removed within that time would remain in the vendor. It can make little or no practical difference in this case, as we have virtually said, whether we adopt the former or the latter view of the relation of the parties, or of the interest which passes by such contracts. In any view that can be taken of the subject, the defendant's assignor had the right to enter upon the land and cut and remove therefrom the timber then standing, and to continue to do so within the five years; but at the expiration of that time his right to cut and remove the timber ceased

—whether by reverting the estate in the remaining timber in the grantor, or by a mere cessation of his right or option to cut and remove the timber under and by virtue of the instrument treated as an executory contract, is of no importance, in view of the special facts of this case. It is more a difference in form than in substance. In no event should we give a construction to the instrument which will confer any greater right or estate than is commensurate with the object and purpose of the parties as expressed in the context. The spirit and letter of the contract exclude the idea that when the time fixed by it expired the defendant's assignor was to have any right, interest, or estate in the timber then standing on the land.

The majority of the cases in the other states which we have been able to examine seem to hold that the clause fixing the time within which the timber must be cut and removed was designed to limit the whole grant, and that the object of such a contract or conveyance is the sale of all the timber, which should be taken off by the end of the time fixed in the instrument. The contracts are thus held to be executory in their nature. *McIntyre v. Barnard*, 1 Sandf. Ch. 52; *Gilmore v. Wilbur*, 12 Pick. 120, 22 Am. Dec. 410; *Strasson v. Montgomery*, 32 Wis. 52; *Reed v. Merryfield*, 10 Metc. 155; *Howard v. Lincoln*, 13 Me. 122; *Saltonstall v. Little*, 90 Pa. 422, 35 Am. Rep. 683. And this is held to be the correct interpretation, even where the words of conveyance are in present, and do not refer merely to the time when the timber is cut. *Pease v. Gibson*, 6 Greenl. 81; *Fletcher v. Livingstone*, 153 Mass. 118, 26 N. E. 1001; *Hicks v. Smith*, 77 Wis. 146, 46 N. W. 133. In *Strasson v. Montgomery*, supra, the court says: "The conveyance is of all the trees and timber on the premises, with the proviso that the vendee should take the same off the land within four years. It is well settled, on principle and by authority, that the legal effect of the instrument is that the vendor thereby conveyed to the vendee all of the trees and timber on the premises, which the vendee should remove therefrom within the prescribed time, and that such as remained thereon after that time should belong to the vendor, or to his grantee of the premises." In *Fletcher v. Livingstone*, supra, it is said to be well settled that a contract like that relied on by the defendant in this case does not immediately pass the title to property, and is not a sale, or a contract for a sale, of an interest in land, but an executory agreement for a sale of chattels, to take effect when the wood and timber are severed from the land, with a license to enter and cut the trees and remove them. Many other cases could be cited in which the same doctrine is laid down. By some of the courts it is held that the title to all of the timber passes, but the title to so much as is not cut and removed within the prescribed time reverts

to the vendor. *Williams v. Flood*, 63 Mich. 403, 30 N. W. 93. In that case the court says: "It is not very important to discuss the exact nature of the plaintiff's rights under the written contract. Whatever they were, they included an absolute sale of all the timber described, subject only to such qualifications of the right of removal as the contract mentions. At most, this condition would only operate by way of forfeiture. The timber had all been paid for, and all belonged to the plaintiff, unless lost by forfeiture for nonremoval." See, also, *McCumber v. Railroad*, 108 Mich. 491, 66 N. W. 376, 32 L. R. A. 102, 62 Am. St. Rep. 713, and cases therein cited. In *Moring v. Ward*, 50 N. C. 272, this court, by Pearson, C. J., said that by such a contract it is the intention to create an estate, so as to entitle the vendee to occupy the land and take the trees for the time prescribed in the contract, and that this estate is in its nature a lease for years, and that the contract is not merely personal in its nature. In this case we repeat that it is not so important to determine the exact nature of the right or estate created by the contract as it is to decide whether or not the defendant, after the expiration of the time fixed for entering upon the land and removing the timber, had any interest or estate in the timber. In our opinion, after a most careful examination of the authorities, it did not have any interest or estate therein.

The defendant insists that the five years did not commence, under the terms of the contract, until his assignor "began to manufacture the timber into wood or lumber." As no definite time is fixed for the Gay Manufacturing Company to begin the manufacture of the timber, the law will imply a reasonable time. We do not think that it can be successfully contended that thirteen years is not, as matter of law, an unreasonable time for cutting and removing the timber, under the terms of the contract. *Manufacturing Co. v. Hobbs*, supra. Neither the defendant nor his assignor had ever cut any of the timber until about two months before this suit was brought.

It was admitted that the Gay Manufacturing Company had paid to the plaintiff at the date of the contract, March 20, 1888, the sum of \$200; that being the amount which the defendant alleges was paid to the plaintiff in advance on the purchase of the timber. The defendant now contends that it is entitled to have that amount paid to it, as the assignee of the Gay Manufacturing Company, because it would be inequitable to allow the plaintiff to keep the timber, or recover damages from the defendant for its conversion, without returning the sum so received by it. It is argued that the plaintiff seeks to have a cloud removed from his title,

and that he who asks equity must first do equity. We cannot concur in the view thus taken by the defendant. The only issues submitted to the jury related to the plaintiff's damages for cutting the timber, and the defendant's counterclaim. It is true that the plaintiff does allege in the eighth paragraph of the complaint that the defendant's assertion of a right to the timber by virtue of the contract is a cloud upon his title, but this was an unnecessary allegation, and the prayer of the complaint does not correspond with it, nor include that relief. Besides, the judgment of the court was simply for the amount of damages assessed by the jury for the trespass committed by the defendant in cutting the timber, or, rather, to follow closely the language of the verdict, to which the judgment refers, for the value of the timber, and nothing else. This is not an equitable action. The plaintiff does not seek to rescind the contract, in which case the court would put the parties in statu quo, but merely alleges in his complaint the facts, and asks that he be declared the owner of the timber cut and converted to the defendant's use; that the contract be declared of no effect, because of the expiration of the time limited in it for cutting the timber; and that he recover of the defendant the damages sustained by reason of its trespass or conversion. The complaint is drawn upon the theory that the contract had expired by its own limitation, and that therefore the defendant, in entering upon the land and cutting the timber, committed a tortious act. The defendant's assignor paid the \$200, practically, for the right or privilege of cutting the timber within five years, which right or privilege was never exercised, but the plaintiff was prevented during that time from selling to any one else. If money is paid for an option to cut timber during a certain period, and the party to whom the option is given does not see fit to avail himself of it, how can any equity arise in his favor to have the money paid back to him? It does not even present a case where money has been paid upon a consideration that has failed. He has simply refused to do what he had a right to do, and to compel the plaintiff to give him back his money would permit the defendant to take advantage of his own default. The plaintiff was certainly put to a disadvantage by the contract in being denied the right to the use of the land, or, as we have said, to dispose of it during the prescribed period, and this is a sufficient consideration to support his legal and equitable right to the money. In no possible view of the case, therefore, has the defendant any equity to have the money refunded.

There is no error in the former decision of this court. Petition dismissed.

(134 N. C. 1)

BROCKENBROUGH et al. v. BOARD OF WATER COM'RS OF CITY OF CHARLOTTE.

(Supreme Court of North Carolina. Dec. 1, 1903.)

CITIES — CONTRACTING DEBT — BONDS ISSUED BY BOARD OF WATER COMMISSIONERS — MORTGAGING WATERWORKS — IMPAIRING RIGHTS OF BONDHOLDERS.

1. The issue of bonds under Priv. Laws 1903, p. 440, c. 196, providing that they shall be paid from the income of the city waterworks, and that none of the city's funds raised by taxation shall be applied to their payment, is not the contracting of a debt by the city, or a pledging of its faith or a loan of its credit, which Const. art. 7, § 7, inhibits, except on vote of the citizens.

2. Waterworks of a city, transferred, pursuant to Priv. Laws 1899, p. 788, c. 271, to a board of commissioners created by the act, which provides that the board shall manage the works, and turn over the surplus income therefrom to the city treasurer, are held in trust by the board for the use of the city, and are not subject to be sold for any indebtedness of the city.

3. After a city had issued bonds for purchase of waterworks, Priv. Laws 1899, p. 788, c. 271, transferred the works to a board of water commissioners, and provided that the net income should be turned over to the city treasurer, and therefrom the bonds should be paid. *Held*, that no rights of the holders of such bonds were impaired by Priv. Laws 1903, p. 440, c. 196, which authorized the board to issue bonds for extension of the works, and to secure them by mortgage on the works, and provided that the net income should first be applied to the latter bonds.

4. Priv. Laws 1903, p. 440, c. 196, authorizing a board of water commissioners holding waterworks in trust for a city to issue bonds for extension of the works, and to secure them by mortgage on the works, is in the power of the Legislature.

Appeal from Superior Court, Mecklenburg County; Neal, Judge.

Action by George H. Brockenbrough and others against the board of water commissioners of the city of Charlotte. Judgment for defendant. Plaintiffs appeal. Affirmed.

Clarkson & Duls, for appellants. Burwell & Cansler, for appellee.

CONNOR, J. This action is prosecuted by the plaintiffs, citizens and taxpayers of the city of Charlotte, and members of the board of aldermen of said city, against the defendant, board of water commissioners, of said city, for the purpose of restraining and perpetually enjoining a proposed issue of bonds, and the execution of a mortgage on the property held and owned by said board, and pledging the rents and tolls derived from the operation thereof to secure the payment of the said bonds and the interest thereon. The facts material to the decision of this appeal, as set forth in the complaint and admitted by the demurrer, are:

On the 13th day of March, 1897, in pursuance of authority vested in it by chapter

40, p. 712, of the Private Laws of 1881, and by chapter 68 of the Public Laws of 1897, the board of aldermen purchased the plant, property, franchises, easements, privileges, and appurtenances of the Charlotte City Waterworks. Pursuant to authority vested in it by said acts of the General Assembly, and by virtue of the approval of a majority of the qualified voters of said city, ascertained at an election duly held for that purpose, it issued and sold \$250,000 of the bonds of the city, and applied the funds received therefrom to the payment of the purchase money of said property, and in making extensions and improvements thereto. At the session of 1899 (chapter 271, p. 788, Priv. Laws) the General Assembly duly passed an act whereby E. T. Cansler, R. J. Brevard, W. O. Dowd, and R. H. Jordan were constituted a board of water commissioners for the city of Charlotte, of which the mayor of said city was made *ex officio* chairman. Provision was made for filling vacancies in said board. Said board was declared to be a corporation under the corporate name of the "board of Water Commissioners of the City of Charlotte," with power to sue and be sued, to hold real estate, and to enjoy the usual privileges of a corporation. That all acts and doings of said board within the scope of their duty or authority are declared to be obligatory upon, and be in law considered as if done by the board of aldermen of, the city of Charlotte. The said board was empowered, for and in the name of the board of aldermen of the city of Charlotte, to take and hold the land, real estate, rights, franchises, and property of every kind "now" owned by said board of aldermen, or that may "hereafter" be purchased, for the purpose of operating and maintaining a system of waterworks for the said city, and have power to acquire such additional property and make such additional improvements thereto as should be necessary to supply the city of Charlotte with a sufficient supply of good and wholesome water. Power was given to condemn land and water rights, if necessary, to extend said system of waterworks. The board was given power to regulate the distribution and use of water, and to fix a price for the use thereof, the time of payment, etc. The property held by said board was exempt from taxation. The board was given power to collect all rents, water rates, etc., and required to keep an account thereof; and after paying the expense of operating the plan or system of waterworks under their control, including cost of such improvements as was deemed necessary, the net balance they were required to pay over to the treasurer of said city. It was provided that said board of aldermen out of such net balance should first pay the interest upon such of the bonds of the city of Charlotte as were sold for the purpose of raising money to purchase said system of waterworks, and the balance remaining to constitute a sinking fund to meet the pay-

¶ 2. See Execution, vol. 21, Cent. Dig. § 133; Municipal Corporations, vol. 36, Cent. Dig. § 628.

ments of said bonds at maturity. The members of said board organized under and pursuant to the provisions of said act of 1899, and the board of aldermen, pursuant thereto, turned over to the said board of water commissioners the said waterworks system, and plant, improvements, and extensions, for the purpose and in accordance with the terms and provisions of said act; and in accordance therewith the said board holds the real estate, rights, franchises, and property so turned over to them. Said board has since acquired additional property and made additional improvements, and is endeavoring to acquire still more property and make further improvements, all of which are necessary to furnish said city and its inhabitants with a sufficient supply of good, wholesome water. The population of said city was at the last census 19,000, and now exceeds 25,000, people. Said city has expended large sums in establishing and maintaining, and now maintains, a paid fire department for the protection of the property of the citizens of said city. It also maintains a system of sewerage, made necessary for the proper drainage of its streets and for the preservation of the public health. Said system of fire protection and sewerage require large quantities of water from said waterworks system for their use, operation, and efficient maintenance. The city has found it necessary to lay and has laid many miles of sewer and water pipes, and purchased the necessary implements, tools, etc., for the operation thereof, all of which are necessary for the protection of the property and health of said city and its inhabitants. That the present water supply is inadequate to meet the demands of public and private consumers, and an efficient operation of said plans. That one of the watersheds of said city, from which it derived a considerable portion of its water supply, has become thickly populated and occupied by manufacturing plants, making it advisable to discontinue the use of water from that source for public or domestic purposes. That neither the said city nor the board of water commissioners has any funds on hand which can be used to purchase necessary real estate, machinery, and other property to adequately equip its system of waterworks to supply the wants and needs of the city or its inhabitants. That it will require the expenditure of at least \$150,000 for said purpose. That to enable the said board of water commissioners to properly equip and maintain said waterworks system, sufficient to supply the city with water necessary for municipal purposes at a moderate cost to said city, it is necessary that the board of water commissioners shall equip and maintain a water system of sufficient capacity to furnish all the inhabitants of said city desiring to use the same a sufficient quantity of pure, wholesome water for domestic purposes, and to charge therefor certain toll or rental, without which the said

commissioners would be unable to maintain said water system for municipal purposes, except at an enormous and unreasonable expense to said city.

The General Assembly at its session of 1903 (Chapter 196, p. 440, Priv. Laws), at the instance and with the approval and pursuant to a resolution of the board of aldermen of said city, duly passed, in accordance with the provisions and requirements of article 2, § 14, of the Constitution, an act repealing sections 6-17, 18, of the act of 1899 (chapter 271, p. 788, Priv. Laws), and conferring upon the board of water commissioners power to acquire such additional property and make such additional improvements thereto as may be necessary to at all times furnish the city of Charlotte with a sufficient supply of good, wholesome water. And in order to procure necessary funds for that purpose, said board was given full power and authority to issue bonds, not to exceed in amount the sum of \$200,000, in such form and of such denominations, and payable at such time or times and places, and to bear such rate of interest, payable semiannually, as said board shall determine. Said bonds to be signed by the mayor of the city as ex officio chairman of said board, sealed with the corporate seal of said city, attested by the ex officio clerk of said board, and the coupons on said bonds to bear the engraved or lithographed signature of said clerk. "All bonds so issued shall be equally and ratably secured by first mortgage or deed of trust upon all the real estate, rights, franchises and other property of every description owned and held by said board and which was purchased by the city of Charlotte from the Charlotte City Waterworks Company as well as all other property, rights and franchises which may hereafter be purchased or acquired by said board for the purpose of extending, maintaining and operating said system of waterworks for said city." Provision is made for the execution of a mortgage or deed of trust on said property for the purpose of securing the payment of said bonds. It was provided that "the said board of water commissioners out of the moneys derived from the collection of tolls or rents for water shall pay (1) the cost and expenses of operating said plant or system of waterworks under its control; including the cost of such incidental improvements as the board may deem necessary for that purpose. (2) The semiannual interest upon the bonds issued by virtue of section six (6) hereof as the same shall become due. (3) The cost and expense of such extensions and additions to the plant of said system as the board may from time to time deem advisable. (4) The semiannual interest upon the bonds heretofore issued by the city of Charlotte for the purchase of said waterworks as the same shall become due for a period of fifteen years from the date thereof. (5) After the expiration of which period all moneys so derived (less the cost and ex-

penses of operating said plant, the interest on the bonds authorized to be issued hereunder and the cost and expenses of additions to the plant as aforesaid) shall be turned over to the treasurer of the city of Charlotte to be held by him and invested under the direction of the board of water commissioners for a sinking fund with which to pay off as they may mature first the bonds issued by virtue of section six hereof in full; second, the bonds heretofore issued by the city of Charlotte for the purpose of purchasing said waterworks system: provided, that none of the funds of the city of Charlotte raised by taxation shall ever be applied to the payment of either principal or interest of the bonds issued by virtue of section six (6) hereof."

Prior to the commencement of this action the board of water commissioners, October 8, 1903, at a regular meeting unanimously adopted a resolution reciting the several matters and things herein set forth, and further reciting that "whereas it has become necessary to relocate and establish new reservoirs, pumping stations, pipe lines, etc., upon and connected with streams drawing their supply from watersheds not so liable to contamination, and sufficient to furnish the necessary water supply for said city for both present and future compensation. First, that the board pursuant to the provisions of chapter 196 of the Private Laws of the General Assembly of North Carolina ratified the second day of March, 1903, hereby authorizes and directs the issuance of one hundred and fifty thousand dollars of its bonds or obligations payable to bearer thirty years after date of said bonds and bearing interest at the rate of five per cent. per annum payable semi-annually," etc. " * * * The said bonds to be of the denomination of one thousand dollars each and payable only out of the moneys to be derived by the board from the collection of tolls or rents for water as provided in the second subsection (17) of section one of the act hereinbefore referred to, the terms and provisions of which act are to be considered as if incorporated herein: * * * provided that neither the bonds authorized to be issued hereunder, the coupons attached thereto, nor the deed of trust securing the same, shall be deemed or held as creating any debt of the city of Charlotte, or as pledging the faith or lending the credit of said city for the payment of the indebtedness hereby authorized, and no action shall be maintained in any court against said city or any of its officers to enforce the payment of said indebtedness evidenced by said bonds, coupons or deed of trust except as to the funds and property herein expressly charged with the payment thereof." The form of the proposed bond is incorporated in said resolution, conforming to the provisions of said act of 1903 and said resolution. The second of said resolutions provides for the execution of a mortgage or deed of trust for securing the payment of said bonds conveying said plant, and

all additions made thereto, with all franchises, etc., appurtenant thereto. The said resolutions in all respects conform to the provisions and requirement of the several acts herein referred to. The complaint alleges that the proposition to issue said bonds and mortgage has not been submitted to, or approved by a vote of a majority of, the qualified voters of said city, nor has said board any other authority therefor than is conferred by said act of 1903. The board of water commissioners threaten to, and, unless enjoined, will, issue and sell said bonds, and execute said mortgage or deed of trust.

The plaintiffs aver that they are advised (1) that the title to said waterworks and appurtenances is held by said board in trust for said city of Charlotte upon the terms set forth in said acts, and that said board is bound, in law, to hold and operate the same upon the trusts aforesaid as such acts provide; (2) that the threatened bond issue and mortgage of said property and pledge of said rents and tolls is violative of the rights of the city of Charlotte, and its citizens as secured to them by the law of the land and the several acts referred to, other than chapter 196, p. 440, Priv. Laws 1903, and particularly violative of article 7, § 7, of the Constitution of the state; (3) that chapter 196, p. 140, Priv. Laws 1903, in so far as it attempts to authorize said board of water commissioners to issue said bonds, and to pledge the water rents, tolls, and emoluments of said waterworks plant and system, and to mortgage the said property and franchises, is violative of section 7 of article 7 of the Constitution, and that therefore chapter 271, p. 788, of the Private Laws of 1899, directing the manner in which the rents, etc., arising from said system of waterworks, and the operation thereof shall be applied is still in force and effect; (4) that said board has no power to mortgage said property, or pledge the rents and tolls derived from the operation thereof, but that it is the duty of said board to hold the same upon the trusts attaching thereto; (5) that the issuance of said bonds and the execution of said mortgage will cast a cloud upon the title to said property.

The defendants demur to the complaint for that it does not allege facts sufficient to constitute a cause of action, because it appears therefrom that the act of 1903 expressly confers upon the said board the several threatened acts sought to be enjoined; that said acts of the General Assembly were passed at the instance and with the approval of the board of aldermen; that it is necessary to issue bonds for the purpose of securing funds sufficient to make the extension and improvements referred, and to enable said board to perform the duties and functions imposed upon it by said legislation; that said proposed bond issue is a necessary expense to be incurred in preserving and maintaining in a state of efficiency municipal property already acquired by the city, and held by

said board in trust for necessary municipal purposes, and that therefore it is not necessary to be first authorized by a majority of the qualified voters of said city; that the act and the resolution of the board expressly provide for the payment of the principal and interest of said bonds from and out of the tolls and rents received from the operation of said waterworks, and further provide that neither said bonds, nor the coupons attached thereto, nor the deed of trust securing the payment thereof shall be deemed or held as creating any debt of the city of Charlotte, or as pledging the faith or lending the credit of said city for the payment of the indebtedness thereby authorized: that the issuing of said bonds and the pledge of said water rents, etc., will not be contracting any debt or pledging the faith or lending the credit of said city in the sense inhibited by section 7 of article 7 of the Constitution.

His honor sustained the demurrer, and plaintiffs appealed.

We have been very much aided in our investigation and disposition of this appeal by full and excellent briefs and oral arguments of the learned counsel for the parties to the record.

It will be convenient to dispose of the questions raised by the pleadings in an order somewhat different from that in which they are presented. If, as contended by the defendants, the bonds proposed to be issued are not debts or liabilities of the city, or if the making and issuance of them be not pledging the faith or lending the credit of the city within the meaning of section 7, art. 7, of the Constitution, several important and interesting questions discussed in the briefs will be eliminated. This question has not before been presented to or decided by this court. The language of the Constitution declares that no county, city, town, or other municipal corporation "shall contract any debt, pledge its faith, or loan its credit," etc. The plaintiffs insist that the issuing of the bonds in controversy comes within this inhibition. "Debt" is defined to be "that which is due from one person to another; that which one person is bound to pay or perform to another." *Black's Law Dict.* 337; *Perrigo v. Milwaukee*, 92 Wis. 236, 65 N. W. 1025. "An indebtedness within restrictions upon municipal indebtedness is an agreement of some kind by the municipality to pay money where no suitable provision has been made for the prompt discharge of the obligation imposed by the agreement." *Sackett v. New Albany*, 88 Ind. 473, 45 Am. Rep. 467. "A debt is a specified sum of money which is due from one person to another and denotes not only the obligation of the debtor to pay, but also the right of the creditor to receive and enforce payment." *State v. Hawes*, 112 Ind. 823, 14 N. E. 87. It would not be contended that upon the facts in this case the city lends its credit or pledges its faith in regard to the proposed bonds. It does not indorse or guaranty their payment, or assume any obli-

gation in respect to them. Nor can its revenues be applied to the payment of them. The income accruing from the operation of the waterworks is not to be paid into the city treasury for disbursement, nor does the city assume any responsibility in regard to the disbursement of the money by the board of water commissioners. This board collects the rents, and applies them to the purposes designated in the act. After the payment of the interest and other objects mentioned in the law, the amount remaining on hand shall be turned over to the treasurer of the city of Charlotte, to be held by him and invested under the direction of the board of water commissioners for a sinking fund. The treasurer of the city is made ex officio treasurer of said board. His bond, of course, is liable for any default in the discharge of his trust, but the city assumes no responsibility in the matter. The statute is so carefully drawn and guarded that but little is left to construction. There can be no possible doubt as to the legal effect and operation of the language used in the statute and the bond, excluding any power to apply the revenues of the city to the payment of the interest on, or principal of, the bonds. We find that the courts of other jurisdictions have considered and decided the question arising upon the construction of restrictive provisions similar to ours. The Constitution of the state of Washington prohibits any town or city contracting any debt in excess of a certain percentage of the assessed value of its property. The city of Spokane undertook to borrow money to complete a system of waterworks, and, for securing the payment thereof, pledged a portion of its rents derived from said waterworks. In an action brought to restrain the city government from making the contract, the court (Hoyt, C. J.) said: "And it is claimed on the part of the respondent that the entering into said contract and the issuance of such obligations of the city is the incurring of an indebtedness, within the meaning of the Constitution, and to do so at the present time is not within the power of the city, for the reason that it is already indebted beyond the constitutional limit. * * * Said ordinance and contract, when construed together, provide that the obligations to be issued in pursuance thereof shall be payable only out of the special fund to be created out of the receipts of the waterworks, as above specified, and that the city shall not be in any manner liable to pay the same except out of moneys in said special fund. * * * This being so, we are of the opinion that neither the ordinance, the contract, nor the obligations to be issued by the city in pursuance thereof, do or will constitute a debt of the city, within the constitutional definition. The only obligation assumed on the part of the city is to pay out of the special fund, and it is in no manner otherwise liable to the beneficiaries under the contract. The general credit of the city is in no manner pledged except for the performance of its duty in the creation of the special fund."

Winston v. Spokane (Wash.) 41 Pac. 888. The court affirmed and followed this case in Faulkner v. Seattle (Wash.) 53 Pac. 365. The Supreme Court of Iowa, in Swanson v. Ottumwa, 91 N. W. 1043, 59 L. R. A. 620, thus states the view held in that state, which we think is correct: "The tax required to be levied is clearly authorized by the statute, and such tax, together with the income of the company derived from other sources, the ordinance expressly provides, shall pay all obligations assumed by the city. If it does not, neither the bondholders nor company have any claim on the city for the deficiency. The obligation of the city is to levy the tax, and see that the amount collected is applied to the specific purposes. If the special fund legally provided is not sufficient, then it may be well said the deficiency is not payable by the city, and it is difficult to conceive how there can be such a thing as a debt which is never to be paid. No burden is created thereby, and there cannot be such an indebtedness. In a constitutional sense, the prohibited indebtedness must be a burden, and payable from funds which could not be constitutionally appropriated for that purpose." *Waterworks Co. v. City of Creston*, 101 Iowa, 687, 70 N. W. 739. The Supreme Court of Illinois, in *Springfield v. Edwards*, 84 Ill. 633, thus states the proposition: "When the appropriation is made, and the warrant or order on the treasury for its payment is issued and accepted, the transaction is closed on the part of the corporation, leaving no further obligation, either absolute or contingent, upon it whereby its debt may be increased." It is also held in this case that, for a failure to collect and pay over the "special fund," the remedy must be against the officers, and not against the corporation; "otherwise a contingent debt would be incurred." The case of *United States v. Ft. Scott*, 99 U. S. 152, 25 L. Ed. 348, presents very clearly the distinction between the status of the city in respect to the bond issue therein and in our case. Mr. Justice Harlan says: "The general reference upon the margin of the bonds to the ordinance under which the improvement was projected should not, in view of the general powers of the council, as declared in the statute, be held as qualifying or lessening the unconditional promise of the city, set forth in the body of the bonds itself, to pay the bonds, with the prescribed interest, at maturity." Again he says: "But the unquestioned fact remains that the bonds, with some interest, held by the relator, were not paid at maturity, as the city agreed that they should be." As we have pointed out, the city of Charlotte makes no such promise. Any inference or suggestion to that effect is expressly negated by the act, the resolution, and the terms of the bonds.

It is said, however, if the rents and tolls accruing from the operation of the waterworks, as provided by the act of 1899, are diverted to the purposes of the act of 1903, the burden on the ordinary revenues will be increased, and

thereby its debt indefinitely increased. We cannot see how this result can justly be called contracting a debt. The question raised by this suggestion will be discussed in another phase of the controversy. We conclude that the proposed bond issue will not constitute a debt against the city of Charlotte, in any legal or constitutional sense. It is immaterial, in this phase of the question, whether we regard the bonds as issued by the board of aldermen or the board of water commissioners. We deem it proper to say this that it may be seen that we have not overlooked the language of section 6 of the act of 1903: "And the contracts and engagements, acts and doings of said board within the scope of its duty and authority shall be obligatory upon and be in law considered as if done by the board of aldermen of the city of Charlotte." The conclusion which we have reached is not affected by the fact that the bonds are issued by the board of water commissioners, but is based upon the provision for raising the fund out of which they are to be paid, to the express exclusion of any other fund or revenue of the city.

Holding, as we do, that the proposed bond issue is not creating a debt against the city, or lending its credit, or pledging its faith, we do not deem it necessary to pass upon the question raised by the demurrer that the purpose for which the fund is to be raised is a "necessary expense," within the meaning of article 7, § 7, of the Constitution. There is much force in the position that, upon the admitted facts in the case, the bond issue could be sustained as a necessary expense. It is evident that the value and efficiency, if not the preservation, of the present system of waterworks as an essential agency in protecting the property and health of the city and its inhabitants, is involved in the proposed action by the board. While the policy indicated by the restrictive constitutional provision upon municipal indebtedness must be kept in view and upheld, we may not disregard the ordinary meaning of words, or give to them a strained and unusual construction. Surely no one could well contend that these words, if used in a power of attorney respecting the private business of the citizen, would be construed to prevent the agent from assuming for his principal such obligations as were necessary for the protection of his property, and the performance of the duties imposed upon him. The people of Charlotte have by their votes declared that a system of waterworks is essential to their corporate welfare and safety. They have empowered their municipal servants and agents to expend a large sum for securing such a system. Is it not clear that this involves the duty of protecting this property, and making it efficient for the very important—may we not say necessary—purpose for which it was originally acquired. If so, the power to contract such obligations as are necessary to discharge the duty must be found. "Narrow and tech-

nical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, and designed as a chart upon which every man, learned or unlearned, may be able to trace the leading principles of government." Cooley, Const. Lim. 59.

That waterworks are held by the city or such quasi municipal corporations as may be established by the Legislature for such purpose for public use and for public purposes is clearly shown by the Supreme Court of the United States in *New Orleans v. Morris*, 105 U. S. 65, 26 L. Ed. 1184.

The plaintiffs suggest that the property purchased by the city by the board of aldermen, and by the act of 1899 transferred to the board of water commissioners, is impressed with a trust for the city, and for the purposes set out in this act, "and that said board is bound, in law, to hold and operate the same upon the trusts aforesaid." It is clear that the Legislature may, in aid of municipal government, or for the purpose of discharging any municipal functions, or for any proper purpose, create municipal boards, and confer upon them such powers and duties as in its judgment may seem best. Section 4, art. 8, of the Constitution, ordains that "it shall be the duty of the Legislature to provide for the organization of cities, towns and incorporated villages," etc. It is uniformly held that "municipal corporations are mere instrumentalities of the state for the more convenient administration of local government. Their powers are such as the Legislature may confer, and these may be enlarged, abridged, or entirely withdrawn, at its pleasure," etc. *Lilly v. Taylor*, 88 N. C. 489; *Harris v. Wright*, 121 N. C. 172, 28 S. E. 266; *State v. Beacham*, 125 N. C. 352, 34 S. E. 447. The Legislature has frequently exercised the power conferred by the Constitution, by establishing boards of health in towns and cities, school boards, and such others as may be deemed wise, as additional governmental agencies. We do not understand that this power is questioned, or that the title to the property purchased by the city from the Charlotte City Water Company did not pass to and vest in the board of water commissioners established by the act of 1899.

In *Kennebeck Water District v. Waterville*, 96 Me. 254, 52 Atl. 774, it is said: "The Kennebeck water district is a quasi municipal corporation. * * * The powers, the rights, and the property of the new corporation rest exclusively in it, and in no degree in the city of Waterville. That the Legislature has authority to create the water district cannot be successfully questioned."

"There is no prohibition which we have been able to discover, and we have been pointed to none, against the creation by the Legislature of every conceivable description of corporate authority and to endow them with all the faculties and attributes of other pre-existing corporate authority. Thus, for

example, there is nothing in the Constitution of this state to prevent the Legislature from placing the police department of Chicago, or its fire department or its waterworks, under the control of an authority which may be constituted for such purpose. The Constitution nowhere commits corporate objects or purposes irrevocably to authorities now existing, nor does it prohibit the committal of them to such corporate authority whose appointment may be called into life by the same law which creates the subject, and commits it to their jurisdiction." *People v. Solomon*, 51 Ill. 87; *Wilson v. Sanitary Dist.*, 133 Ill. 443, 27 N. E. 208; *People v. Draper*, 15 N. Y. 443. A very exhaustive discussion of the subject may be found in *Davock v. Moore* (Mich.) 63 N. W. 424, 28 L. R. A. 738.

Plaintiffs contend that, conceding the power of the Legislature to establish the board of water commissioners, and to transfer to the said board the property of the city, as was done by the act of 1899, the Legislature has not the power to repeal that act and attach other and different trusts to the property, or authorize the board to sell or mortgage it, and for this position they assign two reasons: First, because it is taking the property of the city without due process of law; and, second, because by the act of 1899 the net rents and tolls of the waterworks are directed to be applied to the payment of the interest accruing on said bonds, and to create a sinking fund for their payment.

Referring to the liability of waterworks to be sold for debts of the city, Judge Miller says: "The learned counsel, in the oral argument and in the brief, substantially concede that the waterworks themselves, in the hands of the city, were not liable to be sold for the debts of the city. And if no such concession were made, we think it quite clear that these works were of a character, which, like the wharves owned by the city, were of such public utility and necessity that they were held in trust for the use of the citizens." "The property owned by the city corporation is held by it as a public corporation, and is subject to the lawmaking power of the state vested in the Legislature." *Darlington v. The Mayor, etc.*, 31 N. Y. 164, 38 Am. Dec. 248, in which the question is exhaustively discussed. *Merrweather v. Garrett*, 102 U. S. 473, 26 L. Ed. 197. In *Huron Waterworks Co. v. Huron* (S. D.) 62 N. W. 975, 30 L. R. A. 848, 58 Am. St. Rep. 817, we find a careful review of the authorities and decisions, the court saying: "Having, as we think, established the proposition that the waterworks of a city, when constructed and owned by the city, are to be regarded the same as other city property held for public use, and therefore charged and clothed with a public trust, it would seem to follow that such property cannot be sold and conveyed by the mayor and common council of the city, unless under special authority conferred upon them to sell and convey the same by

the legislative power of the state." The Supreme Court of Connecticut, in *West Hartford v. West Hartford Water Commissioners*, 44 Conn. 360, said: "The introduction of a supply of water for the preservation of the health of its inhabitants by the city of Hartford is unquestionably now to be accepted as an undertaking for the public good, in the judicial sense of that term—not, indeed, as the discharge of one of the few governmental duties imposed upon it, but as ranking next in order. For this purpose the Legislature invested the city with a portion of its sovereignty. * * * The city of Hartford, that it might more economically discharge its duty in this behalf, intrusted this matter of the introduction of water to an agency named the 'Board of Water Commissioners,' and in the name of this agency these lands were purchased and are now held. But they are held merely as a trust. In substance, the land was bought and paid for, and is now clearly the property of the city."

These and many other cases we have examined establish the doctrine that the waterworks are held for the benefit of the public, and are therefore subject to legislative control. In this case it appears affirmatively that this act of 1903 was passed at the request and with the approval of the board of aldermen of Charlotte. That the Legislature may empower the city, by its appointed agencies, to dispose of property held upon trusts for the public, is settled. *Dillon on Municipal Corporations*, 575. Judge Dillon, after noticing a case holding that the power to take, hold, sell, and dispose of property so held confers the power to mortgage, says that he cannot concur with that view, and proceeds to say: "Under charter authority to make all contracts which they may deem necessary for the welfare of the city, a mayor and councilman were considered to have the power to mortgage the city waterworks for the payment of bonds lawfully issued for the construction of the same." Without adopting this view of the law, we have no difficulty in holding that, by express permission of the Legislature, the board may execute a valid mortgage conveying the waterworks, etc., for the purpose of securing the bonds. The plaintiffs suggest that, as the act of 1899 applied the rents and tolls of the waterworks, the act of 1903 cannot divert them. Certainly the holders of the bonds of 1897 had no lien upon or contract right to these rents. The bonds were issued two years before the act was passed. Therefore the purchasers could not look to any other claim upon the city than its general revenues.

In *Adams v. Mayor, etc., of Rome*, 59 Ga. 765, Bleckley, C. J., says: "With the proceeds of the bonds the waterworks were paid for. The holders of the bonds received them without other express security than those offered by the special act. These provisions were, in substance, that all the property within

the city, real and personal, should be subject to taxation pro rata for the payment of the interest and the redemption of the bonds.

* * * It is argued in behalf of the city that the means of liquidation thus provided for by law are exclusive, and that for that reason the mayor and council could not devote the waterworks or any other property to the payment of the interest or to the discharge of the principal of the bonds. We think otherwise. The special act was not intended, as it seems to us, to narrow or cut down the charter in respect to the power of disposing of the corporate property, or of applying the same to the corporate indebtedness by any contract deemed by the mayor and council necessary for the welfare of the city."

The Supreme Court of the United States, speaking of the cases which hold that corporate property pledged to the payment of bonds may not be diverted from that purpose, says: "They simply hold that an act of the Legislature passed after a contract is made which withdraws property then liable to be seized and sold in enforcement of that contract from the power of the courts to seize and sell it impairs the obligation of the contract. But it has never been held, so far as we are advised, that a statute dealing with property not subject to sale for the enforcement of the contract cannot, in providing for a change in the mode of the title by which the debtor holds it, continue the exemption from forced sale of that which it represents in the hands of the same owner the property so exempt."

We have not overlooked the case of *Vaughan v. Commissioners*, 118 N. C. 636, 24 S. E. 425, in which it is held that the commissioners of a county may not mortgage the courthouse to secure bonds issued for the purpose of building it. There was no legislative authority conferred to do so. There is no suggestion in the opinion of the court that such power could not be conferred.

The only case to which our attention has been called which militates against the view which we have taken is *City of Joliet v. Alexander (Ill.)* 62 N. E. 861. Without extending this opinion with a discussion of the facts therein, and the conclusion reached by the court, we do not regard it as controlling us in the disposition of this case. The power to execute a mortgage does not appear to have been conferred by the statute, the terms of which are not set out.

In *Southport v. Stanley*, 125 N. C. 464, 34 S. E. 641, this court, construing section 3824 of the Code, says: "The reasonable construction of the statute must be that the town or city authorities can sell any personal property, or sell or lease any real estate which belongs to the town or city, as the surplus of the original acreage ceded for the town or city site, or such land as may have been subsequently acquired or purchased. But in

no case can the power be extended to the sale or lease of any real estate which * * * is to be held in trust for the use of the town, or any real estate * * * which is devoted to the purpose of government, including town or city hall, market houses, houses used for fire departments, or for water supply, or for public squares or parks. To enable the town to sell such real estate as is mentioned just above, there must be a special act of the General Assembly authorizing such sale or lease."

It is stated that, to enable the commissioners to furnish water for municipal purposes at a reasonable expense, it is necessary that it be furnished to citizens at a fair and reasonable rental. The power of the city to do this was brought into question in *Slocumb v. Fayetteville*, 125 N. C. 362, 34 S. E. 436. Furches, J., said: "We see no objection to the town furnishing electric lights and power to its citizens at uniform rates, as this is a means of local assessment according to the special benefits received by such parties over that of the general public, and these assessments may be used for the support of the concern and the general benefit of the whole." We think this language meets the objection to the power of the board, with legislative sanction, to pledge the tolls, rents, etc., of the public waterworks to the purposes prescribed by the act. Such assessments are no part of the revenue of the city derived from taxation. The distinction between the taxing power and the power to levy assessments for special benefits is clearly pointed out by this court in *Shuford v. Commissioners*, 86 N. C. 552, and other cases in which the question is discussed and decided. 25 Am. & Eng. Enc., p. 1168. We can see no reason why the Legislature may not, under its general power to provide for the government of cities and towns, and legislate in regard to them, authorize the board of water commissioners to apply the rents and tolls as they accrue to the purposes set out in the act, and to pledge such application. The contract thus made will be enforceable by appropriate remedies. We therefore hold that the bonds authorized by the act of 1903 to be issued do not constitute a debt against the city of Charlotte; that the waterworks now owned by the board of water commissioners, or hereafter to be purchased, with all rights and franchises appurtenant thereto, are held by the said board in trust for the use of the city, and are not subject to be sold for any indebtedness of the city; that the act of 1903 does not impair any rights of the holders of the bonds issued pursuant to the provisions of the acts of 1881 and 1897; that the Legislature has the power to authorize the issuing of the bonds and execution of the mortgage proposed to be issued and executed pursuant to the act of 1903; that, pursuant to the provisions of said act, the board of water commissioners has the power to pledge the rents

and tolls accruing from the operation of said waterworks to the purposes specified in said act.

The judgment of the court below is affirmed. Affirmed.

(87 S. C. 409)

SEVERANCE et al. v. MURPHY et al.

(Supreme Court of South Carolina. June 30, 1902.)

INTOXICATING LIQUORS — DISPENSARY ACT — LOCATION OF DISPENSARY — POWERS OF COUNTY BOARD — CONSTITUTIONAL LAW.

1. Cr. Code, § 563 (Dispensary Act, § 7; 22 St. at Large, p. 128, § 7), which provides that the county board shall designate a locality for a dispensary, and that on petition of a majority of the voters such location may be prevented, is not in violation of Const. art. 3, § 34, subd. 11, as special legislation, in that it provides for the location of dispensaries in certain named counties.

2. Under Cr. Code, § 563 (22 St. at Large, p. 128, § 7), providing that, where the county board of control designates a locality for a dispensary on 20 days' public notice, a majority of the voters of the township can prevent its location by signing a petition to the county board requesting that no dispensary be established in such township, a designation is sufficient without stating the exact location as to street or number of the building in which the dispensary is to be situated.

3. Where a county board is authorized to establish a dispensary in a county, the fact that elections have been had in the county resulting adversely to the location of the dispensary is no ground to enjoin such location on an allegation that such act by the county board is unreasonable and unjust.

Appeal from Common Pleas Circuit Court of Williamsburg County; Dantzler, Judge.

Action by P. E. Severance and E. J. Wilkes against R. A. Murphy and others, members of the board of control of Williamsburg county. Decree for plaintiffs, and defendants appeal. Reversed.

So much of the circuit decree as relates to the constitutionality of the act in question is as follows:

"Plaintiffs contend that section 7 of the act of 1896 (22 St. at Large, p. 128) is unconstitutional, 'in that the same contravenes section 5 of article 1 of the Constitution, in that the citizens of Williamsburg county and the citizens of Lake City and other incorporated towns in the county of Williamsburg are denied the equal protection of the laws accorded by said acts to the citizens of the other counties and incorporate towns of the state, and the immunities and privileges of citizens of said town of Lake City and of the county of Williamsburg are abridged by the seventh section of said act; that the same is unconstitutional also in this: that it contravenes subdivision 11 of section 34 of article 3 of the Constitution in this: that the proviso of the said section * * * provides for the establishment of dispensaries throughout the county of Williamsburg in a manner different from that provided by said act for the other counties of the state, there-

by rendering said act a special act, in that it is not uniform in its operation throughout the state; that the seventh section of the said act is unconstitutional also in that it undertakes to allow dispensaries to be located outside of incorporated towns in the counties of Horry and Beaufort, and in no other.' I cannot approve such contention of the plaintiffs. In the case of *Utsey v. Hlott*, 30 S. C. 365, 366, 9 S. E. 333, 339, 14 Am. St. Rep. 910, it is declared: 'While there may be just objections for local laws in general, it is well established that the authority that legislates for the state at large must determine whether particular rules shall extend to the whole state and all its citizens, or, on the other hand, to a subdivision of the state or single class of its citizens only. The circumstances of a particular locality of the prevailing sentiment in that section of the state may require or make acceptable different police regulations from those demanded in another. The Legislature may therefore prescribe different laws of police in each district municipalities, provided the state Constitution does not forbid. These discriminations are made constantly, and the fact that the laws are of local or special operation only is not supposed to render obnoxious in principle.' * * * If the laws be otherwise unobjectionable, all that can be required in those cases is that they be general in their application to the class or locality to which they apply, and they are then public in character, and of their propriety and policy the Legislature must judge. And as Mr. Justice McIver said in the case of *State v. Berlin*, 21 S. C. 296, 53 Am. Rep. 677, the whole matter is well summed up in a note on the same page of Cooley's Constitutional Limitations (390), in the following words: 'To make a statute a public law of general obligation, it is not necessary that it shall be equally applicable to all parts of the state. All that is required is that it shall apply equally to all persons within the territorial limits described in the act.' In the case of *Utsey v. Hlott*, supra, it was averred that a certain act of the General Assembly was unconstitutional, in that it violated section 12 of article 1 of the Constitution of 1868; and in the case at bar it is urged that section 7 of the act of 1896 (22 St. at Large, p. 128) and the amendatory act of 1902, contravene the corresponding section of the Constitution of 1895, to wit, section 5 of article 1. While the section of the act in question prescribes a method of establishing dispensaries in the county of Williamsburg different from other sections of the state, yet the provisions of that section are general in their application to the class or locality to which they apply, and apply equally to all persons within the territorial limits of Williamsburg county.

"Nor can subdivision 11, § 34, art. 3, of the Constitution, avail the plaintiffs. While that section declares that 'in all other cases

where a general law can be made applicable no special law can be enacted,' yet the proviso of section 12 of the same section declares 'that nothing contained in this section shall prohibit the General Assembly from enacting special provisions in general laws.' My construction of the proviso in question is that it is a special provision in the general dispensary law, and is not, therefore, in contravention of that section of the Constitution invoked by the plaintiffs. *Grocery Co. v. Burnett*, 61 S. C. 205, 39 S. E. 881, 58 L. R. A. 687.

"Furthermore, section 11 of article 8 of the Constitution confers upon the General Assembly, 'in the exercise of the police power,' the right to 'authorize and empower state, county and municipal, all or either, under the authority and in the name of the state, to buy in any market and retail within the state, liquors and beverages in such packages and quantities, under such rules and regulations as it deems expedient. * * *' This section is very comprehensive, and, it seems, confers such power upon the General Assembly of the state, in relation to the subject-matter of the section, as is limited by the disposition of that legislative body to determine what legislation is expedient for the purchase and sale of 'alcoholic liquors and beverages within the state.' It is independent of, and is not to be controlled by, any other section of the Constitution. I therefore hold, and so adjudge, that 'section 7' of the act of 1896 is constitutional, and that the amendatory act of 1902 is a valid 'exercise of the police power' by the General Assembly, as authorized by section 11 of article 8 of the Constitution."

From the circuit decree the defendants appeal.

U. X. Gunter, Atty. Gen., for appellants.
W. L. Bass and S. W. G. Shipp, for respondents.

WOODS, J. The defendants, constituting the board of control of Williamsburg county under the dispensary law, had printed in the County Record, a newspaper published at Kingstree, the following notice:

"All voters in Lee Township, county of Williamsburg, State of South Carolina, are hereby notified that application has been made to the county board of control of said county of Williamsburg for the location of a dispensary at Scranton, in Lee Township, and one at Lake City, in Lee Township, both in the county of Williamsburg, State of South Carolina, and that petitions for and against the location of said dispensaries will be received by the undersigned, county board of control, for twenty days from date hereof.

"[Signed] R. A. Murphy, Chairman,

"S. M. McClary,

"P. G. Gourdin,

"County Board of Control."

This notice was given under section 563 of Criminal Code (section 7 of dispensary law of 1896; 22 St. at Large, p. 128), which, for a proper understanding of this discussion, it is necessary to set out in full. After amendment by the act of February, 1902, this section reads as follows:

"There may be one or more county dispensers appointed for each county, the place of business of each of whom shall be designated by the county board, but the state board of directors must give consent before more than one dispenser can be appointed in any county; and when the county board designates a locality for a dispensary, twenty days' public notice of which shall be given, it shall be competent for a majority of the voters of the township in which such dispensary is to be located to prevent its location in such township by signing a petition or petitions, addressed to the county board, requesting that no dispensary be established in that township. The county board may in its discretion locate a dispensary elsewhere than in an incorporated town in the counties of Beaufort and Horry, and no others, except such as are authorized by special act of the General Assembly: provided, however, that any county, town or city wherein the sale of alcoholic liquors was prohibited by law prior to July 1, 1893, may secure the establishment of a dispensary within its borders in the following manner: Upon petition signed by one-fourth of the qualified voters of such county, town or city wishing a dispensary therein being filed with the county supervisor or town or city council, respectively, they shall order an election submitting the question of dispensary or no dispensary to the qualified voters of such county, town or city, which election shall be conducted as other special elections; and if a majority of the ballots cast be found and declared to be for a dispensary, then a dispensary may be established in said county, town or city: provided, that dispensaries may be established in the counties of Williamsburg, Pickens and Marion, and at Seneca and other towns now incorporated in Oconee county, without such election, on compliance with the other requirements of this chapter: provided, that nothing in this chapter contained shall be so construed as to prohibit persons resident in counties which shall elect to have no dispensary from procuring liquors from dispensaries in other counties, or county dispensers from shipping same to their places of residence under proper labels or certificates: provided, further, that nothing in this chapter shall be construed to repeal an act entitled 'An act to allow the opening of dispensaries in Pickens and Oconee counties,' approved December 18th, 1894." 23 St. at Large, p. 1105.

Upon publication of this notice this action was instituted by the plaintiffs, residents of the town of Lake City, in Lee township, to

enjoin the defendants from taking any further steps to establish a dispensary in Lee township. The complaint rests, first, on the allegation that the section above quoted is unconstitutional in so far as it provides "that dispensaries may be established in the counties of Williamsburg, Pickens and Marion, and at Seneca and other towns now incorporated in Oconee county, without such election, on compliance with the other requirements of this chapter," on the grounds that the immunities and privileges of the citizens of Williamsburg and the counties mentioned with it are thereby abridged; and that this provision denies to the citizens of the counties named the equal protection of the laws accorded by the dispensary law to the citizens of other counties; and that, inasmuch as this portion of the section is not uniform in its operation throughout the state, it is special legislation, contravening subdivision 11 of section 34 of article 3 of the Constitution. The second proposition of the complaint is that "said notice was fatally defective, in that the board did not designate a locality in said Lee township, but merely gave notice that in the future that they might make such designation, but whether they would or not was left uncertain; and the board has never otherwise designated a locality for the establishment of a dispensary in Lee township, and given twenty days' public notice thereof; that the said notice was also defective in that the same did not specify, as required by law, the building, giving street and number or location, in which the dispensary was to be carried on at Lake City, in said township." The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action.

His honor Judge Dantzler sustained the constitutionality of the provision of the section of the dispensary law above quoted relating to Williamsburg and other counties included with it upon reasoning so clear and conclusive that we shall not attempt to strengthen it. He held, however, that the notice was fatally defective, and on this ground permanently enjoined the defendants from taking further proceedings towards establishing a dispensary in the town of Lake City, in Lee township. In this, we think, he was in error. The portion of the section now under consideration provides: "And when the county board designates a locality for a dispensary, twenty days' public notice of which shall be given, it shall be competent for a majority of the voters of the township in which such dispensary is to be located to prevent its location in such township by signing a petition or petitions, addressed to the county board, requesting that no dispensary be established in that township." The word "designate," as here used, certainly does not mean that the board shall name a place where they have determined to

establish a dispensary, for the law contemplates no conclusion, or even intention, upon the part of the board until the majority of the voters have had 20 days to prevent its establishment by petition. The true interpretation of the law is that the board must indicate by public notice that they have under consideration the establishment of a dispensary at a designated place, so that the voters of the township may have opportunity to petition against it. No argument is necessary to show the notice now under consideration fully met this requirement.

The circuit judge further held that the designation of locality required to be stated in the notice meant not only the designation of the town, but the place in the town where the dispensary was to be placed. Nothing short of the clearest expression of legislative intention would justify this view, for the board of control in that case might have to rent or purchase property for a dispensary before giving notice, and run the risk of having it on their hands in consequence of an adverse petition by a majority of voters. It will be observed the statute provides for the designation of a "locality" within the limits of a township, not a town. A particular town is a locality in a township, while a street or street number is a locality in a town. That the General Assembly did not mean to limit the meaning of the word "locality" in this section to a particular building or lot is further shown by the fact that, when such exactness was regarded essential, the act so provides in unmistakable language. In section 564 of Criminal Code it is enacted concerning the appointment of dispenser: "The county board of control shall authorize him to keep and sell intoxicating liquors as in this chapter provided, and every appointment so made shall specify the building, giving the street and number or location, in which intoxicating liquors may be sold by virtue of the same." Again, we find this act provides in section 565 of Criminal Code: "The county board of control shall designate or provide a suitable place in which to sell the liquors." This designation of the place—that is, lot or building—in which the business is to be conducted requires no notice to the public, and the act manifestly contemplates it shall be provided or designated after the board of control have taken the preliminary steps by publication of notice, etc., and have decided to establish a dispensary in a certain locality. It is clear that the law contemplates the board of control, before opening a dispensary within the limits of a township, shall give public notice designating the locality by mentioning the town, village, or other definite neighborhood where they contemplate establishing it. The majority of the voters of the township may keep it out of the township by petition. If the requisite petition is not presented, the board of control without public

notice designates the exact place in the town, village, or neighborhood which it regards suitable for the dispensary. We think the notice here under consideration substantially complied with all the requirements of the statute.

The plaintiffs' first and third exceptions and both of defendants' exceptions have been disposed of in the foregoing discussion.

The plaintiffs allege in the tenth paragraph of the complaint: "That it is unreasonable and unjust for the said board to attempt to locate a dispensary at Lake City, in said township, when a majority of the voters of the said town and township have indicated their objections thereto, as above set forth; and plaintiffs aver that said dispensary ought not to be located in said town and township until a reasonable time has elapsed, to wit, one year, from the time of such protest; and plaintiffs allege that they and other citizens ought to be protected from the great vexation, annoyance, and expense put upon them by the frequent attempts of the board to locate a dispensary at Lake City, in said township." In their second exception the plaintiffs submit these allegations are admitted by the demurrer, and are sufficient to sustain the injunction. It further appears from the complaint that an election was held in the town of Lake City on September 7, 1901, on the question of dispensary or no dispensary, and resulted adversely to the dispensary. On October 12, 1901, another election was held on the same question, and the town council passed a resolution "that the election be considered in favor of the dispensary by a majority of one, vote standing 30 for and 29 against." The complaint alleges that this election should have been declared against the establishment of a dispensary. Even if the October election was a nullity, or if the result should have been declared against the dispensary, this could not avail the plaintiffs, because, as we have already seen, the county board of control have the power to establish a dispensary in this instance without an election. The allegation of the complaint that after these recent elections it is unreasonable and unjust for the board to locate a dispensary at Lake City is a mere conclusion, and, if true, furnishes no ground for the court to attempt to limit the power conferred by law on the county board of control.

The judgment of this court is that the judgment of the circuit court be reversed, and the complaint dismissed.

On motion of defendants, remittitur held up for time to prepare writ of error to United States Supreme Court, and November 20th Mr. Justice WOODS ordered that, on motion of George Galletly, Esq., attorney for the respondents, the order heretofore granted in the cause, staying the remittitur from this court to the circuit court of Williamsburg county, is hereby revoked.

(67 S. C. 432)

CHAMBERS v. BOOKMAN et al.

(Supreme Court of South Carolina. July 15, 1903.)

ESTOPPEL IN PAIS—TITLE TO LAND—DEFECTIVE FORECLOSURE—RIGHTS OF MORTGAGOR.

1. Evidence held to show such positive acts on the part of the true owner of the land, inducing an innocent party to purchase it as if the title were in another, as to estop the true owner from setting up title in himself, though no fraud was actually intended, and though he was ignorant of his title.

2. Where a mortgage was defectively foreclosed, the mortgagor can recover possession only by payment of the amount due on the mortgage debt.

Appeal from Common Pleas Circuit Court of Richland County; Aldrich, Judge.

Action by Mary A. Chambers against A. G. Bookman, Mary A. Bookman, Osmund W. Buchanan, D. R. Flenniken, Sarah A. Davis, J. E. McDonald, Chas. A. Douglass, Obear & Douglass, David V. Walker, and Mrs. M. M. Flenniken. From decree for defendants, plaintiff appeals. Reversed.

Wm. H. Lyles, for appellant. Halcott P. Green, for respondents Bookman, McDonald, Douglass, and Obear & Douglass. Jas. W. Hannahan, for respondent Walker. Robt. W. Shand, for respondent Davis.

Statement of Facts.

GARY, A. J. The issue involved and the facts of the case are thus set out in the report of the master:

"The object of the action was to have an adjudication of the title to a certain tract of land situate in Fairfield county, alleged by the plaintiff to have been owned by the defendant Mrs. Mary A. Bookman, and by her mortgaged to Mrs. Mary A. Holmes, by whom the mortgage was subsequently assigned to the plaintiff, which mortgage was foreclosed in an action in the court of common pleas for Fairfield county, wherein the plaintiff in this action was plaintiff, and the defendants Mary A. Bookman and others were defendants. It proceeded to the point of a decree in favor of the plaintiff for the foreclosure of the mortgage and for a sale of the premises by the sheriff for Fairfield county, after the decree of the circuit court had been affirmed on appeal to the Supreme Court, at which sale the property was bid off by Henry N. Obear, Esq., attorney for one Weston C. Bookman. But his bid was subsequently transferred to the plaintiff, and she was about to comply with the bid when an agreement was entered into between her and the defendant Mrs. M. A. Bookman for the conveyance of an interest in a certain part of the mortgaged premises to the said Mrs. M. A. Bookman. This agreement will be referred to later in this report. About this time it was discovered that the defendant A. G. Bookman claimed title to the said premises superior to the title of the defendant M. A. Bookman, and that the other de-

fendants to this cause claimed liens and incumbrances upon said property operative through the said A. G. Bookman. The questions before me were as to the superiority of title, and they have been fully considered. I find the following facts:

"For some years prior to 1867, and up to the 4th day of January, 1869, one Jacob Bookman, of Fairfield district, now county, was seised in fee and possession of a tract of land situate in said district, containing some 1,200 or 1,500 acres, which embraced the tract of land in question described in the complaint in this action. In 1867, Adam F. Du Bard duly recovered a judgment against said Jacob Bookman for a large sum, and it was duly entered in the office of the clerk of the court of common pleas for said district, now county, and state, and a writ of *fi. fa.* was duly issued to the sheriff of that county. By virtue of the *fi. fa.* so issued, L. W. Du Val, Esq., sheriff, Fairfield district, now county, levied upon the tract of land in question, and a homestead being claimed by Jacob Bookman, it was set off to him, comprising the residence and 40 acres of land carved out of the tract levied upon. The balance of the tract was sold, and purchased by one S. W. Bookhart, who received a deed therefor, duly executed and delivered by said sheriff, bearing date the 4th day of January, 1869, which was duly recorded in the office of the register of mesne conveyances for Fairfield county. Thereafter the said S. W. Bookhart reconveyed the said tract of land to Jacob Bookman, by deed dated the 29th day of January, 1869, and duly recorded in the office of the register of mesne conveyances for said county and state. This deed, in consideration of \$4,100, conveyed the said premises to the said Jacob Bookman in trust for the benefit of his children, upon terms specified in the deed, but I find that the trust originated in that transaction and was created by the said Samuel W. Bookhart at the instance and request of Jacob Bookman, said Samuel W. Bookhart intending to receive the full purchase price of said premises, and that the same should be secured by the mortgage hereinafter mentioned. On the same day, to wit, the 29th day of January, 1869, in consideration of said conveyance, to secure the entire purchase price thereof, said Jacob Bookman executed his bond to the said Samuel W. Bookhart, conditioned for the payment of \$4,100, on or before the 1st day of January, 1870, with interest at the rate of 10 per cent. per annum, payable annually, and compounded if not paid, and on the same day duly executed and delivered his deed of mortgage, whereby he undertook to mortgage the premises in question to secure said bond of \$4,100. Subsequently, nothing having been paid upon the said bond, it was assigned by said S. W. Bookhart to one Starnes, and the defendant A. G. Bookman, who was then, and still is, the husband of the defendant M. A. Bookman, and was living upon said

premises, agreed with Dr. Bookhart to assume the said debt, and, to satisfy the said Starnes, arranged to execute his note, indorsed by his wife, the defendant M. A. Bookman, and by Mrs. M. A. Holmes, who was then an aged lady, residing at Columbia, S. C., the aunt of his wife, Mary A. Bookman, and the mother of the plaintiff, Mary A. Chambers. This note was payable to the order of Dr. S. W. Bookhart, and, in consideration thereof, the bond and mortgage of Jacob Bookman, trustee, were turned over and delivered to the said A. G. Bookman, who, by the arrangement, caused the same to be assigned to Mrs. M. A. Holmes by an instrument dated the 14th day of September, 1877, to indemnify her from loss on her indorsement of said note. This arrangement was negotiated by the defendant A. G. Bookman, himself, with the purpose in view of accomplishing a sale of said premises so that they could be purchased in the name of his wife, Mrs. M. A. Bookman.

"Subsequently, at the instance and request of the defendant A. G. Bookman, Mrs. M. A. Holmes, the legal holder of said bond and mortgage, caused the tract of land to be advertised, under the powers contained therein, for 21 days in the Winnsboro News and Herald, and to be offered for sale before the courthouse door for said county and state, at which sale the defendant Mary A. Bookman became the purchaser at the price of \$3,800. The evidence seems to show that this purchase price had been paid either at the time or subsequently. The whole transaction, however, was conducted with the full knowledge and approval of the defendant A. G. Bookman.

"It is now claimed that Mrs. Holmes was never compelled to pay anything on account of her liability on the note to Starnes, and evidence was introduced before me to show that the note was not protested at maturity, and, therefore, that Starnes could not hold Mrs. Holmes responsible. As before stated, the note was made by A. G. Bookman, payable to the order of Dr. S. W. Bookhart, and was indorsed by Mrs. M. A. Bookman and Mrs. M. A. Holmes, who thereby intended to become responsible to Dr. Bookhart for its payment. They thus, under the law of this state, became joint makers with A. G. Bookman, and were not entitled to notice of protest. Mrs. Holmes has been dead for a good many years, and no evidence was offered directly to the point that the note had not been paid by her. At any rate, the relations which are shown to have existed between Mrs. Holmes and the defendant Mary A. Bookman and her husband, A. G. Bookman, were such as to satisfy me that, although she may have held only the legal title to the mortgage as indemnity, she has received no payment except what was due to her, and none that did not meet with the full approval of both of the defendants M. A. Bookman and A. G. Bookman. It is seen that she repeatedly indorsed notes for both of the defendants, and united with them in guaranty-

ing their contracts for supplies for the running of their plantation. Mrs. M. A. Holmes executed to Mrs. M. A. Bookman a deed for the premises in question, bearing date the 4th day of February, 1878, whereby she recited the execution of the mortgage by Jacob Bookman, as trustee, to Samuel W. Bookhart, and the advertisement and sale under the powers contained in the mortgage, and that Mrs. M. A. Bookman had become the purchaser thereof at the price of \$3,800, and undertook to convey the premises to her, but executed the said deed in her name only. Mrs. M. A. Bookman at once took possession of said premises, and her husband, A. G. Bookman, commenced to cultivate the same, claiming that he was cultivating the same as her property. Jacob Bookman, the trustee, continued to live on the premises with the family of A. G. Bookman, and does not seem to have questioned the title of the defendant M. A. Bookman, at any time. Indeed, he seems to have acquiesced in the arrangement whereby the title of the property was to be transferred to Mrs. Bookman. He died in the fall of 1883. Mrs. Holmes, who seems to have entrusted the management of the entire scheme to the defendant A. G. Bookman, seems to have been convinced that he had been successful in transferring the title to her niece, Mrs. M. A. Bookman, for we see that in 1882 she indorsed two notes made by A. G. Bookman and indorsed by Mrs. M. A. Bookman, the payment of which was secured by a mortgage made by Mrs. M. A. Bookman to her on the property in question for \$1,900. These notes were afterwards paid by her, and represented the debt which was adjudged to be the second lien upon the property in question in the case of Mary A. Chambers v. Mary A. Bookman and others. In 1884, A. G. Bookman applied to Mrs. Holmes for a loan of \$2,500 on the bond of his wife, Mrs. M. A. Bookman, secured by a mortgage of the premises in question. Mrs. Holmes referred him to Mr. Edward R. Arthur, who was her attorney in fact, and Mr. Arthur required that he should furnish a certificate from Mr. Buchanan, of the Winnsboro bar, as to the sufficiency of the title and its freedom from incumbrances. This was furnished in the shape of a letter addressed by Mr. Buchanan, dated January 5, 1884, to Mr. A. G. Bookman, and was delivered by Mr. Bookman to Mr. Arthur. Mr. Bookman also made representations that the title of his wife, Mrs. Mary A. Bookman, to the property in question, was good and free from incumbrances. Upon the strength of these representations, Mr. Arthur, acting as attorney for Mrs. Holmes, made the loan, and paid off, at the direction of Mr. Bookman, a note made by A. G. Bookman, indorsed by Mrs. M. A. Bookman and Mrs. M. A. Holmes, to Jones, Davis & Bouknight, and remitted the entire balance of the proceeds (\$1,650) by a check payable to the order of A. G. Bookman, attorney for M. A. Bookman, and that amount was received by said A. G. Bookman and used entirely for his own purposes. No install-

ment, either of interest or principal, having been paid upon the bond in question, the action above referred to, of *Mary A. Chambers v. Mary A. Bookman and others*, was commenced, and was defended by her upon the ground that, being a married woman, the money had been borrowed for the use of her husband, A. G. Bookman, and said defendant A. G. Bookman actively prosecuted said defense, testifying on his wife's behalf that every dollar of the proceeds of the money had gone to his own benefit and not to hers. Notwithstanding this defense, the circuit court decreed in favor of the mortgage, from which decree an appeal was taken to the Supreme Court, where it was affirmed. In said cause, Mr. Buchanan appeared as the attorney for Mrs. M. A. Bookman, defendant, and Mr. Obear appeared as attorney for one of the defendants to said cause. At the sale under such decree, Mr. Obear bid in the property as attorney. It was afterwards learned that in making such bid he acted as attorney for Weston C. Bookman. After the decree of the Supreme Court affirming the decree of the circuit court in said cause, some time prior to May, 1889, the defendant A. G. Bookman learned, through a communication from Mr. Buchanan, that there was some defect in the proceedings for the sale under the Jacob Bookman mortgage, and that the title to the premises in question was probably in himself and his brothers and sisters, as children of Jacob Bookman. He thereupon procured from all of his brothers and sisters a deed of conveyance for their interests in said premises, and he now sets up that title as against the claim of the plaintiff that the title is in the defendant Mrs. M. A. Bookman.

"It is contended by the plaintiff that the execution of the bond and mortgage by Jacob Bookman, being a part of the transaction whereby the trust itself was created, and being the consideration for the deed creating the trust, was binding upon the trust estate, and I concur in their view upon this point. It is further contended that, although the deed whereby Mrs. Holmes undertook to convey the premises in question was defectively executed, so as not to operate as a deed of conveyance, Mrs. M. A. Bookman having entered into possession upon the sale and having paid the purchase money; that she has a good equitable title as purchaser in possession, having paid the purchase money, and also that her title, by possession and the statute of limitations, has ripened into a perfect title. I am inclined to think that she is correct in both these views, but I do not rest my judgment upon either of them. She further contends that even if not correct in either of these views, the defendant A. G. Bookman, and all of the other defendants who claim as privies with him, are estopped by his active participation in the negotiation of the loans in question, and by his representation that the title of the property was in Mrs. M. A. Bookman, from now averring to the contrary.

"I find as facts that the connection of Mrs.

Holmes with this matter, and every step taken by her towards the consummation of the arrangement, was with the full knowledge and at the solicitation of the defendant A. G. Bookman, and that, if the defendant Mrs. M. A. Bookman did not acquire a good title to the premises by the purchase in question, it was because of the failure to accomplish what the defendant A. G. Bookman represented would be accomplished by such proceedings; and that when the defendant A. G. Bookman applied to Mrs. Holmes and her attorney in fact, Mr. Arthur, for the loan above referred to, they had the right to rely upon the representations, then and previously made, that the title to the property in question was in Mrs. M. A. Bookman, and that the said A. G. Bookman, having then and previously actively represented the title so to be in Mrs. M. A. Bookman, and having made use of the funds so borrowed for his own purposes, it would be the grossest fraud upon the holder of the mortgage for him now to be allowed to aver that the title was not in Mrs. Bookman. Mr. Arthur, who acted for Mrs. Holmes as her attorney in fact, is certainly not shown to have known or had any reason to suspect any defects in the title. It is urged that Mrs. Holmes, having been the assignee of the mortgage, and having allowed the sale to be transacted in her name, is bound to know of the defects in the title of Mrs. Bookman. In this I do not concur, as she received the papers only from A. G. Bookman, and seems to have known only what he represented to her. The sale seems to have been transacted with his full knowledge and consent, and I have reached the conclusion that even then she had full reliance upon his representations and his faithfully performing acts necessary to carry out the scheme which had been formed for the transfer of the title to Mrs. M. A. Bookman. If the money due to Mr. Starnes on his note was never paid, it was because the defendant A. G. Bookman desired and requested that it should not be paid. I therefore am of opinion that every principle of equity now estops him from setting up his title to the premises in question.

"The other defendants, except Mrs. M. A. Bookman, all claim through mortgages executed by him subsequent to the mortgage to Mrs. M. A. Chambers, and therefore are privies with him and bound by this estoppel, unless they can put themselves in position of purchasers for value without notice of the equity. None of them have undertaken to prove the considerations of their mortgages, or that they did not have full notice of the claim of Mrs. Bookman and Mrs. Chambers, except the defendant Mrs. Davis, who took her mortgage from the defendant David R. Flenniken. Counsel for Mrs. Davis admits that, being the assignee of the bond and mortgage, which are sealed instruments, Mrs. Davis cannot occupy a higher position than the defendant David R. Flenniken, but that Da-

vid R. Flenniken was in the position of a purchaser for value without notice, having taken the bond and mortgage in consideration of some other mortgage surrendered by Flenniken to Bookman, and said Flenniken had no notice. I find from the evidence that it is very uncertain as to what paper, if any, was surrendered by Flenniken at the time of the execution of the new mortgage, and I further find that at the time thereof said Flenniken was in such a position as to have been bound by knowledge of the claim of Mrs. Bookman. He had testified in the cause on the trial of the cause above referred to. He had, in 1888, taken from Mrs. Mary A. Caldwell, his mother-in-law, an assignment of her claim, which had been adjudged to be the first lien upon the premises in the name of Mrs. M. A. Bookman, and he was the actual holder of that claim at the time of the taking of the mortgage in question. That claim was subsequently paid to him by Mrs. M. A. Chambers, the plaintiff in this action, who took from him the assignment which he then and previously had held from Mrs. M. A. Caldwell. I therefore conclude that none of the defendants can avail themselves of the plea of purchasers for value without notice.

"The defendant Mrs. M. A. Flenniken sets up a mortgage executed to her by A. G. Bookman, trustee, upon the premises in question, in consideration of her conveyance of the premises to the said A. G. Bookman, trustee. She bases her right to so convey upon a tax title made by the sheriff of Fairfield county to her in 1895, at a sale of the property for delinquent taxes levied against the same as the property of the defendant Mrs. Mary A. Bookman. She produced in evidence a tax deed, signed by the sheriff, purporting to convey a tract of 300 acres to her. With reference to this claim, I find the following facts:

"That a tract of 300 acres of land was assessed for taxation in the year commencing the 1st of November, 1893, in School District 18, Fairfield county, in the name of the defendant Mrs. M. A. Bookman, and further find that this was intended to be the tract of land which is a part of the larger tract in question, as above stated. I find that the taxes were not paid by Mrs. M. A. Bookman, and that they became delinquent upon the books of the treasurer for Fairfield county. I find that the treasurer for Fairfield county issued to the sheriff for Fairfield county an original execution against the property of the defaulting taxpayer, but that he did not issue the same in duplicate, as the duplicate execution was produced before me still in the book of original executions. It was not filled out, and it is clear that it was never issued. I further find that the sheriff did not enter upon the premises in question and take exclusive possession thereof before the pretended sale thereof. I further find that the advertisement of the land was not such as was calculated to inform any one that the land in question so to be sold was the property

which was undertaken to be conveyed. The advertisement, dated July 15, 1895, stated that the tract of land contained 390 acres, and that it was sold as the property of Mrs. M. A. Bookman for taxes for the year commencing November 1, 1895. There was not a single element of correct description except the statement that the property was situate in School District 18 of Fairfield county. No effort was made to state the boundaries. This sale occurred on the 5th day of August, 1895, but the money was not paid until the 9th of September, 1895, when the sheriff delivered the deed, which was produced and offered in evidence under the objection of the plaintiff's counsel, who afterwards moved to strike out the same because it was not a complete deed. The sheriff did not attach to it a duplicate of the execution lodged at the time by the treasurer, and did not indorse, even upon the original execution, any statement of his proceedings thereunder. I find that the original execution was duly returned to the treasurer of Fairfield county on the 9th of September, the day the sheriff received the payment of the bid. The sheriff did not undertake to put the purchaser, Mrs. M. M. Flenniken, into possession of the property. That she subsequently entered into an agreement with the defendants A. G. Bookman and Mrs. M. A. Bookman, whereby they executed to her a quitclaim deed in consideration of her reconveying the property to A. G. Bookman in trust for his children. I conclude that without the lodgment of a duplicate in his office, and the taking of the exclusive possession of the premises under the provisions of law, and the due advertisement of the said premises, that said sheriff had no authority of law to make the sale; and I further conclude that not having attached to the deed executed by him a duplicate of the execution, with the certificate as to his proper proceedings thereunder, and not having put the purchaser, Mrs. M. M. Flenniken, into possession of the property, that the deed in question was not executed with due formality, and that no title passed to said Mrs. M. M. Flenniken thereby.

"This brings me to the conclusion that the agreement referred to, entered into by the plaintiff and the defendant Mrs. M. A. Bookman, on the 27th day of December, 1890, should be carried into effect. By the terms of that agreement the plaintiff, Mrs. Mary A. Chambers, was to comply with the bid for the premises assigned to her by Henry N. Obeas, as above stated, and was thereupon to convey to the said Mrs. Mary A. Bookman in fee simple, but without warranty, 200 acres of said tract of land, to be selected by her, including the homestead of 40 acres thereof; but if, upon the test thereafter to be applied, it should appear that said homestead was not so to be sold by decree in said cause, and that consequently said Mary A. Chambers had acquired no title thereto by her purchase at said foreclosure

sale, then said Mary A. Chambers would convey to said Mary A. Bookman, in fee, but without warranty, 40 other acres of said tract adjacent to that already conveyed in lieu of the said homestead, and that the said Mary A. Bookman was to pay the sum of \$2,000, to be applied, first, to the payment of the Caldwell claim provided for in said decree, and then to the payment of any and all cost for which the said Mary A. Bookman might be liable, except the cost and disbursements of her own attorneys, if any there should be, and the residue to be paid over to the said Mary A. Chambers, or her attorneys, to be applied to the payment of her attorney's fees in said cause. The defendant Mrs. Bookman has paid to the plaintiff, Mrs. Chambers, on account of said agreement, the sum of about \$800. The exact amount paid has not been satisfactorily established before me, and I therefore recommend that she be adjudged to pay the full sum of \$2,000, with interest from the date of said agreement, and to be credited with the exact amount paid by her, to be ascertained by a further reference for that purpose, and that upon such payment the plaintiff, Mary A. Chambers, be adjudged to convey to her the said 200 acres, including the homestead, as I find that said homestead was included in the tract ordered to be sold in said cause; and I further recommend that the 200 acres of land so conveyed be charged with the payment of the costs and expenses of this case, to be taxed by the clerk of the court; and that if the said Mrs. Mary A. Bookman shall fail to pay said sum of money on or before the 1st day of November, 1901, that said 200 acres of land be sold by the clerk of the court of common pleas for Fairfield county before the courthouse door for said county, on sales day of December, 1901, or on some convenient sales day thereafter, for one-half cash, the balance to be secured by the bond of the purchaser and a mortgage of the premises, payable 12 months after date, with a clause providing for the payment of attorney's fees, taxes, etc., in case of foreclosure; and that out of the proceeds of said sale the costs and disbursements of this case and expenses of said sale be first paid, and then that the balance coming to the plaintiff, Mrs. Mary A. Chambers, to be ascertained as aforesaid, be then paid, and that the surplus, if any, be paid out to the other defendants in this case who have established their liens against the said defendants in the order of their priority, which has been settled by the decree of the court of common pleas for Fairfield county in the cause entitled 'McDonald & Douglass vs. A. G. Bookman et al.'

"All of which is respectfully submitted."

That portion of the decree of his honor the circuit judge relating to the priorital question in the case is as follows:

"I will next consider the question of estoppel. Estoppel must be established by the preponderance of the evidence, and the bur-

den rests on the party claiming the estoppel. *Bethune v. McDonald*, 35 S. C. 88, 14 S. E. 674. The allegations of the complaint as to the estoppel are:

"Paragraph 3. That the defendant Mary A. Bookman was the niece of the said Mrs. Mary A. Holmes, and from about the year 1882 up to the present date was seised in fee of a certain tract of land situate in the county of Fairfield and said state, described in the mortgage hereinafter alleged, executed and delivered by her to Edward R. Arthur, attorney, and being so seised and possessed of the said tract of land, and desiring during the year 1884 to procure a loan thereon from said Mrs. Mary A. Holmes, she and her husband, the defendant A. G. Bookman, represented to Mrs. Mary A. Holmes that the said Mrs. Mary A. Bookman was seised in fee of the said premises, and that they were free from incumbrances save and except a mortgage previously executed thereon by the said Mary A. Bookman to the said Mary A. Holmes; and upon the earnest solicitation and the strong representations made by the said Mrs. Mary A. Bookman and A. G. Bookman to the said Mary A. Holmes as to the value of the said premises, and that the same were the property in fee simple of the said Mary A. Bookman, free from incumbrances other than as above stated, the said Mrs. Mary A. Holmes consented to make the loan so applied for, and instructed her attorney, E. R. Arthur, Esq., upon the delivery to him of a bond and mortgage executed by the said Mrs. Mary A. Bookman to him, as attorney, to pay over the money to the said Mrs. Mary A. Holmes."

"Paragraph 7. That in said transaction the said defendant Mary A. Bookman was represented by the defendant A. G. Bookman, as her attorney in fact, save in the act of executing the said bond and mortgage, and the proceeds of said loan were paid over to the said A. G. Bookman, as the attorney in fact of the said Mrs. Mary A. Bookman, and was in large part used by him without the knowledge or consent of the said Mrs. Mary A. Holmes or her attorney, but with the knowledge and consent of the defendant Mrs. Mary A. Bookman."

"Paragraph 15. This plaintiff alleges that the claim of said A. G. Bookman is without foundation; but, even if there had been color of right for such claim, he would be in law estopped from setting up the same on account of his representations and dealings with the said Mrs. Mary A. Holmes, through whom this plaintiff claims."

"Why should Mrs. Mary A. or A. G. Bookman have made the representations above set out, or any other, as to the title of Mrs. Mary A. Bookman? Mrs. Bookman derived all the title she had from Mrs. Holmes, and it would have been a strange demand on the part of Mrs. Holmes to ask Mrs. Bookman to say whether the deed she received from Mrs. Holmes, and for which she paid \$3,800

had conveyed to her a good title. All of the parties honestly believed, at that time, that Mrs. Bookman's title was good, save for the mortgage she had put upon the place. The knowledge of Mrs. Holmes was as perfect as that of Mrs. Bookman or of A. G. Bookman. I shall not quote the testimony; but a careful study of it induces me to conclude, as matter of fact, that Mrs. Holmes, Mrs. Bookman, and the attorney who examined the title of Mrs. Bookman, all believed that Mrs. Bookman's title was good, and acted upon that belief. Under these circumstances there was no reason in asking A. G. Bookman his opinion of the title or his knowledge thereof. He could give no knowledge upon the subject to Mrs. Holmes. She knew every fact in relation to that title just as well, if not better, than either Mary A. or A. G. Bookman. The testimony failed to show that A. G. Bookman made the representations as alleged in the complaint; and, further, the testimony shows that Mrs. Mary A. Holmes did not act upon such representations as are alleged to have been made by A. G. Bookman regarding the title of Mary A. Bookman. In 1888 or 1889, A. G. Bookman was advised as to his rights under the deed of S. W. Bookhart to Jacob Bookman, and he then assumed possession and control of the land, and purchased the interests of the other children of Jacob Bookman. Prior to 1888, and the advice then received, A. G. Bookman did not know that he had an interest in said land. The recording of the deed from S. W. Bookhart to Jacob Bookman was constructive notice thereof; but, as matter of fact, A. G. Bookman believed, as did Mary A. Bookman and Mrs. Mary A. Holmes, that the sale and deed of Mrs. Holmes to Mrs. Bookman had passed the fee to Mrs. Bookman. A. G. Bookman, as the attorney or agent of his wife, Mary A. Bookman, approached E. R. Arthur, Esq., as the attorney of Mrs. Mary A. Holmes, to close a loan which, as alleged in the complaint, Mrs. Holmes had agreed to make to Mrs. Bookman, and had 'instructed her attorney, E. R. Arthur, Esq., upon the delivery to him of a bond and mortgage executed by the said Mrs. Mary A. Bookman to him, as attorney, to pay over the money to the said Mrs. Mary A. Bookman.' The said E. R. Arthur, instead of following such directions, refused to make the loan or to pay over the money until the title to the land was examined by an attorney at law and his report upon the title was received. This clearly shows that, if any representations as to title had been made by either A. G. Bookman or his wife, it was not relied upon, and that the loan was made upon the faith of an attorney's opinion which E. R. Arthur, Esq., required, and without which the loan would not have been made.

'The requisites of equitable estoppel, as laid down in *Bigelow on Estoppel* (3d Ed.)

434, and approved by our Supreme Court in *Gaston v. Brandenburg*, 42 S. C. 351, 20 S. E. 157, are as follows: '(1) A false representation or concealment of facts. (2) Such representation must have been made with a knowledge of the facts. (3) The party to whom such representation was made must have been ignorant of the truth of the matter. (4) The representation must have been made with the intention that the other party should act upon it. And (5) the other party must have been induced to act upon it.'

'What are the facts as regards these requisites? (1) The evidence does not show, by the preponderance thereof, that any representation or concealment in relation to the title to the land in question was made by A. G. Bookman. (2) If any representation was made by Bookman, it was made in ignorance of the true state of facts. (3) That while the party to whom such representations are alleged to have been made may have been ignorant of the true state of facts, she had the same and better means of knowing the truth than did A. G. Bookman. She had the mortgage of Jacob Bookman in her possession, she had the lands covered by said mortgage sold, and she made the invalid deed to Mrs. M. A. Bookman. She knew what she had done. (4) If there was any representation made by A. G. Bookman, as alleged, the evidence does not show that it was his intention that Mrs. Holmes or E. R. Arthur, Esq., her attorney, should rely upon his statements, nor that there was any gross or culpable negligence on his part in relation thereto. He readily complied with the demand made on him that the opinion of attorney at law on the title should be obtained before the loan could be made. (5) The representations of A. G. Bookman, if made as alleged, are not proven to have been the inducement to the making of the loan of Mrs. Holmes and her attorneys, because the loan was refused without the opinion of an attorney upon the title. (6) If Mrs. Holmes was misled, it may be that she was misled to her injury, but not by A. G. Bookman.

'It is alleged that A. G. Bookman received and used a part of the money for which the mortgage was given by Mary A. Bookman, and therefore he was, or should be, estopped. This is denied. The Supreme Court, in the case of *Chambers v. Bookman*, held that Mrs. Bookman borrowed this money, that her estate was bound by the mortgage given to secure it, and that what she did with the money could make no difference. She had a right to give it to her husband, and plaintiff had no right to complain.

'Having reached the conclusion that plaintiff has failed to make out her case that the defendant A. G. Bookman is not estopped by his representations or dealings with Mrs. Mary A. Holmes from asserting his title to the premises described in the complaint, it follows that plaintiff's cause or causes of

action cannot be sustained, and that her complaint should be dismissed, with costs in favor of the defendants."

The plaintiff appealed from the decree upon numerous exceptions.

Opinion.

The first question that will be considered is whether the circuit judge erred in deciding that A. G. Bookman was not estopped from relying upon the fact that he was the owner of the land in fee. After careful consideration of all the testimony in the case, this court is satisfied that A. G. Bookman, by his active conduct, induced Mary A. Holmes, without fault on her part, to enter into the transaction with Mary A. Bookman which resulted in the execution of the mortgage that has given rise to this case. In volume 2, § 803, Pom. Eq. Jur., the author of that philosophical work says: "When all the varieties of equitable estoppel are compared, it will be found, I think, that the doctrine rests upon the following general principle: When one of two innocent persons—that is, persons each guiltless of an intentional moral wrong—must suffer a loss, it must be borne by that one of them who by his conduct, acts, or omissions has rendered the injury possible." It has been well said: "If one remains silent where in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent." For a stronger reason he should remain silent when his active conduct has brought about the loss to an innocent party. In section 807 of Pom. Eq. Jur., under the head of "Fraudulent Intent Necessary in an Estoppel Affecting the Legal Title to Land," the general principle is thus stated: "The general rule is that, if a person interested in an estate knowingly misleads another into dealing with the estate as if he were not interested, he will be postponed to the party misled, and compelled to make his representation specifically good. It applies to one who denies his own title or incumbrance when inquired of by another who is about to purchase the land or to loan money upon its security, to one who knowingly suffers another to deal with the land as though it were his own, to one who suffers another to expend money in improvements without giving notice of his own claim, and the like; this equity being merely an instance of fraud which is evidence of an intent to deceive. In the language of a most recent decision, to preclude the owner of land from asserting his legal title or interest under such circumstances, 'there must be shown, either actual fraud, or fault, or negligence equivalent to fraud, on his part in concealing his title, or that he was silent when circumstances would impel an honest man to speak; or such actual intervention on his part, as in *Storrs v. Barker*, to render it just that as between him and the party acting upon his suggestion he should bear the loss.' What is the reason of this

rule? It is accurately explained in this same decision. While the owner of the land may by his acts in pais preclude himself from asserting his legal title, it is obvious that the doctrine should be carefully and sparingly applied, and only on the disclosure of clear and satisfactory grounds of justice and equity. It is opposed to the letter of the statute of frauds, and it would greatly tend to the insecurity of titles if they were allowed to be affected by parol evidence of light or doubtful character." The most important "ground of justice and equity admitted by courts of equity to uplift and displace the statute of frauds concerning legal titles to land, by fastening a liability upon the wrongdoer, is fraud. There are many instances in which equity compels the owner of land to forego the benefits of his legal title, and to admit the equitable claims of another, in direct contravention of the literal requirements of the statute, but they all depend upon the same principle. The rule under consideration is strictly analogous to another familiar rule, that a legal owner of land cannot be turned into a trustee *ex delicto* by any mere words or conduct. A constructive trust *ex delicto* can never be impressed upon land as against the legal title by any verbal stipulation, however definite, nor by any mere conduct; such trust can only arise where the verbal stipulation and conduct together amount to fraud in the contemplation of equity."

Turning to the case of *Storrs v. Barker*, 6 Johns. Ch. 166, 10 Am. Dec. 316, the court uses this language: "The presumption is that every person is acquainted with his own rights, provided he has had reasonable opportunity to know them; and nothing can be more liable to abuse than to permit a person to reclaim his property, in opposition to all the equitable circumstances which have been stated, upon the mere pretense that he was at the time ignorant of his title. Such an assertion is easily made and difficult to contradict. It is rarely that a mistake in point of law, with full knowledge of all the facts, can afford ground for relief, or be considered as sufficient indemnity against the injurious consequences of deception practiced upon mankind; and if the person, as in this case, is not merely silent and passive, but gives explicit confirmation of the title of the party in possession, and encourages him to sell and encourages the purchaser to buy, the case is greatly altered, and equity and policy equally dictate that he, and not the purchaser, ought to suffer. His ignorance of the law ought not to protect him from the operation of the rules of equity. He could easily have dispelled that ignorance, for he had the fact of the will of his daughter before his eyes; and, if he may be allowed to plead his voluntary ignorance in destruction of equitable rights growing out of his own acts and assertions, the grossest imposition and the greatest fraud might be practiced with

impunity. It would seem, therefore, to be a wise principle of policy, that ignorance of the law, with knowledge of the fact, cannot generally be set up as a defense; and it appears to be settled, by a course of equity decisions, that ignorance of one's legal rights does not take the case out of the rule, when the circumstances would otherwise create an equitable bar to the legal title."

In the case of *Dunlap v. Gooding*, 22 S. C. 550, the court quotes with approval the following from *Bigelow on Estoppel*, 434: "It is now a well-established principle that when the true owner of property holds out another, or allows him to appear, as the owner of, or as having full power of disposition over, the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they have directly dealt, but they are derived from the act of the real owner, which precludes him from disputing, as against such third party, the existence of the right or power which he caused or allowed to appear to be vested in the party making the sale."

In volume 2, *Enc. of Law* (2d Ed.) 434, under the caption of "Distinction between Silence and Positive Act of Party Estopped," it is said: "The rule has been laid down unqualifiedly that silence, in the absence of knowledge of one's rights, will not work an estoppel. Thus the omission to assert title to land against persons dealing with it as their own, in the absence of knowledge of such title, will not estop the owner to set up his claim thereto. On the other hand, it has been held that positive acts tending to mislead one ignorant of the truth, which do mislead him to his injury, are a good ground of estoppel, and ignorance of title or right on the part of him who is estopped will not excuse his act. Thus, where an owner positively encourages another to purchase land from a third person on the faith that such third person is the owner, ignorance of the facts of the case will not, as a general rule, prevent the operation of an estoppel against him." See, also, *Holland v. Jones*, 48 S. C. 267, 26 S. E. 606; *Wardlaw & Edwards v. Rayford*, 27 S. C. 178, 3 S. E. 71.

Our conclusion from the foregoing authorities is that positive acts on the part of the true owner of land, which induce an innocent party to deal with it as if the title was in another, will estop him, even if he was ignorant of his title and no fraud was actually intended. The circuit judge was therefore in error when he ruled that A. G. Bookman was not estopped by his conduct.

There is another reason why A. G. Bookman cannot defeat the plaintiff's rights in this action. When Mary A. Bookman entered into possession of the land under a deed made in execution of a defective and invalid power of sale contained in the mortgage, be-

lieving that she was clothed with the legal title at the time of entry, A. G. Bookman's right to recover possession of the land was postponed until he paid the amount due on the mortgage, and he was remitted to his equitable right of redemption. In *Sims v. Steadman*, 62 S. C. 300, 40 S. E. 677, the principle is thus stated: "The main question is whether the heirs of the mortgagor are entitled to recover possession of the land from the defendants claiming under a continuous chain of title from one who entered upon the land, under a deed made in execution of a defective and invalid power of sale contained in a mortgage, in good faith and in the honest belief that he was clothed with the legal title, at the time of such entry. The cases of *Givens v. Carroll*, 40 S. C. 413 [18 S. E. 1030, 42 Am. St. Rep. 889], and *Williams v. Washington*, 40 S. C. 457 [19 S. E. 1], conclusively show that his Honor, the Circuit Judge, did not err in ruling that the defendants are entitled to be subrogated to the rights and equities of the original mortgagees. The complaint does not allege that the defendants, or those from whom they claim, entered into possession of the land forcibly and in violation of law, but simply 'that the defendants are in unlawful possession thereof, and withhold the same from these plaintiffs, claiming some interest therein.' The agreed statement of facts, and the decree of the circuit judge, show that Cook went into possession under and by virtue of his said purchase and deed, and that the defendants claim the land by a continuous chain of title from him. When one enters into possession of land under a deed purporting to convey legal title, believing that his title is good in fee, but which is nevertheless void by reason of the fact that the power of sale contained in the mortgage in pursuance of which the deed was executed was defective and invalid, equity will refer his possession to his deed purporting to convey the fee, to prevent him, in tenderness for his honest mistake, from being considered a trespasser. The case of *Rabb v. Patterson*, 42 S. C. 528 [20 S. E. 540, 46 Am. St. Rep. 743], shows that he is not a trespasser. The necessity of being clothed with a title purporting to convey the fee is set forth in 2 *Pom. Eq. Jur.* §§ 756, 785. Equity gives effect to the deed purporting to convey the legal title in so far as is necessary to protect the rights of those entering into possession of the land under these circumstances, and postpones the plaintiff's right to recover possession until he does equity by paying the amount due on the mortgage (*Cathart v. Sugenhimer*, 18 S. C. 123; *Bailey v. Bailey*, 41 S. C. 337 [19 S. E. 669, 728, 44 Am. St. Rep. 713]; *Bryan v. Kales*, 162 U. S. 411 [16 Sup. Ct. 802, 40 L. Ed. 1020]; *Bryan v. Brasius*, 162 U. S. 415 [16 Sup. Ct. 803, 40 L. Ed. 1022]), and remits him to his equitable rights of redemption." The question as to right of A. G. Bookman to redeem was not presented by the

pleadings, and could not properly be considered, even if he was not estopped from raising such question. *Johnson v. Johnson*, 27 S. C. 309, 3 S. E. 606, 18 Am. St. Rep. 636; *Sims v. Steadman*, supra.

All other questions were dependent upon that of estoppel, and are satisfactorily disposed of in the report of the master.

It is the judgment of this court that the judgment of the circuit court be reversed.

On Rehearing.

(Nov. 27, 1903.)

PER CURIAM. After a careful examination of the within petition, this court fails to discover wherein any material question of law or fact has either been overlooked or disregarded. It is therefore ordered that the petition be dismissed, and that the order heretofore granted staying the remittitur be revoked.

(67 S. C. 419)

RISER v. SOUTHERN RY. CO. et al.

(Supreme Court of South Carolina. Nov. 27, 1903.)

TORT OF SERVANT—LIABILITY OF MASTER—DEPOSITIONS—CERTIFICATE—PERSONAL INJURIES—EVIDENCE—INSTRUCTIONS.

1. An action lies against a corporation and its servant for the willful tort of the servant, though the master has not directed or ratified the tort.

2. Under Code of Law, § 2283, providing that depositions taken de bene esse shall be retained by the officer until he delivers them into the court, or, together with the certificate, shall be sealed up by the officer, and directed to such court, and sent either by mail or express, where the certificate of the notary states that the depositions were retained by him until they were placed in the post office properly addressed, and that he personally placed them in the post office, it makes no difference whether he prepared the certificate before or after placing the depositions in the envelope.

3. In an action for personal injuries a physician cannot testify whether the shock of a stated collision produced a stated result.

4. Where an objection to evidence does not state the grounds thereof, it will not be considered.

5. Where there was nothing in the testimony in an action for injuries to plaintiff contesting the fact that he was a mail agent, assumption of such fact in an instruction is not erroneous as a charge on the evidence.

Appeal from Common Pleas Circuit Court of Newberry County; Izlar, Special Judge.

Action by Luther A. Riser against the Southern Railway Company and Marion Rich. Judgment for plaintiff. Defendants appeal. Affirmed.

The following are defendants' exceptions other than those stated in the opinion:

"First. Motion to Require Election. 1. Error of the presiding judge in overruling defendant's motion to require plaintiff to elect upon which cause of action stated in the complaint he would proceed to trial, namely, the cause of action based upon ordinary neg-

ligence or that based upon willful tort. These causes of action are separate and distinct from and inconsistent with each other. The act of 1898 (22 St. at Large, p. 693) relieves plaintiff from election only where the acts of negligence or other wrongs are several acts, and where they cause or contribute to the injury. It is impossible that one act can be both negligently and willfully done, thus making of one act several distinct, separate, and inconsistent acts. It is equally impossible that an act negligently done should cause or contribute with the same act willfully done to the injury complained of, or vice versa.

"Second. Demurrer to Complaint. 2. Error of the presiding judge in overruling the defendant's demurrer to the complaint, which was as follows: The defendant, Southern Railroad Company, demurs to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action, in that the action is based upon the alleged joint and concurrent tort of the railway company and its conductor. The facts alleged in the complaint show that the injury was the result solely of the negligence of the conductor, for which in a proper action the railway company may be held liable under the principle of respondeat superior, but which does not constitute a case of joint and concurrent tort.

"Third. Objections to the Jurisdiction. 3. Error of the presiding judge in overruling the objections of the defendant to the jurisdiction of the court, and in refusing the defendant's motion to remove the case to the United States Circuit Court; the grounds of said objection and motion being as follows:

"(1) That the said defendant is a non-resident of the state in which said suit is brought, to wit, the state of South Carolina, but is a corporation under the laws of the state of Virginia; that the matter and amount in dispute in said suit exceeds, exclusive of interest and costs, the sum or value of \$2,000; that the said suit is of a civil nature, being an action for \$15,000 for personal injuries to the plaintiff caused on the 26th of September, 1901.

"(2) That prior to the time when the defendant was required by the laws of South Carolina to answer or plead to the complaint served upon defendant on January 17, 1902, to wit, on the 6th day of February, 1902, the defendant filed with the clerk of the court of common pleas for Newberry county, South Carolina, its petition for the removal of said cause to the Circuit Court of the United States for the District of South Carolina, setting out the matters and things above set forth and more fully appearing in the said petition, which is now on file with the clerk of this court, and reference to which is hereby made as constituting a part hereof; that the defendant at the same time offered therewith and caused to be filed with the said clerk a bond with good and sufficient

surety for its entering in said Circuit Court of the United States for the District of South Carolina on the first day of its next session a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court if said court shall hold that this suit was wrongfully or improperly removed thereto.

"(3) That thereafter, to wit, on February 6, 1902, before the time for answering said complaint expired, the defendant served its answer upon the plaintiff's attorneys, and procured a certified copy of the record in said cause to be filed with the clerk of the Circuit Court of the United States aforesaid.

"(4) That the defendant is advised that it is the duty of this court, when said petition and bond have been filed, to proceed no further with the cause; that this court is without jurisdiction to pass any order or render any judgment therein.

"(5) That to proceed with the trial of this cause under the circumstances will deprive this defendant of a right guaranteed by the Constitution and laws of the United States, the right of removal of this cause to the Circuit Court of the United States under section 639 et seq., Rev. St. U. S., and acts of Congress amendatory thereof [U. S. Comp. St. 1901, p. 520], and Const. U. S. art. 3, § 2.

"(6) The complaint states a separable, and therefore removable, case, so far as the Southern Railway Company is concerned. The facts alleged present a case where a master is liable only by reason of the sole negligence of a servant, in which the master has had no participation. The tort is that of the servant; the liability of the master is imputed by law. There is therefore no joint tort stated."

"4. Error of the presiding judge in holding: 'If it has been removed to the United States court, and Judge Simonton sent it back, it is properly before this court, and I overrule the motion.' The error consisting in his honor being controlled by the decision of Judge Simonton, whereas the defendant was entitled to the individual judgment of his honor upon the question, uninfluenced by Judge Simonton's ruling.

"5. Error of the presiding judge in holding: 'It cannot be made now. Having been made over and having been sent back, it cannot be made now' (referring to the motion to remove the cause). Judge Simonton having granted the motion to remand, from which no appeal lies, the only mode of securing a final decision of the question was to renew the motion in the state court to remove the cause, and to appeal from the ruling therein.

"6. Error of the presiding judge in holding that the court of common pleas for Newberry county had jurisdiction to hear and determine the cause.

"Fifth. Motion for Nonsuit. 10. Error of the presiding judge in not sustaining the

first ground of the motion for nonsuit, which was as follows: 'The complaint alleges that the plaintiff's injuries were caused by the joint and concurrent tort of the defendants. The evidence does not tend to sustain this allegation. On the contrary, if it tends to show any negligence, it is the negligence solely of the defendant Rich, for which in a proper action the defendant company may be held liable, but which does not make out a case of joint and concurrent tort.'

"11. Error of the presiding judge in not sustaining the second ground of the motion for nonsuit, which was as follows: 'The plaintiff having alleged a joint and concurrent tort of the defendants, the defendant Southern Railway Company, a foreign corporation, has been deprived of the right to remove this cause to the United States court. He should be required to prove the facts so alleged. To allow him to proceed in the state court without some evidence of this fact would deprive the defendant of a substantial right guaranteed by the Constitution and laws of the United States.'

"12. Error of the presiding judge in not sustaining the third ground of the motion for nonsuit, which was as follows: 'To allow the plaintiff, after alleging a joint and concurrent tort by a railroad company and one of its employes, to recover without proof of such joint and concurrent tort, but simply on proof of a negligent act of the employe, would deprive the company of its property without due process of law, contrary to amendment 14 of the Constitution of United States, for this reason: it would deprive the company of the right of reimbursement from the defaulting servant, which would otherwise exist.'

"13. Error of the presiding judge in not sustaining the fourth ground of the motion for nonsuit, which was as follows: 'A master cannot be held to be a joint tortfeasor with a servant in a willful or reckless tort calling for punitive damages unless he has authorized, directed, participated in, or ratified the same.'

"Sixth. The Judge's Charge. * * * 17. Error of the presiding judge in refusing the defendant's first request to charge, which contained a correct proposition of law applicable to the case, as follows: 'The plaintiff having alleged a joint and concurrent tort of the defendants, the defendant Southern Railway Company, a foreign corporation, has thereby been deprived of the right existing under other circumstances of removing this cause to the United States court. To sustain this action he must, therefore, prove that the acts complained of were the joint and concurrent negligence of the defendants.'

"18. Error of the presiding judge in refusing the defendant's second request to charge, which contained a correct proposition of law applicable to the case, as follows: 'The negligence of an employe, for which, and on which account only, the employer is liable,

is not the joint and concurrent negligence of the employer and employé.'

"19. Error of the presiding judge in refusing the defendant's third request to charge, which contained a correct proposition of law applicable to the case, as follows: 'To constitute a joint and concurrent tort on the part of employer and employé, it must appear that each had a direct share in such tort. The liability of the employer by reason of his relation to the employé does not make out a case of joint and concurrent tort.'

"20. Error of the presiding judge in refusing the defendant's fourth request to charge, which contained a correct proposition of law applicable to the case, as follows: 'To allow the plaintiff, after alleging a joint and concurrent tort by a foreign corporation and one of its employés, to recover without proof of such joint and concurrent tort, would deprive such foreign corporation of the right of removal guarantied by the Constitution and laws of the United States.'

"21. Error of the presiding judge in refusing the defendant's fifth request to charge, which contained a correct proposition of law applicable to the case, as follows: 'To allow the plaintiff, after alleging a joint and concurrent tort by a railroad company and one of its employés, to recover without proof of such joint and concurrent tort, but simply on proof of a negligent act of the employé, would deprive the company of its property without due process of law, contrary to amendment 14, Constitution of United States, for this reason: it would deprive the company of the right of reimbursement from the defaulting servant, which otherwise would exist.'

"22. Error of the presiding judge in refusing the defendant's sixth request to charge, which contained a correct proposition of law applicable to the case, as follows: 'A master is not responsible in punitive damages for the willful tort of his servant unless he authorized or ratified it. To hold otherwise would deprive the master of his property without due process of law, contrary to amendment 14, Constitution of United States.'

"23. Error of the presiding judge in refusing the defendant's seventh request to charge, which contained a correct proposition of law applicable to the case, as follows: 'A master cannot be held to be a joint tortfeasor with his servant in a willful or reckless tort calling for punitive damages, unless he has authorized, directed, participated in, or ratified the same.'

"24. Error of the presiding judge in refusing the defendant's eighth request to charge, which contained a correct proposition of law applicable to the case, as follows: 'The plaintiff, not having alleged in his complaint any injury to his kidneys, is not entitled in this action to recover damages therefor.'

T. P. Cothran, for appellants. Johnstone & Welch, for respondent.

GARY, A. J. This is an action for \$15,000 damages on account of personal injuries sustained by the plaintiff in a railroad collision on defendant's line in Richland county, S. C., 26th September, 1901. The complaint sets forth two causes of action separately stated; one based upon the joint and concurrent negligence of the defendants, the other upon their joint concurrent willful tort. The complaint alleges that on the night of the 26th of September, 1901, the plaintiff was in charge of the United States mail as railway mail clerk upon the passenger train of the defendant Southern Railway Company, No. 16, the evening train from Greenville to Columbia; that said train collided at Fornance with freight train No. 72, the former running into the rear of the latter. The collision is alleged to have been due to the joint and concurrent negligence and carelessness and fault of defendants in the particulars stated in paragraph 6 of the complaint, the substance of which is that the defendant Rich, who was the conductor of No. 72, disobeyed orders, and ran his train ahead of No. 16, without allowing the time required by the rule, and, as a result, before he could get his train upon the side track at Fornance, the passenger train ran into the rear of his train while it was standing upon the main line. The second cause of action states the facts substantially as in the first cause of action, except that the conduct of the defendants is characterized as wanton, willful, and malicious. The answers of the defendants were separate, and contained a general denial of each and every allegation of the complaint. The jury rendered a verdict in favor of the plaintiff for \$8,000. The defendants appealed upon numerous exceptions, which will be set out in the report of the case, except those hereinafter considered.

While the appellants' attorney insists upon the ruling of this court on the questions presented by the exceptions numbered 1, 2, 3, 4, 5, 6, 10, 11, 12, 13, 17, 18, 19, 20, 21, and 23, he has not argued them, as he is of the opinion that they have been decided by this court on previous occasions, adversely to the contention of appellants. He is right in this view, and, such being the case, we deem it only necessary to overrule those exceptions.

The assignment of error by the seventh exception is as follows: "Error of the presiding judge in admitting in evidence the deposition *de bene esse* of George R. North; the ground of objection by the defendants being that it did not appear that the package, at the time it was proposed to be opened, was sealed under the seal of the notary public, as required by law. On the contrary, it appears that all the notary public proposed to seal was the certificate of deposit with the postmaster, and that was sealed before the deposition was placed in the envelope." A photographic copy of the front and back of the envelope containing the deposition is set out in the record. Upon the back of the envelope there is in type-writing a certificate signed by J. A. Bell, no-

tary public for North Carolina, to the effect that the deposition was retained in his hands until he personally deposited it in the United States post office in Charlotte, N. C., duly addressed to John C. Goggans, clerk of the court, Newberry, S. C. This typewriting extends across the flap of the envelope. The signature of the notary public is in ink, and is below this typewriting, but not across the flap of the envelope. The impression of the seal is below the flap, and over the notary public's name. These facts are sufficient to bring the case within the provisions of section 2883 of the Code of Laws, which is as follows: "Every deposition taken under the provisions of the two preceding sections shall be retained by the officer taking it, until he delivers it, with his own hand, into the court for which it was taken, or it shall, together with a certificate of the reasons aforesaid of taking it and of the notice, if any, given to the adverse party, be by such officer sealed up and directed to such court, either by mail or express, and remain under his seal until opened in court." The appellants' attorney, however, contends that the following facts show that the package containing the deposition was not sealed in the manner required by law: The impression of the seal shows clear through on the front side of the envelope, one stroke making both impressions. There was no evidence of the impression of the seal upon the contents of the envelope, which consisted of the testimony of the witness, certificate of the notary, etc., showing that the impression of the seal was made before the contents were placed within. When the certificate of the notary public taking the deposition shows that it was retained by him until it was placed in the post office properly addressed, and that he personally placed it in the post office, it makes no material difference whether he prepared the certificate before or after placing the deposition in the envelope. This is a substantial compliance with the requirements of the statute. By reference to the case of Travers v. Jennings, 39 S. C. 410, 17 S. E. 849, it will be seen that the facts in that case were quite different from those in the case under consideration. This case falls within the principle stated in McKenzie v. Barnes, 12 Rich. Law, 205, in which the court uses this language: "All the requisitions of these rules were chiefly directory to the commissioners, intended to suggest to them, usually persons beyond the jurisdiction of the court, means for guarding against frauds which may be practiced upon the depositions taken under the authority intrusted to them. So far as the requisitions of the rule now of force affect the discretion of the court itself, a substantial compliance with them, accompanied by appearances of fairness, may serve; whilst the most exact adherence would not countervail evidences of fraud. The names of commissioners must be 'written by themselves,' yet a commission from Australia would not be ordered to remain unopened until another one was sent to prove

the handwriting of the commissioners; for who would prove the handwriting on the second one? Until the contrary appeared, the handwriting would be presumed genuine. With like indulgence, names written on a sealed envelope will be considered across the seals until some reason arises for supposing that the seals have been broken. * * * It has been supposed that 'across the seals' meant to require such arrangement of the names as would prevent breaking of the seals without disturbance of the names. It is, however, well known that, where skillful villainy is exercised upon the fastenings of paper packages, simple expedients relied upon to expose its tricks serve only to prove treacherous security and delusion. To the care and fidelity of the commissioners and the vigilant integrity of the post-office department the safe return of commissions sent by mail must be confided, and when, as rarely happens, grounds for suspecting unfairness are presented, a literal compliance with directions may be demanded to prevent fraud. But when there has been a manifest effort to pursue a direction, and its end has been attained, the court will not allow it to be turned to the defeat of a full and fair trial by nice discriminations between degrees of formality not plainly distinguished by material circumstances. The prominence given by the appellants, in their argument here, to their first ground of appeal, must be our excuse for the attention we have bestowed on it, so disproportionate to its intrinsic importance." This exception is overruled.

The assignment of error by the eighth exception is as follows: "Error of the presiding judge in sustaining the plaintiff's objection to the following question asked of Dr. McIntosh: 'Did the shock of that collision produce any injury upon Mr. Riser's kidneys?' Dr. McIntosh was a medical expert. More than that, he attended the plaintiff from the night of the collision, before he was removed from the place of the accident, to the time he left the hospital. His knowledge as an expert and his personal examination of the plaintiff qualified him to answer the question." There are two reasons why this exception cannot be sustained. In the first place, the question propounded to the witness was in antagonism to the rule laid down in Easler v. Ry. Co., 59 S. C. 317, 37 S. E. 938. The court has so recently considered the question raised by the exception that it only deems it necessary to refer to the authority just mentioned. In the second place, the record shows that the witness had already practically answered the question propounded to him. This exception is therefore overruled.

The assignment of error presented by the ninth exception is as follows: "Error of the presiding judge in overruling defendant's objection to the following question asked Mr. Rich: 'When this accident happened, were you retained in the service of the com-

pany?" the same being irrelevant." When the defendant's attorney objected to the testimony, he did not state the grounds of his objection. The numerous cases in this state show that the question is not properly before this court for consideration, and the exception must therefore be overruled.

The assignments of error in the fourteenth and fifteenth exceptions are as follows:

"(14) Error of the presiding judge charging the jury as follows: 'The Southern Railway having undertaken to transport the United States mail was bound to carry the agents in charge of the mail.' The error consisting in charging as matter of fact, in violation of article 5, § 26, Const. S. C., that the Southern Railway Company had undertaken to transport the United States mail, which was at issue."

"(15) Error of the presiding judge in charging the jury as follows: 'The company owed to this agent—this mail agent—the duty to carry him safely.' The error consisted in charging as matter of fact that plaintiff was a mail agent, and that he was on duty as such at the time of the accident, which facts were at issue, in violation of article 5, § 26, Const. S. C." Appellants' attorney does not discuss these exceptions in his argument further than to say: "Exceptions 14 and 15 impute error in charging upon the facts. A reference to them is all that is needed, we submit, to be convinced that error was committed." When the charge is considered in its entirety, it will be seen that the presiding judge submitted the facts at issue to the jury, and likewise charged the jury, that, "If the testimony satisfies you that the plaintiff was a mail agent in charge of the United States mail, and was on board of the passenger train of the defendant the Southern Railway Company at the time of the injuries of which he complains," etc.; thus submitting this specific fact for their determination. There is nothing in the testimony showing that this fact was contested. It seems to have been assumed even by the defendants' witnesses. These exceptions are likewise overruled.

The assignments of error in the sixteenth and twenty-second exceptions are as follows:

"(16) Error in charging the jury as follows: 'If the said negligent acts were done by the defendant, its agents or servants, wantonly, willfully, and maliciously, such mail agent would be entitled, on proving his case, to not only compensatory, but punitive, damages.' The error consisting in (1) holding a master liable for punitive damages for the willful tort of the servant without authorization, direction, participation, or ratification on the master's part; (2) in an action based upon the joint willful tort of master and servant allowing a recovery of punitive damages against the master upon proof of a willful tort by the servant without authorization, participation, direction, or ratification on the part of the master. In both instances de-

priving the defendant company of its property without due process of law, contrary to amendment 14, Constitution of the United States."

"(22) Error of the presiding judge in refusing the defendants' sixth request to charge, which contained a correct proposition of law applicable to the case, as follows: 'A master is not responsible in punitive damages for the willful tort of his servant, unless he authorized or ratified it.' To hold otherwise would deprive the master of his property without due process of law, contrary to amendment 14, Constitution of the United States."

The cases cited in the argument of the appellants' attorney from this state show that the question is settled in South Carolina contrary to his contention. These exceptions are likewise overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(58 W. Va. 619)

VIRGINIA ACCIDENT INS. CO. v. DAWSON, Secretary of State.

(Supreme Court of Appeals of West Virginia. May 16, 1903.)

FOREIGN INSURANCE COMPANIES—RIGHT TO DO BUSINESS—CERTIFICATE FROM SECRETARY OF STATE.

1. A foreign accident insurance company is not required to comply with section 2, c. 34, of the Code of 1899, and get its certificate to do business in this state from the Auditor, but gets its certificate from the Secretary of State, under section 30, c. 54, of the Code of 1899, upon complying with the latter section. It is not required to file a writing accepting the provisions of section 30, and agreeing to be governed thereby.

Poffenbarger, J., dissenting.

(Syllabus by the Court.)

Petition of the Virginia Accident Insurance Company for writ of mandamus to W. M. O. Dawson, secretary of state. Writ granted.

Rucker, Anderson & Hughes, for petitioner. Brown, Jackson & Knight, for respondent.

BRANNON, J. The Virginia Accident Insurance Company, a Virginia corporation, desiring to do business in this state, filed with the Secretary of State, March 7, 1903, a copy of the certificate of its corporation, and requested the Secretary of State to issue to it a certificate of the fact, as provided in section 30, c. 54, of the Code of 1899, as it appears in chapter 35, p. 108, Acts 1901, but the Secretary refused such certificate; and the company asks from this court a mandamus requiring the Secretary to issue such certificate, in order that it may carry on its corporate business in this state. The company's petition states that it engages in the business only of insuring persons against bodily injury sustained through external, violent, and accidental means only; that it issues but one form of policy; that, in case of accident to

one of its assured, it is bound by its policy to pay him \$7 per week during disability for a period not exceeding 26 weeks; that, in case of death within 16 weeks after the injury, the company would pay \$60 to the representative of the assured; that under one policy the liability could not exceed \$182; that its policy assumes risk for only one month at a time, and lapses in default of premium, which is \$1 per month. The return of W. M. O. Dawson, secretary of state, to the mandamus nisi awarded by this court, presents for our consideration two reasons why the mandamus should not go: First, that petitioner is a foreign insurance company, and, as such, must get a certificate, not from the Secretary of State, under section 30, c. 54, Code 1899, but from the Auditor, under another statute (section 2, c. 34); and, second, that, if the Secretary is to issue a certificate, the company had not fully complied with section 30, c. 54, as it did not, in addition to filing the certificate of incorporation, also file a writing accepting the provisions of section 30 of chapter 54 of the Code of 1899, and agreeing to be governed thereby.

The case involves only the construction of our statute law pertinent to the subject. Does the certificate to enable the petitioner, as a foreign corporation, to do business in this state, emanate from the Secretary of State, under section 30, c. 54, Code 1899, or from the Auditor, under section 2, c. 34, Code 1899? That depends on the question whether an accident insurance company is an insurance company, within the meaning of section 2, c. 34. If it is, then the petitioner is not entitled to a certificate from the Secretary of State at all, but its certificate must come from the Auditor. On the other hand, if this company is not an insurance company, within the meaning of section 2, c. 34, then its certificate comes from the Secretary of State, if it has fully complied with section 30, c. 54, of the Code of 1899. Chapter 34 concerns insurance, telegraph, and express companies, generally, by its title, and by numerous detailed provisions as to terms upon which they shall operate, their taxation, service of process on them, and their liability. Section 1, as found in chapter 107, p. 234, Acts 1901, says that every insurance, telegraph, telephone, or express company having its principal place of business in this state, incorporated by Virginia before June 20, 1863, or by this state, shall be a domestic corporation; all others, foreign. This provision is applicable to all insurance, telegraph, telephone, and express companies. It distinguishes foreign from domestic corporations for the general purposes of that chapter, or any other, because there are certain provisions applicable to the one, and not to the other, and this section gives the test as to whether such a corporation is domestic or foreign for general legal purposes. It is applicable to all; but, when we come to section

2, we find it limited to particular corporations, reading: "It shall not be lawful for any officer, or agent of any life, fire or marine insurance company, directly or indirectly, to take risks or issue policies of insurance within this state, without first procuring from the Auditor a certificate as hereinafter directed. Before obtaining such certificate, such company, its officers or agents, shall furnish the Auditor with a statement under oath of the president or secretary of the company, for which he or they may act, which statement shall show: First. The name and locality of the company," and 10 other items of the statement, "which statement shall be filed in the office of the said Auditor." Clearly, this language is limited to "life, fire or marine insurance" companies. It does not include, but by implication excludes, accident insurance companies. Such are its words. Do not these words mean what they import? Though only the words "life, fire or marine insurance" are used, do they have a broader meaning, and include accident insurance—any insurance company? Do they include employers' liability insurance, or fidelity and guaranty insurance, or title insurance, or live stock insurance, or boiler or glass insurance? Will those words open to take in every new species of insurance that may come in the mutation of business in future? I think not. But it is so argued virtually. Let us go back to see whether those three words, "life," "fire," "marine," were sedately chosen. An act passed in 1867 (Acts 1867, p. 146, c. 117) laid a tax on "all insurance companies establishing agencies or doing business in this state except life and accidental," and required a deposit of \$25,000 with the Treasurer. This favored life and accident companies, by exempting them from those demands. In the Code of 1868 we find section 2, c. 34, the parent of our present section 2, c. 34: "It shall not be lawful for any officer or agent of any foreign fire or marine insurance company, directly or indirectly, to take risks or issue policies without procuring a certificate from the Auditor as hereinafter directed." This included only fire and marine insurance. So did Acts 1871, p. 145, c. 107. Two acts of 1872-73, chapters 69 and 221, and Acts 1881, p. 294, c. 38, still include in the requirement of a certificate from the Auditor only fire and marine insurance; but in 1882 (Acts 1882, p. 202, c. 85) section 2 was amended to include life insurance companies. Chapter 108, p. 320, Acts 1891, again amended section 2, but did not widen it as to the character of the companies. Thus we see that the act of 1867 required of all insurance companies a deposit, but exempted life and accident companies. The Code of 1868 required of foreign insurance companies an invested capital of \$200,000 in section 2, c. 34, "Of foreign insurance companies," but the section only named fire and marine companies. Accident and life companies were still exempted. The acts later exempted those two

until 1882, when life companies were put into the section, but accident companies were still favored, as they were by the act of 1867. The Legislature, through several acts, favored life and accident companies, and then saw proper to make life companies come under the requirements of section 2, but still left out accident companies. Surely it knew of accident companies. Through eight acts amending section 2 it was choice in selecting the companies it would bring under the demands of section 2. The letter of that section does not include accident companies, and past acts show a purpose not to include them. Besides, there is reason for this. Fire, marine, and life insurance companies issue large policies, calling for hundreds of millions of dollars in the aggregate, and only a few policies are of inconsiderable amount, while accident companies have small risks, and do not compare with fire, marine, or life companies, either in the aggregate of policies, or in the amount of the several policies. The losses from them are incomparably smaller. Here we find a reason for difference.

But section 2, after requiring of all fire, marine, and life insurance companies a certain certificate, adds, "No foreign insurance company, or agent thereof, shall transact any business of insurance in this state unless such company is possessed of at least one hundred thousand dollars of actual capital invested in the stock or bonds . . . at the current market value at the date of such statement." It is said that this applies to all insurance companies, and includes accident companies. Observe that the section opens with requiring a statement of the character, assets, and other circumstances of only life, fire, and marine insurance companies, and in immediate connection it adds the obligation, as to foreign insurance companies, of having a certain capital. Why leave the words of the section a few lines above, in the opening words giving the companies to which the section relates—the subject of the section—and go off to find an accident, title, or guaranty insurance company, and apply this clause also to it? That clause makes this capital an element required for the issuance of the certificate, and that is the certificate required in the outset of the section only of life, fire, and marine companies. This capital requirement is not an element participating in a distinct certificate. It is only one certificate with which the section deals. As the office of this clause is to add a prerequisite to the certificate as to foreign companies, we must relate it only to those companies required to have that certificate. The section demands a certificate, by its words, only of certain companies, and specifies the requisites for it; and, having done this, section 3 requires the Auditor to issue that same certificate spoken of in the opening of section 2; that is, after the "statement" is filed, and evidence adduced of the invested capital, and in case it is a company of a state which re-

quires a deposit of our companies, there must be also evidence that a like deposit has been made here. It is the one certificate which the section speaks of, and that is required only of life, fire, and marine companies by the letter of section 2.

It is admitted that the "statement," distinctively so called, is required only of life, fire, and marine companies. If so, accident companies do not have to file it. This tends to show that accident companies are not included. Note the words in section 2, "market value at the date of such statement." That statement is required only of life, fire, and marine companies. It requires the investment only of them. Stress is placed in argument upon the provision in section 2 that the Auditor may investigate the condition of any insurance company, and, if its condition is unsound, revoke its certificate. That does not broaden the scope of the section. That applies only where a certificate is required, and I repeat that there is but one certificate mentioned in the section, and that is the one required of life, fire, and marine companies. If no statement is required of an accident company, then no certificate is required of it, for the filing of the statement is an element of the certificate, or prerequisite. The same answer is given as to the feature authorizing the Auditor to revoke a certificate where a company holding it has failed to pay a judgment. It applies only in those cases where a certificate is demanded by the statute. It may be that such powers over unsound accident, title, stock, or other insurance should exist, but the Legislature has not yet provided for it.

We are called by the brief to consider section 18, c. 34, wherein it is provided that no agent shall make, renew, or negotiate any insurance without "first obtaining the Auditor's certificate of authority as required by law," and subjecting him to penalty for so doing. It is said this requires a second certificate. Whether so or not, it has no force on the question in hand. But this section does not define a second certificate. It is the certificate "required by law"; that is, by other law—the one issued to the company under section 3. The only purpose of section 18 is to enforce the provisions of section 2 requiring certain companies to have certificates of authority to insure. Insurance companies operate by officers and agents. If they are by punishment restrained from getting insurance for unauthorized companies, the evil contemplated will be suppressed; that is, the issue of insurance policies by companies which have no certificate of authority. It is needless to cite authority to prove that an accident company is different from a life or fire or marine insurance company. The difference is substantial. We cannot accede to the position that this company is a life insurance company because if death ensues it pays \$60. It is not a life insurance company, within the meaning of section 2, c. 34. We think that life, fire, and marine insurance companies are the only ones

contemplated by section 2. In answer to a question, we do not think that life, fire, or marine insurance companies obtaining a certificate under section 2, c. 34, have also to comply with section 30, c. 54, and get certificate under the latter section.

We conclude that accident insurance companies do not come under section 2, c. 34, of the Code of 1899, so as to require the Auditor's certificate therein specified. The Legislature has not yet so ordered. It has not yet seen fit to require of them \$100,000 capital invested. We cannot legislate. We cannot amend the statute.

After writing the above, I discover that section 13, c. 34, was amended by chapter 107, p. 234, Acts 1901, so as to place a fixed license tax on foreign accident insurance companies. Until the act of 1901, they were not in that section by express specification. That section says that, if any company fail to make payment or report of business, the Auditor shall not issue to the company the certificate mentioned in section 3 of chapter 34; and from this it may be argued that, as foreign accident companies are brought under the license, they must obtain the Auditor's certificate, under section 2, just the same as life, fire, and marine insurance companies, and have invested capital of \$100,000. To so hold, we must amend section 2 by inserting the word "accident," and make it read, "It shall not be lawful for any officer or agent of any life, fire, marine or accident insurance company * * * to take risks without the Auditor's certificate." We must thus amend the section by implication. We must do what the Legislature did not do. Nothing short of this will bring such result. The Legislature in 1901 selected certain sections of chapter 34 for amendment, but left section 2 untouched. Shall we amend it by inserting that word? The Legislature put it in one section, but not in the other. We cannot thus amend when the Legislature having the matter in hand has not done so. We must say that it intended to leave section 2 stand, and must give it as left standing, and section 13 as amended in 1901, each, effect. Thus we say that section 13 denies the Auditor's certificate to those companies in default required by section 2 to have such certificate, but that such companies as are not required by section 2 to have the certificate are not meant by that clause. Those companies not reporting business for license tax, or not paying it, are under section 14, which puts them and their agents under penalty of not less than \$100 nor more than \$1,000. The act of 1901 did not insert accident companies in section 2, because it did not intend to require of them proof of \$100,000 assets.

The next question is, is the petitioner entitled to a certificate from the Secretary of State under section 30, c. 54, of the Code of 1899? We think it is. That section says: "Any corporation duly incorporated by the laws of any state or territory of the United States, or of the District of Columbia, or of

any foreign country, may unless it be otherwise expressly provided hold property and transact business in this state upon complying with the requirements of this section, and not otherwise." The requirement is only that it file with the Secretary of State a copy of its articles of association, and of the law or authority under which it is incorporated. Then the Secretary issues a certificate of the fact of filing such documents, and this certificate operates by law to allow it to do its corporate business in this state. If, however, the corporation is a railroad or other corporation doing business in this state, as lessee of the works, franchise, or property of another corporation, or person, or otherwise, it must, in addition to the documents just mentioned, file a paper, sealed with the corporate seal, accepting the provisions of section 30, and agreeing to be governed thereby. This is not required of any but such lessee corporation. The object of this provision is to prevent such lessee from escaping the liability imposed by that section on the plea that it is only a lessee. The section makes railroad corporations doing business in this state, as to property, works, and operations, domestic corporations. It was the purpose to compel agreement to be so liable as a domestic corporation in demanding a corporate consent from such lessee company. But this accident insurance company is not a lessee corporation operating works of another. The Legislature of 1893 considered that section 2, c. 34, would not apply to guaranty companies, as it put in a section making it apply to them. Code 1899, p. 121, c. 10. What the Legislature ought to have done is one thing. What it did do is another. Only the Legislature can cure defects. A court cannot legislate.

Therefore we award the mandamus.

POFFENBARGER, J. (dissenting). The Virginia Accident Insurance Company, a Virginia corporation, and clearly a foreign corporation, within the meaning of the statutes of this state, asks for a peremptory writ of mandamus commanding the Secretary of State to issue to it a certificate, under section 30 of chapter 54 of the Code of 1899, authorizing it to do business in this state. This application is resisted by the Secretary of State on the grounds that said company is not entitled to a certificate under said section, and that he has no authority to issue the same, and that said company must obtain its certificate and authority to do business in this state from the Auditor.

The solution of the question presented depends upon the construction of chapter 34 of the Code, under which, if at all, accident insurance companies must obtain such authority from the Auditor. Said company insists that only life, fire, and marine insurance companies are subject to supervision by the Auditor, and required to obtain from him authority to do business. Whether accident insurance companies fall within the require-

ments of said chapter must be determined by reference to the several acts of the Legislature, commencing with section 8 of chapter 113, p. 146, of the Acts of 1863, requiring, among other things, a license to any person to "act as agent for any foreign insurance company," and inflicting a penalty of not less than \$5 nor more than \$50 for acting without such license. Section 55 of chapter 118, p. 166, of the Acts of 1863, required every agent of any insurance company incorporated by any other state or government to return under oath to the assessor, annually, the gross receipts of such agency. Section 16 of chapter 123, p. 222, of the Acts of 1863, imposed license taxes upon every agent of a foreign insurance company doing business within the state; the amount being \$50 for every such company for which the agent acted, except in towns or cities containing a population of 3,000 or more, and in such cities or towns a tax of \$100 per annum. Chapter 33, p. 23, of the Acts of 1864, may be regarded as the groundwork of legislation in this state looking to the creation of a bureau for the supervision and control of insurance. That chapter contains 13 sections, and expressly repeals the sections hereinbefore referred to, as well as the twenty-third and following sections of chapter 39 of the Code of Virginia of 1860. This chapter took out of the hands of the assessors of the various counties the licensing of the agents of foreign insurance companies, and placed the entire control and supervision of insurance companies and their agents in the hands of the Auditor of the state. Section 1 of said chapter reads as follows: "Every domestic insurance and express company, and every person acting in this state as principal agent of any foreign insurance or express company, shall semi-annually make returns to the auditor as follows." Then follow section 2, showing what shall be returned; section 3, requiring the payment into the treasury of the state of a tax of 3 per cent. on the amount of premiums so returned; section 4, prescribing the penalty for failure to make the returns, and relieving said companies from the payment of any other taxes to the state, and any county levy or school tax; section 5, prohibiting any foreign insurance company, after the 1st day of April then next, from renewing any contract of insurance without having complied with the provisions of section 6; section 6, requiring the appointment of an attorney, and consent and agreement that service of process upon him should be as effective as if duly served upon the company; section 7, requiring the power of attorney to be filed by the company in the office of the Secretary of State; section 8, providing that the power of attorney should be irrevocable as long as any liability of the company remained unsatisfied in the state; section 10, making service on the attorney equivalent to service on the principal; section 11, imposing a pen-

alty of not less than \$20 nor more than \$200 upon the agent acting without having complied with the fifth, sixth, seventh, and eighth sections; and section 12, providing that every insurance company which had been or should be incorporated by an act of the General Assembly of Virginia in force within this state, or under the act of the Legislature of this state passed October 26, 1863, "shall be deemed a domestic company within the meaning of this act, and every other insurance or express company, a foreign company." An examination of chapter 34 of the present Code will show that it contains, in some form and in some connection, the general plan and substantial provisions of said chapter 33, p. 23, of the Acts of 1864, and plainly and unmistakably includes, when read in the light of said act of 1864, every foreign insurance company, of any description whatever.

Recurring again to previous legislation, we come to chapter 117, p. 146, of the Acts of 1867, the first section of which reads as follows: "All insurance companies establishing agencies or doing business in this state, except life and accident insurance company, shall pay to the state semi-annually, on the first day of July and January of each year, a tax of three per cent. upon the gross receipts of such companies during the previous six months of their business within this state." Section 2 requires such companies to deposit with the Treasurer of the state \$25,000. Section 3 imposed a penalty for noncompliance with the provisions of the act. The act contains no repealing clause. It probably relieves life and accident insurance companies from the payment of the tax imposed by chapter 33, p. 23, of the Acts of 1864, by implication, and also from making the deposit; but it does not relieve or except them from other duties and liabilities imposed by the act of 1864, not included with the exceptions named by the act of 1867. The next legislation on the subject is found in chapter 34 of the Code of 1868. Section 1 of said chapter is like the same section of the same chapter of the present Code, except for the addition of one word in the present section. Section 2 of said chapter, down to "life insurance companies associations," reads, in all substantial respects, like section 2 of the Code of 1868, except that in the Code of 1868 the word "foreign" was inserted in the first line after the words "agent of any," and the word "life," appearing in the first line of the present section, was omitted, and except, further, that the capital required was \$200,000 under the Code of 1868, while it is but \$100,000 in the present statute. Said section 2 of chapter 34 of the Code of 1868 contained a further provision as to how much capital should be in cash, and required \$25,000 to be deposited with the Governor. The remaining provisions of said chapter of the Code of 1868 are very similar to those of chapter 34 of the present Code. In one

significant respect it altered the act of 1864. It will be remembered that the act of 1864 required the power of attorney to be filed in the office of the Secretary of State. The Code of 1868 required, as does the present Code, that the certificate be filed in the Auditor's office. While it did not require from life and accident insurance companies the statement prescribed in section 2, either foreign or domestic, it did require "every foreign insurance, telegraph and express company doing business in this state, or the agent or agents thereof, shall annually make returns to the Auditor as follows." Section 7. The present statute requires the same thing. Section 13 of chapter 34 of the Code of 1868 required a tax to be paid "by any foreign fire or marine insurance, telegraph or express company." Section 13 of chapter 34 of the present Code requires such tax to be paid by any foreign insurance, telegraph or express company, in the first clause thereof, and by all others, including life insurance companies, in the remaining clauses. The tax on both life and accident insurance companies was clearly restored by chapter 34 of the Code of 1868. Chapter 107, p. 145, of the Acts of 1871, amended section 2 of chapter 34 of the Code of 1868, but not in any substantial or important particular. It made section 2 inconsistent with section 13, and to that extent modified said section 13. Chapter 69, p. 164, of the Acts of 1872-73, again amended and re-enacted said section 2 of chapter 34, and expressly repealed so much of the act of 1871, and sections 3 and 13 of chapter 34, as were inconsistent or in conflict with said section as amended by the act of 1872-73. Section 2 of chapter 34 of the Code of 1868, before and after amendment by the act of 1871, made it unlawful for any officer or agent of any "foreign fire or marine insurance company" to do business in this state without having procured from the Auditor a certificate, etc. As amended by the act of 1872-73, said section made it unlawful for any officer or agent of "any fire or marine insurance company" to do business as aforesaid, leaving out the word "foreign." It is to be observed that the change has been carried into the section as it stands now. All life, fire, or marine insurance companies, whether domestic or foreign, are now, and have been since the act of 1872-73, required to render the statement prescribed in the first part of said section. The part of that section requiring such statement, which is not confined to foreign insurance companies of any kind, is immediately followed by this language: "And no foreign insurance company, or agent thereof, shall transact any business of insurance in this state, unless such company is possessed of at least one hundred thousand dollars of actual capital," etc. The change in the statute in reference to the statement, and the omission to change the succeeding part of it, prohibiting foreign insurance companies, without

any express exception, from doing business in the state, except upon the conditions thereafter named, clearly shows that the words "life, fire or marine insurance company," in the first part of the section, were not intended by the Legislature to limit or qualify, as antecedent words, the words "no foreign insurance company," found in the second part of the section, after the requirement as to the statement, and in reference to a wholly different matter, namely, the amount of assets required to enable a foreign insurance company to do business in this state. Said act of 1872-73, however, did not require the statement from life insurance companies, but in the second part of the section, as amended by that act, imposing a 3 per cent. tax on the gross amount of premiums received in this state for the previous year upon "every foreign insurance company doing business in this state," contained the proviso that "any foreign life insurance company which shall invest in this state the whole amount of its net receipts from its business therein, shall pay only one-third of the aforesaid rates." This shows clearly that, while foreign life insurance companies are not included in that part of the statute requiring the statement to be made, they were included in the second part, which imposed a tax upon them, and required the fulfillment of certain conditions as to assets and the making of returns for taxation; thereby again emphasizing the entire separation and distinction of the second part of that section from the first part.

The next act is chapter 88, p. 204, of the Acts of 1881, which again amended and re-enacted said section 2. The amendment consisted principally of the elimination therefrom of certain provisions, not important to be considered in this connection. This was followed by chapter 85, p. 202, of the Acts of 1882, amending and re-enacting the whole of chapter 34 of the Code of 1868. One change made in section 2 by this act is the insertion of life insurance companies among those from which the statement is required to be made. Several other changes were made in that section, which need not be repeated here. By chapter 108, p. 320, of the Acts of 1891, section 2 was again amended, and re-enacted so as to read as it now appears in the Code of 1899.

From what has been stated, it is very clear that in its origin, as well as its progress down to the present time, all this legislation had for one of its purposes, but perhaps its chief purpose, the obtaining of revenue from these corporations. It started as a revenue measure, and is continued as a revenue measure. Clearly the second part of section 2 places all foreign insurance companies under the supervision and control of the Auditor. Section 7 requires a return to the Auditor by every foreign insurance company. Section 8 shows what returns a foreign insurance company shall make. It reads as follows:

"If such returns be made on behalf of an insurance company, they shall show the amount of premiums on all insurances made, renewed or negotiated within this state, or on any subject of insurance within this state, on behalf of such companies, during the period to which the said returns relate, including as well premiums uncollected as those which are paid." Section 11 shows when and for what period the returns shall be made, and with what degree of particularity the facts shall be stated. Section 12 authorizes the Auditor to prescribe forms and regulations for carrying the provisions of the chapter into effect, and makes it the duty of every assessor to transmit to him a list of all the companies and agents doing business within the assessment district. What is the reason for all these requirements? The question is answered in the next section, which reads, in part, as follows: "At the time of making such return by any foreign insurance, telegraph or express company, the officer or agent making the same shall pay into the Treasury of the state a tax of two per cent. on the gross amount of the premiums, or charges and freights, or receipts for dispatches and messages stated in the said return, which shall be in full of state taxes only." What about domestic insurance companies? This is answered by the sixth section, which says: "The property of domestic insurance, telegraph and express companies shall be assessed for taxation as other property in this state. But the stock notes of such companies shall not be assessed; nor shall such notes or any part of them be considered a part of the indebtedness of the maker thereof, in listing his property for taxation."

It has been shown that the act of 1864 taxed all insurance companies, without any distinction between foreign and domestic companies. The act of 1867 probably exempted life and accident insurance companies from any taxation, and required a deposit from all insurance companies except life and accident companies. Subsequent acts have clearly and unmistakably restored the tax upon life and accident insurance companies, both foreign and domestic. It has been shown that originally the power of attorney executed by a foreign insurance company was required to be filed in the office of the Secretary of State, but is now required to be filed in the Auditor's office, and there is no statutory provision which expressly gives to the Secretary of State or his office any connection with or control over an existing insurance company. The statement required to be made by life, fire, and marine insurance companies was at first confined to foreign fire and marine insurance companies, and made its first appearance in the Code of 1868. That has been modified so as to apply to life, fire, and marine insurance companies, whether domestic or foreign. All must make that statement. Likewise, the require-

ment as to assets to be possessed by a foreign insurance company made its first appearance in the Code of 1868, and has since been retained, except as to the amount of the assets. In that, as first inserted, no class of companies was included except insurance companies, and they were limited to foreign insurance companies. It said that no foreign insurance company should do business, unless possessed of a certain amount of actual capital. Nothing but the most unsubstantial inference or implication could limit the words "no foreign insurance company," found in the second part of said section, so as to mean foreign fire and marine insurance company in the Code of 1868. If any such meaning was intended originally, the Legislature, in the Acts of 1872-73, clearly obliterated it, and showed a contrary interpretation, when it left the words "fire and marine insurance company" in the first part of the section, and found it necessary to except life insurance companies, in express terms, so as to prevent their being compelled to pay the entire amount of tax. This clearly shows that the Legislature never did intend the statute to mean what it is claimed to mean by the plaintiff here. No rule of construction, in the absence of such express legislative interpretation, will justify the construction contended for by the petitioner. Whatever may be said of the statute as it stood in the Code of 1868, no such connection and limitation as is contended for here can be made in the present condition of that section. Of that part requiring the statement to be made, the section applies to all life, fire, and marine insurance companies. Of that part containing the requirement as to assets, it is limited to foreign insurance companies, so that it cannot have the same meaning as in the former part of the section, even if it could have had such meaning when the former part was limited to foreign companies. This legislation having been commenced for revenue to be derived from all insurance companies, and other provisions having been ingrafted upon it, partly for the purpose of enforcing the payment of revenue, and partly for the purposes of supervision, and a virtual department of insurance created in the Auditor's office, through which the payment of taxes is to be enforced and supervision exercised, and the Legislature having manifested in this legislation a clear intention to extend the supervisory power of the state over all insurance companies, no rule of mere composition or grammatical construction ought to be permitted to overcome and defeat that intention, as well as to narrow and cut down the express language of the statute. The rule of construction of deeds, wills, statutes, and constitutions differs from that of composition, under which a general and indefinite expression is limited in meaning and effect by definite words antecedently used in the same connection. In law the rule of construction looks not only

to what has gone before, but to what follows and consequences as well. It compels consideration of the whole instrument, so that every part of it, if possible, may take effect, and that every word in it may operate in some way. The maxim applied by Blackstone is "*Nam ex antecentibus et consequentibus fit optima interpretatio.*" Not only must every word have some effect, if possible, but its full effect, if not inconsistent with other provisions. Even the rule of grammar under which general and indefinite words are limited by definite antecedent words is not applicable to this case. Can it be said that "no foreign insurance company" is uncertain and indefinite? Most assuredly it is not. It is general, but its meaning is not the least uncertain, and it cannot be said to be indefinite, so that its meaning must be obtained from antecedent words.

Do the words "at the date of such statement," found in the clause providing that "no foreign insurance company, or agent thereof, shall transact any business of insurance," etc., demand a different construction? Plainly, these words refer to the statement required in the first part of the section, and it is urged that their presence is conclusive evidence of legislative intent to narrow the words "no foreign insurance" so as to mean "no foreign life, fire, or marine insurance company." Such may have been the original design and proper construction. As stated, the requirement of a statement was first made in the Code of 1868, and applied only to "foreign fire and marine" insurance companies, but the chapter required payment of taxes by all foreign insurance companies. See sections 7 to 13, inclusive, c. 34, Code 1868. Section 7 requires "every foreign insurance" company to make return for taxation. Section 13 requires payment of taxes by every "foreign, fire or marine" insurance company; also by "any other insurance company, except life insurance companies"; and finally, "by a life insurance company," prescribing different rates of taxation for each class, namely, 4, 3, and 2 per cent., respectively. Since 1868, sections 2, 3, and 13 of chapter 34 have been radically changed, without striking out the words "at the date of such statement." Among others, this was inserted by chapter 69, p. 164, Acts 1872-73: "When by the laws of any other state, any deposits of money or other securities, or other obligations or prohibitions, are imposed or would be imposed on insurance companies of this state, doing, or that might seek to do business in such other state, or upon their agents therein, so long as such laws continue in force, the same obligations and prohibition, of whatever kind, shall be imposed upon all insurance companies of such other state doing business within this state, or upon their agents here." When this was inserted, the first part of section 2 required the statement to be made only by fire and marine insurance companies. Shall

the words "all insurance companies of such other state," in the new provision, be so restricted? Why? It is later in date, and, if there is inconsistency or repugnance, shall not the later expression of legislative will control, and, if need be, broaden the first and older part of the section? Is not that a well-settled rule of construction?

Another new provision inserted by the act of 1872-73 is this: "Every foreign insurance company doing business in this state at the time of the making of the annual statement as required by law shall pay into the State Treasury, as taxes, three per cent. of the gross amount of premiums received in this state during the previous year, taking duplicate receipt therefor, one of which shall be filed with the Auditor; and upon the filing of said receipts, and not till then, the Auditor shall issue the annual certificate as provided by law, and the said sum of three per cent. shall be in full of state taxes only: provided, that any foreign life insurance company which shall invest in this state the whole amount of its net receipts from its business therein shall pay only one third of the said rates." Are the words "every foreign insurance company," found in this new provision of section 2, limited in meaning to fire and marine insurance companies by force of the old language in the first clause of the section? If so, why the necessity or reason for the proviso as to life insurance companies? Although not so required by the first clause, did not this new clause clearly mean that foreign life insurance companies should make the annual statement and procure the certificate? If so, did not the same clause require all other foreign insurance companies to do the same things? If, to effectuate this new and later requirement, the old language of the first part of the section must be broadened, what harm results or violence is done? "Whether the prior statute is recent or of long standing, it must yield, if there is conflict. But with a view to ascertain the intent of the legislation on a given subject at any time it must all be considered, whether it has continued in force or been modified by successive changes." *Suth. Stat. Const.* § 283. All these new provisions and changes, and others hereafter to be noted, make manifest an intent which cannot be restrained or cut out by referring such general words as "no foreign insurance company," "every foreign insurance company," "any insurance company," and the like, to the antecedent words, "life, fire, and marine" insurance companies, as *ejusdem generis*, for they occur in new and distinct provisions, which by their express terms show a contrary intention. On this subject, *Sutherland on Statutory Constructions*, § 279, says: "In cases coming within the reach of the principle just illustrated, general words are read not according to their natural and usual sense, but are restricted to persons and things of the same kind or genus as those just mentioned. They

are construed according to the more explicit context. This rule can be used only as an aid in ascertaining the legislative intent, and not for the purpose of controlling the intention or of confining the operation of the statute within narrower limits than was intended by the lawmaker. It affords a mere suggestion to the judicial mind that, where it clearly appears that the lawmaker was thinking of a particular class of persons or objects, his words of more general description may not have been intended to embrace any other than those within the class. The suggestion is one of common sense. Other rules of construction are equally potent—especially the primary rule which suggests that the intent of the Legislature is to be found in the ordinary meaning of the words of the statute. The sense in which general words or any words are intended to be used furnishes the rule of interpretation, and this is to be collected from the context; and a narrower or more extended meaning will be given, according as the intention is thus indicated. To deny any word or phrase its known and natural meaning in any instance, the court ought to be quite sure that they are following the legislative intention. Hence, though a general term follows specific words, it will not be restricted by them when the object of the act and the intention is that the general word shall be understood in its ordinary sense."

Having ascertained that this rule restraining general words to antecedent specific words never controls, but yields to, clearly apparent legislative intent, and that, where the provisions of a prior statute are in conflict with those of a later one, the former must yield, how is it possible to say the words "at the date of such statement" can stand, and control the clearly expressed intent of the Legislature that every foreign insurance company shall procure from the Auditor a certificate to do business? Take the following clause found in section 2 of chapter 34: "No person shall act as agent or broker in the solicitation or application for a policy of insurance, for any company or corporation referred to in this act, without first procuring a certificate of authority from the Auditor." Can there be any doubt that it applies to agents of all insurance companies? Are not all classes of insurance companies, domestic and foreign, mentioned in the chapter? Are not life insurance companies, without any designation or limitation, mentioned in the very section in which the clause is found? All the provisions of the entire chapter relate to the same general subjects; they have sprung into being at different times within the past 40 years; they are or were acts in pari materia; they have been, from time to time, combined, arranged, altered, rearranged, and finally put into chapter 34 of the Code; and the legislative intent must be gathered from them all, and must prevail. The application of any one narrow rule of

construction, or a construction based upon a single clause, is not only violative of the rules of statutory construction, but injurious to the state and the public, as it will operate to deprive the state of its revenues, and expose the people to the fraudulent or dangerous practices and operations of unsound insurance companies.

I do not intend to say here that all insurance companies are required to have \$100,000 of capital, to enable them to do business in this state. That question is not presented. No application has been made to the Auditor for a certificate to do business, and the petitioner denies that it is required to have such certificate, or that its agents must obtain such certificates. If, on such application, the Auditor should refuse it on the ground of insufficiency of assets, the question may come before this court for decision. However it may be as to the requirement concerning assets or capital, I think there cannot be any doubt that all foreign insurance companies must pay taxes, are subject to the right and duty of the Auditor to examine into their conditions and affairs, and must procure the certificate of authority to do business in this state.

The provision for the issuance of a certificate by the Auditor authorizing insurance companies and their agents to do business in the state is found for the first time in the Code of 1868, it having been put in at the same time that the requirements as to statement and assets were inserted, and has ever since been retained in the statute, and no foreign insurance company of any kind or character is entitled to do business without such a certificate. Under the Code of 1868, no provision was made for any certificate to any domestic insurance company, and neither sections 2 nor 3 applies in any manner, shape, or form to anything but foreign insurance companies. In 1882, when the whole chapter was re-enacted, it was provided that, "upon any domestic company complying with what is required of it by the preceding section, the Auditor shall issue a like certificate thereof." This was not done without reason. Up until that time the Auditor was authorized to examine into the condition and affairs of foreign insurance companies only. The act of 1882 authorized him to examine into the condition and affairs of any insurance company doing business in this state. Here it appears, by express language, and the cutting out and insertion of words and clauses by way of amendment, that sections 2 and 3 were not intended to be limited to the companies mentioned in the first part of the section only. These changes made in the two sections in 1872-73 are retained in the statute as it is found in the Code to-day. Not only in express terms, but by the manifest intent of the Legislature, as read in the nature of the provisions made, and the whole course and history of antecedent legislation, it clearly appears that these two sections are designed to give to the Auditor supervision and control, according to the provisions of the sections,

over all insurance companies doing business in this state, of whatever size, character, or jurisdiction, for by section 2 he may not only inquire into the conditions and affairs of any insurance company doing business in this state, but, "whenever it shall appear to the satisfaction of said Auditor that the affairs of any such company are in an unsound condition, he shall revoke the certificate granted in behalf of such company and shall cause a notification thereof to be published in some newspaper of general circulation published at the capitol of this state, and the agent or agents of such company are, on and after such notice, required to discontinue the issuing of any policy or of the renewal of any previously issued," said section 2 was amended in important respects by chapter 221, p. 648, Acts 1872-73, and a new section added.

It may be said that this argument is without force, for the reason that section 3 says such companies may acquire a certificate from the Auditor, and not that they shall have such certificate. But if some other part of the statute says they shall not do business without it, the certificate becomes essential, and its acquirement a condition precedent to the doing of business. They are not compelled to take it, but they are not allowed to do business without it. This question is set at rest, in express and emphatic language, as to all insurance companies, domestic and foreign, in section 2, where it is said, "No person shall act as agent or broker in the solicitation or application for a policy of insurance, for any company or corporation referred to in this act, without first procuring a certificate of authority from the Auditor. Said certificate of authority must be renewed annually on the first day of January, or within sixty days thereafter."

Further light is thrown upon this question by the history of the provisions found in section 18 of chapter 34. That section came to life in 1868, along with the provisions as to the statement and the assets and the certificate to do business, and, like them, was confined to the officers and agents of foreign insurance companies, who were prohibited from making, renewing, or negotiating in this state any insurance or contracting for insurance on behalf of such company unless the company had complied with the fifteenth and sixteenth sections of the chapter, in reference to the appointment of an attorney and service of process. In the Acts of 1872-73, which struck the word "foreign" out of the first part of section 2, there was added something that was not contained in section 18, nor any other part of chapter 34, namely, that "no officer or agent of a foreign insurance company shall make, renew or negotiate in this state any insurance or contract for insurance on behalf of such company, or transact any business for such company, directly or indirectly, without first obtaining the Auditor's certificate of authority as required by law; and this applies to all persons engaged in any manner in soliciting

risks, issuing or obtaining the issue of policies, selling tickets of insurance, or otherwise doing the business of insurance, either by direct appointment from the company or as such agent." When the act of 1882 was passed in an effort to systematize the law on the subject, and when it was provided that certificates should be issued to domestic as well as foreign insurance companies, and the Auditor was authorized to examine into the condition and affairs of any insurance company, the provision added to section 2 by the Acts of 1872-73, and just quoted, was somewhat changed in its phraseology, namely, by striking out the word "foreign," and embodied in section 18 of the chapter where it is now found, and expressly made to include the agents of any insurance company doing business within this state.

Plainly, the certificate prescribed and authorized by section 3 of chapter 34 is designed for two purposes, in that it may be withheld or revoked on either of two grounds for the purpose of enforcing compliance with the statutory regulations. Whether, when first provided for, it was intended as a weapon or instrument by which to exclude unsound insurance companies, by way of protection to the public, for which purpose it is still used and intended, or to enforce the payment of taxes by foreign insurance companies, it is unnecessary to inquire. Certainly it is, by express provision of the statute, authorized to be used for the latter purpose, as chapter 34 now stands. By section 13, requiring payment of taxes by foreign insurance companies to the Auditor, it is further provided that, "should any company fail to make such payment and file such receipt, the Auditor shall not issue to such company the certificate mentioned in the third section of this chapter so long as such failure may continue." That is the only direct remedy to be found in the Code of West Virginia by which to enforce payment of the taxes by foreign insurance companies. There can be no remedy for the collection of taxes, except such as is given by the statute, and there is none other. Unless, therefore, foreign insurance companies are required to take such certificate, there is no remedy by which they can be compelled to pay the taxes. Are they not required to pay taxes? Does not the statute expressly require them to pay taxes? The answer to these questions is found in the provisions of the statute hereinbefore quoted, expressly requiring every foreign insurance company to pay taxes into the State Treasury. It is true that certain penalties are prescribed for failure to make the return and payment of the taxes, but that is not a remedy for the collection of the taxes. Conditions may be imagined under which an insurance company might well afford to pay the penalty fixed by the statute, rather than to pay the taxes. The taxes might be far in excess of the forfeiture for failure to pay. Surely the Legislature never intended to im-

pose a tax upon foreign insurance companies—every insurance company—without providing a remedy for the collection of the taxes.

Go back and trace up the history of the remedy for the collection of taxes from foreign insurance companies. Section 3 of chapter 33 of the Acts of 1864 required the return to be made and the tax to be paid at the same time, and section 4 of said chapter inflicted a penalty for failure to make the return or nonpayment of the tax. No certificate was required. The act of 1867 gave a remedy by action of debt to recover the penalty. The next legislation on the subject is found in the Code of 1868, c. 34, § 13. That section provided that at the time of making the return the tax should be paid by "foreign fire or marine insurance companies," and then says, "And at the time of making such return by any other insurance company, except life insurance companies, the officer or agent making the same shall pay into the Treasury of the state a tax of three per cent. on the amount of premiums mentioned in said return; and at the time of making such return by a life insurance company, the officer or agent making the same shall pay into the Treasury a tax of two per cent. on the amount of premiums mentioned in said return." The express language of this section did not require the withholding of the certificate for nonpayment of the tax. When this section was amended and re-enacted by the act of 1882, it required "any foreign insurance company" to pay the tax at the time the return was made, and then said that, if such company failed to make such payment, the Auditor should not issue to such company the certificate mentioned in the third section of the chapter so long as such failure continued. There, for the first time, the withholding of the certificate was made the remedy for the collection of the tax from foreign insurance companies; and such use has been from that time, and still is, continued.

The amendment of section 13 of chapter 34 of the Code of 1899, by chapter 107, p. 234, of the Acts of 1901, but confirms the views hereinbefore expressed. Prior to the amendment, section 13 required all foreign insurance companies, except "foreign live stock" insurance companies, to pay taxes at the rate of 2 per cent. on the gross amount of premiums. It and other sections were so amended as to require payment of taxes on the risks taken, instead of on the premiums, and as to classify the companies, and prescribe different rates of taxation, making fire companies pay one-fourth of a mill on each dollar, life and accident companies $1\frac{1}{2}$ mills on each dollar, and miscellaneous companies one-tenth of a mill on each dollar. This separation and classification, resulting in the naming of "accident" companies as subject to taxation, confirms the view that the Legislature itself considered such companies as included in the words "foreign insurance"

companies, used in the sections imposing taxation.

Further pursuit of this question of legislative intent is unnecessary. Every recurrence to the statutes, and re-examination of them, reveals changes by elimination of words, insertion of words, and rearrangements, all indicating the same thing, and setting the matter of legislative intent entirely beyond question. All insurance companies, domestic and foreign, except some that are expressly exempted, and possibly some mentioned in chapter 55 of the Code of 1899, and those provided for by chapter 28, p. 47, of the Acts of 1891, are clearly made subject to supervision, examination, and taxation, and must procure their certificates to do business from the Auditor. For domestic mutual fire insurance companies organized under chapter 55 of the Code of 1899, and title and trust companies provided for by chapter 28, p. 47, of the Acts of 1891, Code 1899, p. 1118, no express provision is made in those chapters; and whether chapter 34 of the Code applies to them is a question which does not arise here, and cannot be decided. Companies formed for mutual relief and for insuring lives on the assessment plan, mentioned in section 27a of chapter 55 of the Code, are classified into domestic and foreign companies. Whether the former are required to obtain certificates to do business is not expressly stated in that section, and whether it can be so construed, and whether they are covered by chapter 34, cannot be decided now. Foreign companies of that kind are expressly required to obtain certificates, and made subject to examination. Fraternal societies securing members through the lodge system, without agents, are expressly exempted by subsection 10 of section 27a of chapter 55, Code 1897. Chapter 28, p. 47, Acts 1891, providing for incorporation of title and trust companies, does not require of them such certificate, nor subject them to the examination prescribed for insurance companies. Foreign fidelity and guaranty companies are expressly required to comply with all provisions of law applicable to fire insurance companies.

Having concluded that foreign accident insurance companies must procure certificates from the Auditor, it remains to inquire whether they must also procure certificates under section 30 of chapter 54 of the Code of 1899. Apparently, that would be not only useless, but inconsistent, and likely to lead to confusion. One certificate to do business ought to suffice, it would seem; and, besides that, a company holding a certificate under chapter 54, and another under chapter 34, might have the latter revoked by the Auditor, and still claim the right to act under the other certificate. From these considerations, I conclude that a certificate from the Secretary of State is unnecessary, and need not be issued if demanded, as it would be,

alone, ineffectual to authorize an insurance company to do business in the state. Chapter 34 makes special provision for such companies, and is inconsistent with section 30 of chapter 54, which is general in its terms.

For the reasons stated, the peremptory writ ought to be refused, the *mandamus nisi* quashed, and the petition dismissed.

(119 Ga. 30)

GREEN v. FARRAR LUMBER CO. et al.

(Supreme Court of Georgia. Nov. 14, 1903.)

MECHANICS' LIENS—PAYMENTS TO BUILDING CONTRACTOR—APPLICATION—DUTIES OF OWNER.

1. Under the provisions of the Civil Code of 1895, § 2801, subd. 2, as amended by the act of 1899 (Acts 1899, p. 33; Van Epps' Code Supp. § 6176), the owner of property improved by a contractor is bound to see that money paid by him to the contractor is applied to claims for material or labor unpaid at the date of the payment to the contractor, or else he will be liable for such claims in the event the contractor fails to pay them. When no claims of lien have been filed, the materialmen and laborers may be paid in such order as the contractor determines. If a claim of lien has been filed and recorded, then the owner must see that such materialman or laborer is satisfied out of the money paid by him to the contractor, or he will be held liable for the amount in the event, upon suit brought, it should be determined that the claim was valid. The owner is not in any event required to pay more than the contract price of the improvement to materialmen and laborers, but it is incumbent upon him to see that payments to the contractor are to the full amount of the contract price appropriated to materialmen and laborers, if there are valid claims to this extent.

(Syllabus by the Court.)

Error from Superior Court, Whitfield County; A. W. Flite, Judge.

Action by L. W. Green against the Farrar Lumber Company and others. From the decree plaintiff brings error, and defendants assign cross-error. Reversed on error, and affirmed on cross-error.

R. J. & J. McCamy, for plaintiffs in error. W. C. Martin, W. M. Jones, and Shumate & Maddox, for defendant in error.

COBB, J. Mrs. Green filed an equitable petition against Jones and others, in which she alleged that she had made a contract with Jones to erect a dwelling house at a cost of \$1,100; that the house was completed, with the exception of several small items mentioned in the petition; that, after deducting what she had paid on the contract and the reasonable cost of completing the house, there was still due Jones \$183.40, which she asked that she might pay into court, in order that Jones and the other defendants might determine in what proportion they were entitled to the same. The case came on to be tried upon an agreed statement of facts, in which it was set forth that on July 18, 1901, Mrs. Green entered into a written contract with Jones, whereby he was to furnish all material and labor and do all the

work necessary to construct a dwelling house according to the plans and specifications referred to in the contract, the contract price to be paid weekly as the work progressed, Mrs. Green to retain 20 per cent. of the contract price as security for the completion of the house; that as the work progressed she paid to Jones, or to materialmen and laborers at his request, \$884.40 in the aggregate, all of this amount having been paid to Jones, except \$59.40, which was paid directly to parties who had lawful claims against Jones for material or labor; that during the progress of the work Jones paid to materialmen and laborers \$1,013; that when he quit work the house was in such a condition that it would cost \$52.71 to complete it according to contract; that none of the parties to whom either plaintiff or Jones had paid sums of money for work or material had filed liens upon the house and lot; that the actual cost of the house for work done and material furnished was \$1,632, or \$532 more than the contract price; that certain parties named have claims against Jones, amounting in the aggregate to \$510.78, for material furnished and work done, and have filed and recorded their liens in due time and in the manner prescribed by law. The judge held that Mrs. Green "was liable to all persons doing work on the house in question, or furnishing material therefor, for such proportionate part of the claim of each as the contract price, less the amount she was forced to pay to complete the job, bore to the amount which the building actually cost W. T. Jones, the contractor." In accordance with this holding he entered a decree against Mrs. Green in favor of the different parties who had filed liens for sums aggregating \$277.25. To this decree Mrs. Green excepted, on the ground that it required her to pay a sum exceeding the contract price of the house; and those in whose favor the decree was rendered excepted, on the ground that the court erred in not decreeing that they should be paid their claims in full.

The determination of this question depends upon what is the proper construction of Civ. Code 1895, § 2801, as amended by the act of 1899. See Acts 1899, p. 33; Van Epps' Code Supp. § 6176. Paragraph 1 of the section just referred to provides that all mechanics of every sort who take no personal security for work done or material furnished in improving real estate, and all contractors, materialmen, and persons furnishing material for the improvement of real estate, shall have special liens on such real estate. Paragraph 2, as amended by the act of 1899, provides: "When work done or material furnished for the improvement of real estate is done or may be furnished upon the employment of a contractor, or some other persons than the owner, then, and in that case, the lien given by this section shall attach upon the real estate improved, as against such true owner, for the amount of the work done, or

material furnished, unless such true owner shows that such lien has been waived in writing, or produces the sworn statement of the contractor, or other person, at whose instance the work was done, or material was furnished, that the agreed price or reasonable value thereof has been paid; provided, that in no event shall the aggregate amount of liens set up hereby exceed the contract price of the improvements made."

It is well settled that laws giving to a creditor a lien upon the property of his debtor, being in derogation of common law, are to be strictly construed against the creditor and liberally in favor of the debtor. If there are degrees of strict construction, certainly an act of the General Assembly which has for its purpose the giving of a lien upon property of one in favor of the creditor of another should be dealt with according to the strictest rules of strict construction. The purpose of this act is to protect materialmen and laborers for work done and material furnished to contractors who fail or refuse to pay. Under it the liability of the contractor to his materialmen and laborers is transferred to the person who employs the contractor. It would seem that, if the money due to the contractor by the owner is actually used by the contractor in discharging just and valid claims of materialmen and laborers, the purposes of the law have been accomplished. And in the light of the fact that the act expressly declares that in no event shall the claims of materialmen and laborers against the owner and contractor exceed the contract price of the improvement, if the owner can show that all amounts paid by him to the contractor have been appropriated to the payment of valid and just claims of materialmen and laborers, he should not be held liable for any additional sum, notwithstanding the contractor may be indebted to other materialmen and laborers; that is to say, the owner is bound for the contract price, and is bound to see that to the extent of this price the amounts paid to the contractor are appropriated by him to the payment of valid claims of materialmen and laborers; but if the aggregate claims of materialmen and laborers exceed the contract price, the loss should fall upon them rather than upon the owner. If the owner pays to the contractor any sum of money which is not applied to the discharge of claims of materialmen and laborers, then the owner would be liable to the extent of the amount not so applied, in the event any materialman or laborer had an unsatisfied claim against the contractor, and asserted his lien in due time and in the proper manner. Giving this law this construction requires that the word "liens" shall be construed to mean, not the perfected and recorded liens, but the inchoate or imperfect liens, or claims arising by the mere furnishing of material or the performance of labor. If at the time of the payment to the contractor no materialman or laborer has filed and recorded his

lien, the payment to any of the materialmen or laborers having claims of lien which might be perfected by the filing and recording of the liens may be made by the contractor; and if the money of the owner is used for this purpose, he will not be required to pay this amount again to any materialman or laborer. Certainly it was not intended that this law should have the effect of compelling materialmen and laborers to file liens before they could obtain payment out of the money paid the contractor by the owner. See Civ. Code 1895, § 3935. When none have filed and recorded liens, but all have claims of lien, the payment by the contractor out of money furnished him by the owner of any such claims will be sufficient to discharge the liability of the owner to any other materialmen or laborers to the extent of the amount paid. If any materialman or laborer has filed his lien, then payment to others in preference to him would be at the peril of the owner; and, if any such lien was finally reduced to judgment, it could be enforced against the owner. This construction of the act requires that materialmen and laborers must be paid to the extent of the contract price; that, whenever a materialman or laborer presents a claim within the time he would be compelled to file and record his lien, the discharge of his claim by the contractor will protect the owner to this extent against unsatisfied claims of other materialmen and laborers; but that, where claims of liens have been duly recorded, payments made to other materialmen and laborers with the money of the owner will be no reply to the claims of such materialmen or laborers so recording their liens. Applying the law so construed to the facts of the present case, there being no liens filed or recorded at the time Mrs. Green made various payments to the contractor, if these payments were in fact applied to the discharge of valid claims of materialmen and laborers at a time when they were entitled under the law to file and record their liens, then the amounts so paid are to be construed as part payment of the contract price, as against the claims of materialmen and laborers who filed their claims of lien subsequently to the payment, and this is true whether the material for which the lien was claimed was furnished at the time of the payment or the work for which compensation was asked was done at that time. The owner and contractor can pay materialmen and laborers in such order as they see proper until claims of lien are filed and recorded. Those who desire to obtain a preference have their remedy by promptly filing their claims of lien under the law. Even so construed, the law will operate harshly in a given case; but it seems to us that the act requires the construction we have given to it. The decree rendered by the judge was not in accord with these views, and the judgment on Mrs. Green's bill of exceptions must be reversed. Under the facts as they appear

in the present case, there was no error in refusing to decree the full amount of the unpaid claims, and therefore the bill of exceptions of the Farrar Lumber Company and others will be affirmed. Let the case be tried again in the light of what is herein laid down.

Judgment on one bill of exceptions reversed, on the other affirmed. All the Justices concur.

(119 Ga. 108)

COOK v. STATE.

(Supreme Court of Georgia. Dec. 8, 1903.)

MURDER—INDICTMENT—SUFFICIENCY—EVIDENCE

1. In an indictment for murder, which charges that the accused did kill and murder a named person by shooting him with a gun, from the effects of which shooting he died, it is not necessary to allege that the gun "was loaded with powder and leaden balls."

2. Where in such an indictment the given name of the person alleged to have been murdered is interlined, in lieu of another name which is "crossed out," and is in different ink and a different handwriting from the rest of the indictment, a demurrer upon the ground that, for this reason, the person alleged to have been murdered is not sufficiently identified, is without merit.

3. Where the courthouse of a county has been destroyed, an indictment found and returned into the superior court of such county, by a grand jury sitting in a building, located at the county site, which has been "provided" by the proper county authorities as the place for holding that term of such court, is not void, although such county authorities may not, "by order or resolution duly passed and placed upon their minutes," have "constituted and designated" such building as the place for holding the court, and may not have so "constituted and designated" it "by advertisement or in any other public and formal manner."

4. The verdict was amply supported by the evidence, and there was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Wilcox County; D. M. Roberts, Judge.

Earnest Cook was convicted of murder, and brings error. Affirmed.

E. H. Williams, for plaintiff in error. J. T. De Lacy, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

FISH, P. J. Cook was tried at the September term, 1903, of the superior court of Wilcox county, upon an indictment found at that term, charging him with the offense of murder. Before entering his plea of not guilty, he demurred to the indictment, and also filed a plea in abatement. The demurrer was overruled, and the plea in abatement was stricken upon motion of counsel for the state. The defendant excepted, pendente lite, to each of these rulings. The case proceeded to trial before a jury, and a verdict was rendered finding the accused guilty. He made a motion for a new trial, which was overruled, and he excepted.

1. Error is assigned in the bill of exceptions upon the overruling of the demurrer. One ground of the demurrer was that the indictment failed to allege that the gun with which it was charged the crime was committed "was loaded with powder and leaden balls." The indictment charged that the accused "did then and there unlawfully and with force and arms," etc., "kill and murder one Jonas Snell * * * by shooting said Jonas Snell with a gun, from the effects of which shooting said Jonas Snell died" on a named date. It was not necessary to allege that the gun "was loaded with powder and leaden balls." The charge was that the accused killed and murdered Snell by shooting him with a gun. By necessary implication the indictment charged that the gun was loaded, for one cannot shoot and kill another with an unloaded gun. The question made by the demurrer has long since been decided by this court adversely to the contention of the plaintiff in error. *Peterson v. State*, 47 Ga. 524; *Thomas v. State*, 71 Ga. 44.

2. Another ground of the demurrer was that the person alleged to have been murdered was not sufficiently identified in the indictment, in that the deceased was first designated in the indictment as John Snell, and again as Jonas Snell, "the name John being crossed out and the name Jonas being inserted in lieu thereof, and the said erasure and interlineation being in different ink and in a different handwriting from that of the remainder of said bill of indictment." There was no merit in this ground of the demurrer. It will be observed that the indictment was not demurred to upon the ground that it appeared, from the erasure and interlineation, to have been altered after it had been returned by the grand jury, but upon the ground that because of the erasure and interlineation the person alleged to have been murdered was not sufficiently identified. The name "John," being erased, was no part of the indictment, and the name "Jonas," being interlined therein in lieu of the name erased, was a part of the indictment. "If an indictment have an interlineation, and have a caret at the proper place where the interlined words are to come in, the court will take notice of the caret and read the indictment correctly." *Rex v. Davis*, 7 Car. & P. 319, 3 Bingham's N. C. 524. The indictment, as it appeared when the demurrer was presented, described the person alleged to have been murdered as "Jonas Snell," and only so described him. Hence there was no confusion or uncertainty in the indictment as to the name of the person alleged to have been murdered. This alone was sufficient reason for overruling the demurrer. But if the indictment had been demurred to upon the ground that it was defective because of an apparent alteration therein, we think the demurrer would have been properly overruled. The presumption would have been that the erasure and interlineation were made before

¶ 1. See *Homkide*, vol. 26, Cent. Dig. § 220.

it was indorsed by the foreman. *French v. State*, 12 Ind. 670, 74 Am. Dec. 229. "Interlineations or erasures in an indictment apparently made before it had been acted upon by the grand jury present no cause for quashing the same." *Jones v. State*, 99 Ga. 46, 25 S. E. 617.

3. The plea in abatement contained the following allegations: (1) That the indictment was not sufficient in law, "for the reason that the same was not found or preferred by the grand jury while assembled at the courthouse of said county, * * * or at any other place duly and legally constituted and designated by the commissioners of roads and revenues of said county by order or resolution duly passed and placed upon the minutes of their court previous to the finding of said bill of indictment." (2) That the building heretofore used as a courthouse, and wherein the superior court of the county had heretofore held its sessions, was sold by such commissioners and removed by the purchaser from its former site, leaving the county without a courthouse. (3) "That the building in the city of Abbeville, said county, known as Beaton's Hall, and in which the bill of indictment was found and returned into court by the grand jury, * * * was never constituted or designated as the place for holding the present term of the superior court of said county, by advertisement or in any other public or formal manner by said commissioners." (4) That "the chairman of the board of commissioners was duly authorized to procure suitable offices in some brick building in said city of Abbeville for the ordinary and clerk of the superior court," but "the said order made no provision for the procurement of a temporary courthouse or room in which the superior court * * * might hold its sessions," and the minutes of the board of commissioners "show no further official action in reference to said matter." (5) "That in view of the foregoing the said grand jury was without jurisdiction or authority to present or indict the defendant." Upon the argument of the demurrer it was admitted by counsel for the accused that Beaton's Hall was within 50 yards of the site of the former courthouse. It is evident that this was a purely technical plea; and we think it was properly stricken upon demurrer. The act of December 17, 1896 (Acts 1896, p. 50; Van Epp's Code Supp. § 6219), provides that if for any cause "it shall or may be impracticable to hold any session or sitting of any superior court in this state at the courthouse, or other place provided by law therefor, it shall and may be lawful to hold any such court, and any session or sitting thereof, at such place or places as the proper authorities of the county, in and for which such court is to be held, may from time to time provide for such purpose; provided, that no session or sitting of any superior or city court of this state can, under this act, be held at any place other than the county site

of the county of such court." The courthouse of Wilcox county, having been destroyed, the county authorities of that county had, under this act, the power to "provide," from time to time, the place at which any session or sitting of the superior court should be held. So, if, at the time this indictment was found and returned into court, the court and the grand jury were sitting at a place which had been "provided" by the county authorities for the holding of that term of the superior court, then the grand jury was not without jurisdiction to find the indictment. In our opinion the plea in abatement was defective, in that it did not allege that Beaton's Hall had not been "provided" by the proper county authorities as the place at which to hold the term of the superior court at which the indictment was found. Under the act of 1896 the county authorities had the power to provide the place at which the court should be held, and, for aught that appears to the contrary in the plea, they did provide the place where the court was held and the indictment was found. Indeed, it does not appear from the plea that the board of commissioners of roads and revenues did not, "by order or resolution duly passed," designate the place for the court to be held, for they might have done this and neglected to have such order or resolution entered upon their minutes. But we do not rest our decision here. We place it upon the broader ground that the county authorities might have procured and furnished Beaton's Hall for a temporary courthouse, and let it be known that they had "provided" it as the place for holding this term of the superior court of Wilcox county, without constituting and designating it as such "by order or resolution duly passed and placed upon the minutes of their court"; and, if they did so, such term of said court could have been lawfully held there. They could "provide" a place for the court to be held, without constituting and designating it as such "by advertisement or in any other public and formal manner." While it would probably be better for county authorities, exercising the power conferred upon them by this statute, to designate the place for holding the court by some formal order or resolution, and to give timely notice of the place provided "by advertisement or in some other public and formal manner," for the information of all persons interested, or likely to be interested, in the proceedings of the court to be held there, there is nothing in the statute which requires this to be done. The statute simply declares that it shall be lawful to hold the court "at such place or places as the proper county authorities * * * may from time to time provide for such purpose." The primary meaning of the word "provide" is, "To look out for in advance; to procure beforehand; to get, collect, or make ready for future use; to prepare" (*Webster's Dict.*); and it is evidently used in this sense in the

statute. There was nothing in the plea which negatived the idea that, previously to the assembling of the court at which the indictment was found, the proper county authorities had procured and prepared Beaton's Hall as the place in which the court should be held. We are clearly of opinion that the plea in abatement failed to show that the grand jury found the indictment while sitting at a place which had not been lawfully provided by the proper county authorities as the place for holding the September term, 1903, of Wilcox superior court.

4. The motion for a new trial contained only the general grounds. The verdict was amply supported by the evidence; consequently there was no error in overruling the motion for a new trial.

Judgment affirmed. All the Justices concur.

(119 Ga. 152)

CAMP, Deputy Sheriff, v. WILLIAMS BROS.

(Supreme Court of Georgia. Dec. 10, 1903.)

**EXECUTION—LEVY—PROPERTY IN CUSTODIA
LEGIS—LIABILITY OF SHERIFF—DISTRESS
WARRANT—RETURN—AMENDMENT.**

1. Where a distress warrant for rent, issued by a proper officer and regular upon its face, was levied by a constable upon personal property, after which levy a mortgage on the same property was foreclosed and the execution placed in the hands of the sheriff, the latter had no right or authority to levy the mortgage execution upon the property which by reason of the constable's levy was already in the custody of the law. *Fulghum v. Williams Co.*, 40 S. E. 695, 114 Ga. 643, 88 Am. St. Rep. 48.

2. Where in such case the sheriff did make an entry of levy on the execution, such entry was void, and the sheriff could not be held liable to the mortgagee for allowing the property to be taken away by the purchaser at the sale under the levy of the distress warrant.

(a) If for any reason the distress warrant was invalid, it was not the duty of the sheriff to resist it, but was the right of the mortgagee to do so.

(b) If the distress warrant was issued against an individual, and the whole property levied upon as his, when as matter of fact it was the property of a partnership of which the defendant was a member, the mortgage execution being against the partnership, it was not the duty of the sheriff to resist the distress warrant on that ground. Such resistance should be made by the other members of the firm or by the mortgagee.

(c) That the levy of the distress warrant was excessive was not a matter into which it was the duty of the sheriff to inquire.

3. If the written entry of levy of the constable did not describe and specify all of the articles levied upon, the sheriff, in the trial of a rule against him for not having sold the property under the mortgage execution, had a right to have the constable amend his levy so as to show what particular articles he had ac-

tually levied upon and sold. *McLeod v. Brooks Lumber Co.*, 26 S. E. 745, 98 Ga. 253.

(Syllabus by the Court.)

Error from City Court of Floyd County; John H. Reece, Judge.

Action by Williams Bros. against J. E. Camp, deputy sheriff. Judgment for plaintiffs, and defendant brings error. Reversed.

Denny & Harris, for plaintiff in error. Rowell, Copeland & Rowell, for defendants in error.

SIMMONS, C. J. Judgment reversed. All the Justices concur.

(119 Ga. 138)

GRIFFIN v. STEPHENS.

(Supreme Court of Georgia. Dec. 9, 1903.)

**ADMINISTRATOR'S SALE—PURCHASE BY ADMINISTRATOR—ACTION BY HEIR
—LIMITATIONS.**

1. A purchase by an administrator at his own sale of property belonging to the estate of his intestate is voidable at the option of an heir, upon his election within a reasonable time to set the sale aside.

2. An action by an heir against an administrator for realty, purchased at his own sale should ordinarily be brought within seven years from the date of the sale, unless the heir be under age or other disability, and in that event within seven years after the disability has been removed. *Candler v. Clarke*, 16 S. E. 645, 90 Ga. 550 (3).

3. It appearing from the petition that the sale at which the administrator purchased was made 34 years before the action was brought, and the plaintiff delayed for more than 18 years after attaining her majority before bringing suit for the land in dispute, and that the circumstances were such that with the slightest diligence she might, upon becoming of age, have ascertained that the administrator upon her father's estate was the purchaser of the land at his own sale, and no sufficient reason or adequate excuse for her failure to ascertain this fact being alleged, her election to set the sale aside was not made within a reasonable time (*Etheredge v. Slayton*, 19 S. E. 818, 94 Ga. 496 [1], and cases cited), and the petition was properly dismissed on demurrer. See *Word v. Davis*, 33 S. E. 691, 107 Ga. 780.

(Syllabus by the Court.)

Error from Superior Court, Milton County; Geo. F. Gober, Judge.

Action by C. J. Griffin against J. R. Stephens. Judgment for defendant, and plaintiff brings error. Affirmed.

G. B. Walker and J. P. Brooke, for plaintiff in error. T. L. Lewis, B. F. Simpson, G. I. Teasley, and D. W. Blair, for defendant in error.

FISH, P. J. Judgment affirmed. All the Justices concur.

¶ 1. See *Execution*, vol. 21, Cent. Dig. § 133.

¶ 1. See *Executors and Administrators*, vol. 22, Cent. Dig. §§ 579, 583.

(113 Ga. 187)

SIVELL v. HOGAN.

(Supreme Court of Georgia. Dec. 10, 1903.)

CONSIDERATION—SEALED INSTRUMENT—PRESUMPTION—UNILATERAL CONTRACT—VALIDITY—STATUTE OF FRAUDS—ENFORCEMENT.

1. At common law the general rule was that when a seal was affixed to an instrument there was a conclusive presumption of law that it was founded upon a consideration. Civ. Code 1895, § 3656, is merely a codification of the common law.

2. The fact that a party endeavoring to enforce a contract under seal and governed by the general rule may himself introduce evidence showing that the contract was in fact without consideration furnishes no reason for not enforcing it.

3. A unilateral contract within the statute of frauds becomes mutual and binding upon the party not originally bound, if he does any act which would take the transaction out of the operation of the statute so far as he is concerned; and where he thus becomes bound the other party cannot insist that the contract is invalid because the obligation of both was not originally in writing.

4. A. signed a writing agreeing to deliver to B. at a time and place stated and at a price named goods exceeding in value \$50. B. did not agree, in writing or otherwise, either at the time the above paper was signed or thereafter, to pay for the goods. The time for delivery passed without B. doing anything to bind himself to pay for the goods. After that date B. tendered the price and demanded the goods. *Held*, that B. could not maintain against A. an action for damages for failure to deliver at the time and place fixed in the writing. The right of B. to demand an enforcement of the obligation depended upon his doing some act prior to the time fixed for delivery which would bind him to pay in the event of delivery.

(Syllabus by the Court.)

Error from City Court of La Grange; F. M. Longley, Judge.

Action by T. M. Hogan against E. M. Sivell. Judgment for plaintiff, defendant brings error. Reversed.

Harwell & Lovejoy, for plaintiff in error.
Henry Reeves and J. R. Terrell, for defendant in error.

COBB, J. T. M. Hogan brought suit against E. M. Sivell for damages claimed to have resulted from the breach of an alleged contract of which the following is a copy: "Georgia, Harris Co. Know all men by these presents, that I have this day sold T. M. Hogan 10 bales of cotton averaging 500 lbs. each, at 7 cents per pound, basis middling threes (Inman's classification); said cotton to be delivered in Chipley, Ga. by Nov. 1st, 1900. Witness my hand and seal this 9th day of July, 1900. E. M. Sivell. [L. S.]" The defendant pleaded that the instrument sued on was without consideration, and wanting in mutuality, and therefore void; that the contract, if a contract at all, was a transaction in cotton futures, and that any promise made by the plaintiff to pay for the cotton was void under the statute of frauds. The petition alleged that the plaintiff tendered to the defendant on November 1, 1900, the agreed price of the cotton, and that the defendant refused to accept the money and de-

liver the cotton. The plaintiff died before trial, and his administratrix became a party in his stead. The court directed a verdict for the plaintiff, and the judgment overruling the defendant's motion for a new trial was reversed by this court. 115 Ga. 667, 42 S. E. 151. On the second trial the jury found for the plaintiff \$100, with interest from November 1, 1900. The defendant's motion for a new trial having been again overruled, he excepted.

1. At common law a seal imported a consideration, and, as a general rule, a contract under seal was not open to an attack that it was without consideration. 21 Am. & Eng. Enc. L. (1st Ed.) 898; 2 Bl. Com. (Cooley) *446; 6 Am. & Eng. Enc. L. (2d Ed.) 682, 762, 763, 798; 11 Am. Dig. (Cent. Ed.) § 406; Broom's Com. L. 284, 285. The rule, however, was subject to important exceptions. It did not apply to contracts in restraint of trade, or those in which the consideration was fraudulent or illegal. See 21 Am. & Eng. Enc. L. (1st Ed.) 899. Many states have abrogated the common-law rule. See 6 Am. & Eng. Enc. L. (2d Ed.) 798. The common-law rule was applied by this court in the cases of *Rutherford v. Baptist Convention*, 9 Ga. 54, and *Justices v. Smith*, 13 Ga. 502, and recognized in *Bruton v. Wooten*, 15 Ga. 570. There has never been any legislative enactment on the subject in this state. The first Code codified the common law with reference to this matter, and the provision of that Code has been incorporated into Civ. Code 1895, § 3656, which is as follows: "In some cases a consideration is presumed, and an averment to the contrary will not be received. Such are generally contracts under seal," etc. The case of *Smith v. Smith*, 36 Ga. 184, 91 Am. Dec. 761, was decided since the Code. The question there was whether the court would decree performance of an agreement of settlement of an estate. The agreement was under seal, and Judge Harris, in discussing the question of consideration, said: "Is the agreement on consideration? It purports to be under seal. The solemnity of a sealed instrument imports consideration, or, to speak more accurately, it estops a covenantor from denying a consideration, except for fraud." The cases of *Neil v. Bunn*, 58 Ga. 583, and *Simms v. Lide*, 84 Ga. 553, 21 S. E. 220, contain a bare intimation that the presumption of a consideration arising from the presence of a seal would be a rebuttable one, but in neither was the point made or passed upon. In none of these cases was the provision in the Code cited or referred to. The only case which deals directly with the section of the Code is *Weaver v. Cosby*, 109 Ga. 310, 34 S. E. 680, where Mr. Justice Lewis apparently treated the provision as meaning that a seal was merely *prima facie* evidence of a consideration, saying that an instrument under seal then being dealt with "raised a strong presumption of law" that it was founded upon a consideration. Inasmuch, however, as

It was held in that case that the evidence offered to rebut the presumption was not sufficient for this purpose, the decision is not to be regarded as binding authority for the proposition that the seal would not be conclusive upon the question of consideration. It is manifest, in our opinion, that the section of the Code is but a codification of the common law, and that the word "generally" used therein was inserted for the purpose of excluding the exceptions of the common law, as well as any other exceptions which might have been or might be made in the law of this state. An exception has been made in favor of deeds. Civ. Code 1895, § 3599. And before the adoption of the Code it was held by this court that failure of consideration could be pleaded to a note under seal. *Albertson v. Holloway*, 16 Ga. 377. We are not, however, prepared to adopt the reasoning upon which this decision was founded that the common-law rule related only to such instruments under seal as were known to the common law as "specialties," there being no such thing at common law as a promissory note under seal. We rather prefer the view of the Supreme Court of South Carolina that a seal raised a presumption of the existence of a consideration at the time the contract was entered into, but not that it had not since failed either wholly or in part; and that, while want of consideration could not be pleaded, failure might. See *Koster v. Welch*, 35 S. E. 435, and citations. Our Code defines a specialty to be a contract under seal. Civ. Code 1895, § 3634. We are not, however, to be understood as definitely committing ourselves at this time to the proposition that even want of consideration cannot be pleaded to a promissory note under seal, though this would seem to be true.

2. It is said, though, that this rule ought not to be applied in the present case, because the plaintiff undertook to show what was the real consideration, and from the evidence which she introduced it appeared that the contract was in fact without any consideration. We do not think the question of want of consideration was open to examination by either party. The presumption raised by the presence of the seal was one of law, and evidence by either party as to what was the real consideration was immaterial, unless it showed that the consideration was immoral or illegal. It is true that when the case was here before it was ruled that the particular evidence offered by the plaintiff to show a promise on the part of her intestate to pay for the cotton was not open to the objection that it was irrelevant. But the court was not then dealing with the question we have been discussing, but with the plaintiff's right to show a promise to take the cotton, so as to relieve against the unilateral character of the instrument sued on. The fact that the evidence was introduced on the last trial cannot be used by the defendant to rebut the conclusive presumption of the law that the contract was

founded on a consideration of some kind; and, there being nothing in the evidence to show that the consideration was not such a one as the law would recognize, the contract must be deemed to have been founded upon a sufficient consideration.

3. The contract, as it originally stood, was wanting in mutuality. See *Harrison v. Wilson Lumber Co.* (Ga.) 45 S. E. 730, and citations. It is well settled, however, that a unilateral contract, though required by the statute of frauds to be in writing, may be made mutual by the other party's doing some act which would take the case out of the statute so far as he is concerned. *Perry v. Paschal*, 103 Ga. 134, 29 S. E. 708, and citations; *Hammon on Con.* § 337; *Harriman on Con.* § 103; 1 *Parsons on Con.* (8th Ed.) *451; *Bishop on Con.* (Enlarged Ed.) § 87; *Broom's Com. L.* (9th Ed.) 300, 301. There was, however, in the present case, no evidence that Hogan had done anything which would take the case out of the statute of frauds, so far as he was concerned. It was sought to accomplish this purpose by the introduction of a paper of which the following is a copy: "Georgia, Harris County. Know all men by these presents, I have this day purchased of E. M. Sivell — bales of cotton, averaging five hundred (500) pounds each, at seven (7) cents per pound, basis middling threes (Inman's classification); said cotton to be delivered in Chipley, Ga. by Nov. 1st, 1900. Witness my hand and seal this —, 1900. [Signed] T. M. Hogan." This paper did not have the effect contended for by the plaintiff. It did not specify the number of bales of cotton, nor was it dated, nor was there anything on the face of the paper to connect it with the writing signed by Sivell. No other writing was offered to so connect it, and parol evidence would not have been admissible. See, in this connection, *Turner v. Lorillard Co.*, 100 Ga. 645, 28 S. E. 383, 62 Am. St. Rep. 345; *Augusta So. R. Co. v. Smith*, 106 Ga. 864, 33 S. E. 28. When the case was here before, it was ruled that it was necessary for the plaintiff to prove the allegations of the petition that her intestate actually tendered the price of the cotton to the defendant. On the second trial there was evidence of a tender on November 15th. It is insisted now that time was of the essence of the contract, and that, as no tender was made on November 1st, the date fixed by the contract for the delivery of the cotton, the plaintiff could not recover. Time is of the essence of a contract when the parties so stipulate, or when the nature of the contract is such as to indicate that this must have been their intention. *Harriman on Con.* § 285; *Sneed v. Wiggins*, 3 Ga. 94; 11 Am. Dig. (Cent. Ed.) §§ 938, 939. When Sivell signed the writing agreeing to deliver to Hogan 10 bales of cotton at Chipley, Ga., on November 1, 1900, Hogan was not bound to take and pay for the cotton, the contract being within the statute of frauds, and he not having signed any obligation in writing to do so. Consequently, as the matter

then stood, Hogan was not bound to take the cotton, even if Sivell had delivered it at the time and place agreed on. Sivell was bound by the terms of the contract so far as the statute of frauds was concerned, he having signed it. But, as Hogan was under no obligation to take and pay for the cotton, Sivell was at liberty to withdraw what at this stage of the transaction was a mere offer to deliver the cotton upon the terms stated in the writing, provided the withdrawal was communicated to Hogan before he did anything which would make him bound to accept the offer and pay for the cotton. But, if Hogan did any act which would take the case out of the statute of frauds so far as he was concerned, and make the contract binding upon him, then what was before a mere offer would become a contract binding upon both parties, and neither would be at liberty to withdraw without the consent of the other. Hogan might have become bound by a payment of the amount to Sivell before the time for delivery arrived. He might have become bound by signing a writing agreeing to pay the amount stipulated in the event the cotton was delivered at the time and place fixed. It is possible that he might have become bound to pay by a tender of the amount stipulated on the 1st of November, or by a continuing tender prior to that date. If he had become bound in any of these ways, it would then have been incumbent on Sivell to deliver the cotton at the time and place agreed on. Sivell, however, being chargeable with notice that at the time he signed the paper Hogan was not bound to take and pay for the cotton, he was under no obligation to complete his offer by delivery, unless Hogan did something to render himself bound to accept it. Consequently, unless Hogan did something to render himself bound, Sivell was not liable to an action for damages for a failure to deliver the cotton at the time and place stated in his offer. By signing the paper Sivell placed himself in a position where he was required either to withdraw his offer before Hogan did something to render himself bound, or to deliver the cotton and complete the offer in the event Hogan became bound to an acceptance. In this sense time was of the essence of the contract, and, if Hogan did nothing on or before November 1st to render himself bound, Sivell had a right to treat the transaction as at an end.

Under this view of the case, the verdict was contrary to the evidence, and the court should have granted a new trial. The foregoing discussion covers all of the assignments of error with which it is necessary to deal.

Judgment reversed. All the Justices concur.

(119 Ga. 253)

HALL v. GREENE COUNTY.

(Supreme Court of Georgia. Dec. 12, 1908.)

COUNTY TREASURER—COMMISSIONERS.

1. A county treasurer is not entitled to commissions for receiving and repaying money bor-

rowed by the county to meet ordinary current expenses.

(Syllabus by the Court.)

Error from Superior Court, Greene County; H. M. Holden, Judge.

Affidavit of illegality filed by George A. Hall against the county of Greene. Judgment for defendant, and plaintiff brings error. Affirmed.

Jas. Davison, for plaintiff in error. Saml. H. Sibley and Jas. B. Park, for defendant in error.

CANDLER, J. This case arose upon the trial of an affidavit of illegality filed in Greene superior court by Hall, formerly treasurer of Greene county, to arrest the levy of a fl. fa. against him issued by the county commissioners, and based on an alleged indebtedness by Hall to the county in his official capacity as treasurer. The case was referred to an auditor, who found, on an agreed statement of facts, that Hall was indebted to the county in the sum of \$332.83. Both the plaintiff and the defendant filed exceptions to the auditor's report, but at the hearing the presiding judge overruled all the exceptions, and sustained the report in full. Hall excepted. Under the agreed statement of facts, the sole question presented for our determination is, was the county treasurer entitled to commissions for receiving and paying out money borrowed by the county commissioners to pay court and jail expenses, expenses of working a chain gang on the public roads, and other current expenses; the money having been borrowed "to be repaid within less than one year, from the tax of each year, and the borrowed money each year [being] less than the tax for such years." The auditor found, in effect, that the purpose for which the money was borrowed was not to meet casual deficiencies in the revenues of the county, and that the treasurer was therefore not entitled to the commissions claimed. The meaning of the expression "casual deficiencies" is no longer open to question in this state. In the case of *Lewis v. Lofley*, 92 Ga. 804, 19 S. E. 57, the present Chief Justice, speaking for this court, said: "We cannot conceive how a debt incurred for the building of a courthouse can be regarded as a debt incurred 'to supply casual deficiencies of revenue.' The word 'casual' means that which happens by accident or is brought about by an unknown cause; and we think the framers of the Constitution, in using this language, meant some unforeseen or unexpected deficiency, or an insufficiency of funds to meet some unforeseen and necessary expense." This case has been frequently referred to, and this court has consistently adhered to the doctrine there laid down. In the case of *Commissioners of Habersham County v. Porter Mfg. Co.*, 103 Ga. 614, 30 S. E. 547, the ruling was, upon a request for a review, expressly reaffirmed. It was also discussed

in the cases of *City of Dawson v. Dawson Waterworks Co.*, 106 Ga. 703, 32 S. E. 907, and *Dyer v. Erwin*, 106 Ga. 848, 33 S. E. 63; and, as before stated, the ruling made has never been overruled.

There is no authority whatever in our law authorizing county authorities to make any such loans as the one disclosed by this record. The treasurer was not bound to receive any moneys obtained in this way; and, if he did, and the funds had been misappropriated by him, the securities on his bond would not have been liable therefor. Having received and paid them out, however, he would be accountable for them, although no liability would arise against his sureties. *Mason v. Commissioners*, 104 Ga. 35, 30 S. E. 513. In the present case the treasurer did receive the borrowed money. He paid it out for the current expenses of the county, and at the end of the year, when the taxes came in, paid off the loan; but, in handling the money derived from the loans, he was not handling county funds, within the meaning of the Political Code of 1895, § 458. If he had taken commissions out of the borrowed money at the time it was turned over to him, the loss would have been that of the lenders, and not the county. Parties loaning money to counties for purposes such as the ones for which the money in the present case was loaned cannot collect back any part of it which does not go to its proper use. The treasurer here did not attempt to retain his commissions at the time of receiving the borrowed money or at the time of paying it back, but sought to take it out of the regular county funds at the time of turning over his office to his successor. In *Wood v. Commissioners*, 60 Ga. 558, it was held: "On money borrowed without authority of law, whether by the ordinary, the county commissioners, or the county treasurer, no commissions can be retained by the county treasurer out of the county funds; but retaining commissions out of such borrowed money affects the lenders, and not the county, as the county, in the absence of a statute to authorize borrowing, is not bound for any borrowed money which is not applied to its use. If the treasurer has used county funds proper, either to compensate himself for handling money illegally borrowed, or to repay the lenders beyond the sums actually expended for the benefit of the county, he is liable for any deficit thus occasioned." It was not the intention of the General Assembly, in fixing the compensation of county treasurers, to have the public moneys pay toll more than twice. To permit the treasurer to take out 2½ per cent. on \$1,000 borrowed to pay current expenses of the county, as commissions on money received, another 2½ per cent. as the \$1,000 is expended, another 2½ per cent. as the taxes come in from the public, with which the loan is repaid, and still another 2½ per cent. when the \$1,000 is repaid to the lender, would be

to tax the same fund four times with payment of commissions, when it is plainly the intention of the law that he should receive commissions only twice—when the money, the lawful income of the county, is received, and when it is paid out.

Judgment affirmed. All the Justices concur.

(119 Ga. 219)

HORTON & SMITH v. HARVEY.

(Supreme Court of Georgia. Dec. 12, 1903.)

NEGLIGENCE—INJURY TO LICENSEE.

1. One who hauls his cotton to be ginned at a public ginnery is not a mere licensee, and may recover for damages when injured on the premises by the owner's negligence, even though they are not willfully and recklessly inflicted.

(Syllabus by the Court.)

Error from City Court of Floyd County; John H. Reece, Judge.

Action by W. E. A. Harvey against Horton & Smith. Judgment for plaintiff, and defendants bring error. Affirmed.

The plaintiff's petition alleged that defendants were the owners of a public gin, to which he carried a load of seed cotton; that, after it had been ginned and packed, he drove his wagon to the platform erected by defendants, to receive the bale, which weighed about 500 pounds; that defendants, having no proper machinery for lifting the cotton, undertook to load it upon the wagon by hand, shoving it off the ginnery platform to the wagon with great force and violence, so that, by reason of this violence and the sudden motion given to the bale, it was thrown against plaintiff, knocking him off the wagon and breaking his leg. The defendants filed a demurrer, which being overruled, they excepted.

Geo. A. H. Harris & Son, for plaintiffs in error. Fouché & Fouché and M. B. Eubanks, for defendant in error.

LAMAR, J. The plaintiff was not a mere licensee, but, having been invited to bring his cotton to be ginned at defendants' public ginnery, could recover damages for injuries occasioned by defendants' negligence while he was on the premises, even though the act was not reckless, willful, or grossly negligent. *Atlanta Cotton Seed Oil Mills v. Coffey*, 80 Ga. 145, 4 S. E. 759, 12 Am. St. Rep. 244. While the petition was meager in its statement of facts, the charge that the cotton was shoved from the ginnery platform onto the wagon with great force and violence, thereby throwing it against the plaintiff and breaking his leg, set out a cause of action as against a general demurrer. The fact that there was no crane and no rope and tackle for lifting the cotton, and that the plaintiff knew thereof, and by the exercise of ordi-

¶ 1. See *Negligence*, vol. 37, Cent. Dig. § 42.

nary care could have avoided the injury, were matters for defense. *Archer v. Blalock*, 97 Ga. 719, 25 S. E. 391.

Judgment affirmed. All the Justices concurred.

(119 Ga. 88)

BROWN v. GEORGIA, C. & N. RY. CO.

(Supreme Court of Georgia. Nov. 28, 1903.)

DISMISSAL—DEFECTIVE PETITION—CARRIERS—DEPOT BUILDINGS—BREACH OF CONTRACT.

1. The court at the trial may dismiss a petition, if so defective that after verdict a motion in arrest of judgment would be sustained, but it cannot consider special demurrers not filed at the appearance term.

2. A railroad company is only bound to keep open its waiting room for a reasonable time before and after the departure of trains, and ticket holders permitted to remain therein during the night have no cause of action for cold and discomfort suffered because the same is not kept heated and lighted.

3. It was alleged that the plaintiff bought, from the agent of a railroad company, tickets for himself and wife, entitling them to transportation on a particular train soon due to stop at the station; that they stood in the rain, alongside the track, waiting for such train, which passed without stopping, thereby occasioning a breach of the contract of carriage; that there were no accommodations available except in the station house, in which they were permitted to remain for the night; and that, by reason of the exposure and the condition of the waiting room, the plaintiff's wife was rendered ill, and he thereby deprived of the value of her services, and put to expense for medical attention. Such a petition set forth a cause of action.

4. The gist of such action was not the failure to furnish and maintain a comfortable depot building, but for consequences arising from exposure incident to the failure to transport, and in spite of the plaintiff's use of the waiting room, which was the only means available to lessen the damages.

(Syllabus by the Court.)

Error from City Court of Elberton; P. P. Proffitt, Judge.

Action by A. D. Brown against the Georgia, Carolina & Northern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

In his suit against the Georgia, Carolina & Northern Railway Company, Brown alleged that on February 24, 1902, he carried to the defendant's station at Heardmont a quantity of household goods to be shipped to McCormick, S. C., on the next train; that the agent informed him that he had no scales on which to weigh them, but would send them forward on the next day; that he thereupon bought for himself and wife two tickets from Heardmont to Calhoun Falls, telling the railroad agent that they would go on the local freight train (which also carried passengers) due at Heardmont about 5 o'clock p. m., which was accustomed to stop there for both passengers and freight, and always did stop when signaled; that the train arrived after dark; that it was cold and raining; that petitioner and his wife left the station building and stood alongside the track, prepared to enter

the car when the train stopped; that when signaled by the agent the train slowed up, but failed to stop; that petitioner and his wife were wet and chilled, and, because it was impossible to obtain lodgings or accommodation in the village, they were compelled to remain in the station room all night, and until the next day at 12 o'clock, when the first train stopped for passengers; that the weather was excessively cold, the rains heavy and continuous, and the waiting room uncomfortable; that, although petitioner did his best to keep up a fire with such wet wood as he could find, they suffered severely, and his wife was made seriously sick, and has never recovered her health; that the furniture was not shipped for more than a month, and by reason thereof his wife's illness was aggravated. No demurrer was filed, but at the trial term the defendant moved to dismiss because no cause of action was set forth. That motion was sustained, and subsequently, over plaintiff's objection, the grounds of the motion were set out in a written demurrer, which was sustained, several days after the dismissal.

Geo. C. Grogan and I. O. Van Duzer, for plaintiff in error. Jos. N. Worley, Erwin & Erwin, and H. J. Brewer, for defendant in error.

LAMAR, J. Railroad companies are bound to provide reasonable accommodations at their stations for passengers who are invited to travel on their roads, and will be liable for such damages as proximately flow from a violation of this duty. The character of the accommodations required, of course, varies with the amount of business done at a particular point, and the company might be relieved altogether of the obligation to furnish depots at flag stations, or points where trains stop for the accommodation of occasional travelers. But even where waiting rooms are maintained, the company is only required to keep them open for a reasonable time before and after the departure of trains. *Central Ry. Co. v. Motes*, 117 Ga. 923, 43 S. E. 990; *Civ. Code* 1895, § 2189; *Caterham R. Co. v. London Ry.*, 87 Eng. C. L. R. 409; *Boothby v. Grand Trunk R. Co.* (N. H.) 34 Atl. 157; *Texas & Pac. R. Co. v. Cornelius* (Tex. Civ. App.) 30 S. W. 720; *Texas & Pac. R. Co. v. Pierce* (Tex. Civ. App.) 30 S. W. 1122; *Weightman v. Louisville, N. O. & T. Ry. Co.*, 70 Miss. 563, 12 South. 586, 19 L. R. A. 671, 35 Am. St. Rep. 660. The allegation that the room was not kept comfortable during the entire night, therefore, of itself gave rise to no cause of action. The agent having, however, sold tickets entitling plaintiff and his wife to be transported on a particular train, they became passengers and entitled to their rights as such, and, when the train passed without stopping, there was a breach of the contract. But they could not stand alongside the track until the next train

arrived and recover damages for the results of the exposure, for they were bound to lessen their damages (Civ. Code 1895, § 3802) and to seek the most available shelter. If the waiting room was, as alleged, the only place where they could stay for the night, and if, in spite of utilizing such means as were feasible, the plaintiff's wife was made sick and her services lost, the husband is entitled to a verdict, not for the failure to keep the waiting room heated after hours, but for the damages which resulted from the company's failure to transport on the train agreed. The condition of the waiting room is not the gist of the action, but is set out to show that damages resulted from the failure to convey, notwithstanding the fact that the parties took advantage of such accommodations as were at hand. Where a passenger is left at an improper place, in consequence of which he suffers injury, the same rule applies as in cases where a passenger has been carried past his destination. In either instance he is entitled to recover the damages naturally and proximately flowing therefrom. *Caldwell v. R. & D. R. Co.*, 89 Ga. 550, 15 S. E. 678 (2).

The petition should not have been dismissed. It set out a cause of action, and after verdict thereon a motion in arrest would not have been granted. The special demurrers, not having been filed at the first term, could not have been considered (Civ. Code, 1895, §§ 5046, 5052), and for that reason the question as to what is a proper measure of damages for a failure to transport person or property is not presented by this record.

Judgment reversed. All the Justices concur.

(119 Ga. 128)

EVERETT v. TABOR et al.

(Supreme Court of Georgia. Dec. 8, 1903.)

INJUNCTION—COMPLAINT—NECESSITY—CONFLICTING EVIDENCE—JUDGMENT OBTAINED BY FRAUD.

1. A complainant seeking extraordinary equitable relief must make a case which does not rest upon doubtful or disputed principles of law, for an injunction will not usually be granted where his right thereto is not clear.

2. In all cases the complainant must establish the existence of the fraud or fact on which his right to interlocutory relief is based, and show the necessity for injunction, in order to preserve rights or to prevent irreparable injury.

3. A denial by the defendant of the facts set up in the equitable petition, or a conflict in the evidence, does not necessarily require a refusal of interlocutory relief.

4. There should be a balance of conveniences in such cases, and a consideration whether greater harm might be done by refusing than by granting the injunction.

5. Where the evidence is conflicting, and it appears that the injunction if granted would not operate oppressively to the defendant, but that if denied the complainant would be practically remediless in case he should thereafter establish the truth of his contentions, it would be strong reason why the chancellor should ex-

ercise his discretion so as to preserve rights by preserving the status.

6. Equity will not only relieve against a judgment obtained by fraud, but against one which has been properly rendered where the losing party has a meritorious defense, and is prevented by the fraud of the other from entering an appeal or making a motion for a new trial.

7. Where the evidence is conflicting, the defendant is solvent, and there is nothing to show that the complainant will suffer irreparable damages by reason of the refusal to grant the injunction, this court will not interfere with the chancellor's discretion in denying the same.

(Syllabus by the Court.)

Error from Superior Court, Gilmer County; Geo. F. Gober, Judge.

Action by J. S. Everett against T. H. Tabor and others. Judgment for defendants, and plaintiff brings error. Affirmed.

In his equitable petition Everett alleged that Tabor had sued him in the justice's court; that he had a meritorious defense, which could only be established by the introduction of a mortgage; that, having failed to give a proper "notice to produce," he was unable to make out his defense, but confessed judgment, intending to appeal; that he had the appeal papers and bond duly prepared, and, within the time allowed by law, presented them to the justice, at the same time tendering the cost; that the justice notified him that Tabor had paid the cost and withdrawn the case; that the justice had by Tabor's direction made the following entry on the docket: "T. H. Tabor withdraws suit, and pays costs of suit to superior court;" that the justice thereupon told Everett that the latter could do nothing more until Tabor commenced his suit in the superior court; that, relying on this statement, Everett took no further action; that later, within the time allowed for entering the appeal, Tabor or his attorney gave similar information to Everett's attorney; that several months thereafter Tabor caused an execution to issue on the judgment previously rendered, and had a levy made. It appears that thereupon Everett filed an affidavit of illegality on the ground that "there was no legal judgment as the foundation of issuing said fi. fa., nor was there any judgment at the time of issuing the same." This affidavit was dismissed, and another of like character subsequently filed, which was in turn dismissed, and this petition for injunction filed. Tabor demurred, and answered, denying that he ever withdrew or dismissed the suit, or that he authorized any one else to do so for him, before or after judgment, but has at all times insisted that he has a valid judgment against Everett, and has in good faith tried to bring about a sale of the property, but has been prevented by the affidavits of illegality, which he charges were made for the purpose of delay. He denied that he had had any conversation with Everett or Everett's attorney, or the justice, about withdrawing the case or about appealing the same, or that he did anything to hinder or prevent Everett

from appealing the case, or that he ever prevented him from making any defense, or practiced any fraud to prevent him from doing so, or that he authorized the justice to "withdraw" or dismiss the case; and claimed, if Everett did not appeal, it was his own negligence, or he really had no intent to appeal. The judge refused the injunction, and Everett excepted.

N. A. Morris, A. N. Edwards, and Gordon B. Gann, for plaintiff in error. J. P. Perry and D. W. Blair, for defendants in error.

LAMAR, J. An injunction will not usually be granted where a complainant's right is not clear. He should state by his pleadings a case which does not rest upon doubtful or disputed principles of law. This he did in the present case. For equity will not only relieve against a judgment obtained by fraud, but against one which has been properly rendered, where the losing party has a meritorious defense, and is prevented by the fraud of the other from entering an appeal or making a motion for a new trial. *Markham v. Angier*, 57 Ga. 43; *Marchman v. Sewell*, 93 Ga. 653, 21 S. E. 172; *Civ. Code 1895, §§ 4913, 4915*; *Thompson v. Laughlin*, 91 Cal. 313, 27 Pac. 752; *Sanderson v. Voelcker*, 51 Mo. App. 333.

But the defendant insists that the injunction was properly refused, because the defendant denied the allegations in the bill. There are, however, exceptions to the rule that an injunction will be refused where the defendant's answer swears off the equity. *Holt v. Bank of Augusta*, 9 Ga. 554; *Coffee v. Newsom*, 8 Ga. 449; *Cottle v. Harrold*, 72 Ga. 831 (7). For while it is true that the complainant must always establish, to the reasonable satisfaction of the chancellor, the existence of the fraud, or the fact on which the right is predicated, this does not mean that he must establish it beyond controversy. A denial by the defendant, or a conflict in the evidence, does not necessarily require a refusal of the interlocutory relief. In all such cases the chancellor must exercise a sound discretion. *Civ. Code 1895, § 4920*. If the evidence for the complainant is weak, and that for the defendant strong, the injunction could be refused. If that for the complainant is strong, and that for the defendant weak, or even if it be in practical equipoise, the injunction should be granted or refused according to the peculiar circumstances of the particular case. There should be a balance of conveniences, and a consideration whether greater harm might result from refusing than from granting the relief prayed for. If the grant of an injunction in such a case would operate oppressively to the defendant, the restraining order should be refused; but if it appears that if the injunction were denied the complainant would be practically remediless in the event he should thereafter establish the truth of his contention, it would be

strong reason why interlocutory relief should be granted. The delay to one party would not counterbalance the irreparable injury which might flow to the other if the chancellor made a mistake in passing on the disputed issue of fact. Under such circumstances it would generally be a wise exercise of discretion to preserve the rights by preserving the status. But, giving full effect to those principles, a reversal is not demanded. For although the solvency of a plaintiff in *fi. fa.* is by itself no reason why the enforcement of a fraudulent judgment should not be enjoined (*Sanderson v. Voelcker*, 51 Mo. App. 328 [3]), yet where the fact of fraud is squarely denied, and the holder of the execution is not alleged to be insolvent, the refusal to grant the injunction does not dismiss the bill, nor prevent the bringing of other appropriate action for damages. No irreparable injury will result to the complainant, if he can eventually satisfy a jury of the invalidity of the judgment. *Sharpe v. Kennedy*, 51 Ga. 257, 263; *Farmers' Bank v. Ruse*, 27 Ga. 398.

Judgment affirmed. All the Justices concur.

(119 Ga. 133)

TATE v. GAIRDNER.

(Supreme Court of Georgia. Dec. 9, 1903.)

ADMINISTRATOR—STATED ACCOUNT—OBJECTIONS—HEARING.

1. A party objecting to a stated account must surcharge or falsify.
2. When an account has become stated, the party rendering the same is bound thereby, unless he shows that there has been a clear and palpable mistake in the account, or an omission of items is clearly and satisfactorily established; and this must be done to the same extent and with the same degree of certainty that courts of equity require in order to correct mistakes.
3. The returns of executors, administrators, or other trustees to the ordinary become, after approval by him, stated accounts within the meaning of the rules above announced.
4. On the hearing of a citation for a settlement before the ordinary against an administrator or executor, neither the ordinary nor the superior court on appeal has authority to allow the defendant credit for items accruing after the last return, unless such items are specially pleaded in the answer.
5. While the rulings of the judge on the exceptions of fact, which were complained of in the numerous grounds of the motion for a new trial, were in the main correct, the rulings complained of in three grounds were erroneous, and require a reversal of the judgment, which will set aside the entire verdict, in the absence of a direction to the contrary. It not being clear that under the peculiar facts such direction would be in the interest of justice, it will not be given.

(Syllabus by the Court.)

Error from Superior Court, Elbert County; H. M. Holden, Judge.

Action by Lavonia Gairdner, administratrix, against E. B. Tate, administrator, for an accounting. Judgment for plaintiff, and defendant brings error. Reversed.

I. O. Van Duzer and O. P. Harris, for plaintiff in error. Jos. N. Worley, for defendant in error.

COBB, J. H. K. Gairdner and J. H. Grogan were the executors of the will of George W. Dye. Both having died, Tate was appointed administrator with the will annexed of Dye's estate. Tate cited Mrs. Lavonia Gairdner, as administratrix of the estate of H. K. Gairdner, and the executors of Grogan, before the ordinary for the settlement of the accounts of the executors of Dye. The only allegation in the petition upon which the citation was based as to the liability of the executors was in the following words: "There still remain in the estates of said H. K. Gairdner and John H. Grogan assets belonging to the estate of said Geo. W. Dye, deceased, to which your petitioner is entitled, that he may proceed to administer the estate of the said Geo. W. Dye." The executors of Grogan answered the citation, denying the allegation above referred to, and also denying that the estate of their testator was in any manner liable for waste, mismanagement, interest, or funds of any kind. The administratrix of Gairdner answered, alleging that she had no funds or assets in her hands belonging to the estate of Dye which should be turned over to the administrator with the will annexed; and especially pleaded an alleged settlement which had been made between her intestate and the legatees of Dye as an accord and satisfaction of all claims or demands which the estate of Dye had against the estate of her intestate. The ordinary rendered a judgment in favor of the defendants, and Tate appealed to the superior court. The case came on for trial in the superior court and resulted in a verdict in favor of the plaintiff. The case was brought to this court upon a bill of exceptions assigning error upon the refusal of the judge to grant a new trial, and the judgment was reversed. See *Gairdner v. Tate*, 110 Ga. 456, 35 S. E. 697. In the opinion in the case just referred to Mr. Chief Justice Simmons suggested to the presiding judge that, as the case involved complicated and intricate matters of account, it might with propriety be submitted to an auditor. Adopting the suggestion thus made, the case was referred to an auditor, who reported that the executors were due the estate of Dye \$525.58. To this report Tate and Mrs. Gairdner each filed exceptions, both of law and fact. No exceptions appear to have been filed by the executors of Grogan. The exceptions of law were sustained by the court. On the exceptions of fact filed by the parties the court directed a verdict. The jury were directed to find in favor of certain exceptions filed by the plaintiff as well as by the defendant, and against certain exceptions filed by the plaintiff as well as by the defendant. The plaintiff made a motion for a new trial upon the general grounds, and by amend-

ment added several grounds, in which error is assigned generally upon the order directing a verdict on the several exceptions of fact filed by the plaintiff and defendant, and also specifically assigning error upon the direction of a verdict against certain exceptions of fact filed by the plaintiff and in favor of certain exceptions of fact filed by the defendant. The motion for a new trial was overruled, and a bill of exceptions was sued out, in which error is assigned upon the judgment overruling the motion for a new trial, and also upon the judgment sustaining certain exceptions of law filed by the defendant, to which ruling exceptions *pendente lite* had been duly filed.

1-3. It is a well-settled rule in equity that one who objects to a stated account must surcharge or falsify; that is, must allege an omission in the account, or deny the correctness of some or all of the items rendered. Civ. Code, § 3994. An account rendered by an administrator or executor to the ordinary is a stated account, within the meaning of this rule; and when such an account is attacked in equity the burden of proof is upon him who surcharges or falsifies, and consequently the allegations in the bill must be sufficient to admit evidence for that purpose at the trial. *Shorter v. Hargroves*, 11 Ga. 658 (5). Upon a citation before the ordinary for a settlement the court of ordinary has the same jurisdiction over the matters of the account of the executor or administrator as a court of equity would have upon a bill for a settlement, and the rule in equity above referred to has been held applicable to the pleadings upon which the settlement before the ordinary is to be based; it having been distinctly ruled that: "Where an attack is made upon returns which have been examined and allowed by the court of ordinary, it is incumbent upon the party who attacks them to show wherein they are unlawful, and in his pleading he should point out specifically the items of the returns on which the attack is made, and as to each should disclose the cause or ground of the attack." *Bonner v. Evans*, 89 Ga. 659, 15 S. E. 907 (1). It is true that in the case just cited the account of the guardian of a lunatic was involved, but the principle is equally applicable to accounts of executors, administrators, and other trustees who are required by law to make returns to the ordinary. If the party against whom the account is rendered is bound to specifically attack the items of the account before he will be heard to make objection to the same, for equal, if not greater reason, the party rendering the account, which has become an account stated, should be held bound thereby until some defect is pointed out in the account by a specific objection thereto. And such has been held to be rule in this state. *Trippe v. Wynne*, 76 Ga. 200 (2a). While authorities in other jurisdictions are not in accord on this subject, there is authority in

harmony with the decision just cited. See *Warner v. Myrick*, 16 Minn. 91 (Gil. 81); *Moody v. Thwing*, 46 Minn. 511, 49 N. W. 229; *Hendy v. March*, 75 Cal. 566, 17 Pac. 702; *St. Louis Bottling Co. v. Bank*, 8 Colo. 70, 5 Pac. 800; *Barker v. Hoff*, 52 How. Prac. 382; *Beach v. Kidder* (Sup.) 8 N. Y. Supp. 587; 1 Enc. P. & P. 89. See, also, generally, on the subject of accounts stated, 1 Cyc. pp. 364-401. If such is the rule in reference to accounts stated generally, certainly this rule would be applicable to a stated account like the return of an administrator or executor to the ordinary, which has been approved by the court as correct, and which is declared by statute to be prima facie correct as to all persons interested therein. If a creditor or heir or legatee is bound by the account until he points out specifically the incorrect or omitted items, certainly the executor or administrator who renders the account should be likewise bound. Applying this rule in the present case, we find no specific attack made upon the returns of the executors, either by the plaintiff or the defendants. The plaintiff charges generally that the estates of the executors are liable to the estate that he represents. The representatives of the deceased executors deny this only in general terms, and make no specific attack upon the returns of the executors, or any item therein. Before the plaintiff will be allowed to attack the returns, he must allege in his petition that some of the items are incorrect, setting forth the items, as well as the grounds of attack upon them; or he must allege that there has been an item or items omitted from the returns, which should form a part thereof, setting forth specifically what such items are, so that the defendants may be put on notice of the claims made against them. Before the executors who made the returns, or their legal representatives, will be allowed to attack the returns, they must set forth the items which they claim were incorrectly made a part of the account, or must set forth specifically the items which should have been made a part thereof and were omitted, giving the reasons why such items were omitted or were incorrectly stated, as the case may be. And in a case where an executor or administrator seeks to surcharge or falsify his own account, in order to sustain the objection it must appear that there was a clear and palpable mistake made in the account, or that there has been an omission of items to which the proof clearly and satisfactorily shows he was entitled; and this must be done to the same extent and with the same certainty that courts of equity require where applications are made to correct mistakes. In the absence of clear proof of mistake, the account rendered to the ordinary must stand. See *Tripp v. Wynne*, supra. It follows from what has been said that when the executors of Dye charged themselves with \$1,275 collected from rents, and a return em-

bracing this item was approved by the ordinary, the auditor erred in striking the same from the account, there being no specific attack made upon this item, and the judge should have sustained the exception to the auditor's report which assigned error upon this finding. It also follows that there was no error in sustaining the exceptions of law filed by the defendant which raised the question that the auditor erred in admitting evidence tending to show the incorrectness of certain items in the returns which had not been attacked in the pleadings. Nor was there any error in holding that the exceptions of fact which were directed against the findings of the auditor of the different amounts which were not embraced in the pleadings could not be sustained.

4. It follows from what has been said that, where an executor has been cited to a settlement before the ordinary, and the petition does not make any attack upon his returns, and the defendant, in his answer, merely denies in general terms liability, and does not set up any claim that the return was incorrect or incomplete, the ordinary is to make up the account and settlement from the returns as they appear of record in his office. If the plaintiff desires to charge the defendant, he must set forth in his petition the grounds of liability upon which he relies with the same certainty he would be required to set them up if he had applied to a court of equity to compel the executor to come to a settlement. The defendant is also bound to set up by answer his defense with the same degree of certainty that would be required in an answer in equity. If the executor or administrator has made no returns, then the petition for the citation should allege this fact, and also show what property of the estate has gone into his hands. In such a case the defendant should set forth in detail the credits that he relies upon with the same certainty that would be required in a return to the ordinary. If the defendant has made returns, but payments have been made by him since the last return, he should set forth in his answer the items of such credits with the same certainty as would be required in a return. If his answer does not set forth such additional items, then the court has no authority to allow them in the settlement. It therefore follows that, as Mrs. Gairdner did not set up in her answer the item of \$3,000 paid by her on the Howard note since the death of her husband, the auditor erred in allowing her credit for this amount, and the judge erred in directing the jury to find against the exception filed in regard to this matter. The judge also erred in directing the jury to find in favor of the exception of the defendant which set up a credit of 10 per cent. commissions on the item of \$1,275 interest, which the executors had earned. This item was not pleaded, nor have we been able to find it in any of the returns of the executors.

5. While the motion for a new trial consists of the general grounds and 10 special grounds referring to rulings of the judge directing findings by the jury on the exceptions of fact, those rulings which seem to us to be erroneous are confined to three of these grounds only. The other rulings are free from error, as under the present condition of the pleadings no other course was open to the judge than that which he followed. The errors in these three grounds will result in a reversal of the judgment overruling the motion for a new trial, which, in the absence of a direction by this court confining the effect of the judgment to the items involved in the three grounds which contain the erroneous rulings will have the effect to set aside the entire verdict. We might, in the exercise of the discretion with which the law invests this court, direct that the verdict and judgment be amended by striking two of the items of credit which the auditor erred in allowing and inserting the item of debit which the auditor erred in striking; but no request was made for such a direction, and we are not altogether clear that this course would be in the interest of justice. We will therefore reverse the judgment generally, and leave the case to be disposed of in accordance with the law applicable thereto when it comes before the judge again for final judgment.

Judgment reversed. All the Justices concur.

(119 Ga. 76)

SWEENEY v. SWEENEY.

(Supreme Court of Georgia. Nov. 28, 1903.)

EJECTMENT—EVIDENCE—JUDGMENT—ENTRY—SHERIFF'S DEED—DECLARATIONS OF AGENT—OBJECTIONS TO EVIDENCE—RIGHT OF ACTION—COSTS OF FORMER SUIT.

1. Where, on the trial of an action for the recovery of land, brought by one who claimed to have purchased the same at a sheriff's sale against the defendant in the execution under which it was sold, the plaintiff introduced in evidence the sheriff's deed, accompanied by an exemplification of a valid judgment against the defendant, and proof of the loss of the execution issuing therefrom, a prima facie case of title in the plaintiff was made out, and it was erroneous for the court to charge the jury that the sheriff's deed could be considered only as color of title.

(a) A judgment rendered by the court in 1869 in a suit on an unconditional contract in writing, where no issuable defense was filed under oath, in all respects regular, except that it was not signed by the judge, is valid if entered on the minutes of the court, and they are signed by the judge; and, in the absence of any proof to the contrary, it will be presumed that the judge signed the minutes.

(b) Sufficient evidence was introduced in this case to raise a reasonable presumption that the execution was lost, and to show due diligence in searching for it.

(c) The recitals in a sheriff's deed, of the execution, and the seizure and sale of the property by virtue thereof, are, when the execution is lost, prima facie evidence of the truth of such recitals.

2. The declarations of an agent, who is in possession of realty merely to manage and care

for the same, are not admissible in evidence against the principal to disparage his title.

3. Where evidence is objected to as a whole, and some parts of it are admissible, it is not erroneous to overrule the objection.

4. A judgment abating an action upon the ground that the plaintiff had brought the same without having paid the costs which had accrued in a previous suit, involving the same subject-matter and against the same defendant, which had been begun and dismissed by him, is no bar to the bringing of a third suit for the same cause of action, and against the same defendant, if, before instituting the last proceeding, the plaintiff has paid all the costs which had accrued in the two previous suits.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by Miles Sweeney against Mary Maloy, and equitable petition against the same defendant for an injunction. The suits were consolidated, and, on the death of defendant, Kate I. Sweeney, administratrix, was made defendant. Verdict for defendant, and plaintiff brings error, and defendant assigns cross-error. Reversed on main bill of exceptions, and affirmed on cross-bill.

M. W. Harris and J. R. Cooper, for plaintiff in error. W. J. Grace and J. L. Anderson, for defendant in error.

FISH, P. J. Miles Sweeney brought ejectment, to the April term, 1901, of Bibb superior court, against Mary Maloy, for certain realty in the city of Macon. As ancillary to this action, he brought to the same term, and against the same defendant, an equitable petition for injunction and receiver, in which he set forth the title upon which he relied for a recovery. Pending the suits the defendant died, and Kate I. Sweeney, administratrix on her estate, was made party defendant. On the trial the two actions were consolidated and tried as one. The plaintiff introduced the following documentary evidence: (1) An exemplification of the minutes of Bibb superior court, showing the following judgment: "Patrick Fleming vs. John & Mary Maloy. Complaint. No issuable plea under oath having been filed in this case: It is ordered that plaintiff have judgment against defendants, John Mulloy and Mary Mulloy, for the sum of three hundred dollars principal, with interest from August 22nd, 1867, and costs of suit. By the Court, June 14th, 1869. Whittle & Gustin, Plaintiff's Attys." (2) An exemplification of the execution docket of such court, showing an entry thereon of the execution issued upon such judgment and its delivery to Martin, sheriff, on August 7, 1869. (3) A sheriff's deed, dated May 7, 1873, and duly recorded, executed by George F. Cherry, sheriff of Bibb county, to Miles Sweeney, to the premises in dispute; consideration, \$250. This deed recited that James Martin, late sheriff of Bibb county, on August 9, 1869, levied the execution above referred to upon the land in dispute, and that George F. Cherry, sheriff, sold

it in pursuance of such levy. The deed also contained the recitals usual in sheriff's deeds. (4) A warranty deed from Miles J. Sweeney to Patrick Sweeney, dated and recorded May 9, 1885, to the premises in dispute; consideration, \$256. (5) A warranty deed from Patrick Sweeney to Miles J. Sweeney, to the premises in dispute, dated June 26, 1888, and duly recorded; consideration, \$500. The plaintiff testified that he had the execution referred to in his possession some six or seven years prior to the trial; that he did not know what had become of it; that he had made frequent and thorough searches for it, but had failed to find it. Sheriff Wescott and Deputy Sheriff Menard testified that they had made several searches in the sheriff's office for the execution, but it could not be found. Deputy Clerk Holt testified that it could not be found in the clerk's office after careful search. The plaintiff's contentions were, in brief, that he purchased the property in good faith at sheriff's sale, and paid \$250 for it; that he went into actual possession under the sheriff's deed, and so remained, holding the property adversely, until 1885, when he conveyed the property to his brother Patrick Sweeney, with the verbal understanding between them that Patrick should hold the title until the plaintiff should return from Ireland, where he then contemplated going for a few years; that, upon his return from Ireland, Patrick reconveyed the property to him, in 1888; that he remained in possession of it till 1893 or 1894, when, Mary Maloy having gone into possession of part of it, he sued out a warrant to dispossess her. The defendant's contentions, in substance, were that Mary Maloy had been in the actual adverse possession of the property for more than 30 years; that plaintiff had never been in possession; that Mary Maloy furnished plaintiff with sufficient money to pay for her the claim of Patrick Fleming, and she believed he had done so; that he fraudulently had the property sold by the sheriff, and took the sheriff's deed to the same, and she had no knowledge until recently that any such sale had ever been made, or that plaintiff claimed to own any interest in the property. Evidence was submitted by both parties tending to sustain their respective contentions. There was a verdict in favor of the defendant. The plaintiff moved for a new trial, which being refused, he excepted.

1. The court charged the jury that, inasmuch as the execution in favor of Fleming against John and Mary Maloy had not been put in evidence, the deed from Cherry, sheriff, to Miles Sweeney could be considered by them only as color of title, and that, to make out a prima facie case, plaintiff would have to show seven years' adverse possession under such deed. In the motion for a new trial, error was assigned upon this charge, and we think the exception well taken. A

sale regularly made by virtue of a judicial process issuing from a court of competent jurisdiction conveys the title as effectually as if the sale were made by the person against whom the process issued. Civ. Code 1895, § 5446. And in all controversies in the courts of this state the purchaser at such a sale shall not be required to show title deeds back of his purchase, unless it be necessary for his case to show good title in the person whose interest he purchased. Id. § 5447. As we have seen, the suit was brought against the defendant in execution by the purchaser at sheriff's sale; and the sheriff's deed exhibited in evidence by the plaintiff was accompanied by exemplifications showing a judgment against the defendant, the entry on the execution docket of the execution issued on the judgment, and delivery of the execution to the former sheriff, and by proof of loss of the execution. While the judgment was rendered in a suit upon an unconditional contract in writing, where no issuable defense was filed on oath, yet it appears to have been rendered "by the court," and was entered on the minutes; and the presumption is, nothing to the contrary appearing, that the court did its duty by signing the minutes. The judgment was therefore valid. *American Mortgage Co. v. Hill*, 92 Ga. 305, 18 S. E. 425, and cases cited. Proof that the *fi. fa.* was entered on the execution docket, and that the docket showed a delivery of the execution to the former sheriff, was sufficient to show that the *fi. fa.* had existed; and the unavailing searches made for it by the sheriff, the deputy sheriff, and the clerk, as well as by the plaintiff, were sufficient to authorize the presumption that it was lost or destroyed—proof sufficient to raise a reasonable presumption of its loss or destruction being all that was necessary. *Vaughn v. Biggers*, 6 Ga. 188 (2); *Harper v. Scott*, 12 Ga. 125 (4). In *Fretwell v. Morrow*, 7 Ga. 264, where it appears that a constable levied a justice's court *fi. fa.* on land, and delivered the execution to the sheriff, who duly sold the land, but failed to execute a deed to the purchaser, and that his successor in office subsequently executed such deed, it was held that upon proof of loss of the *fi. fa.* the deed was admissible in evidence. It is true that it was not expressly said that the deed was admissible as title, but such was evidently the extent of the ruling, as the deed would have been admissible as color, unaccompanied by the *fi. fa.*, though the latter had not been lost. It has been several times held that "the sheriff's deed alone, unaccompanied by either the judgment or the *fi. fa.*, was sufficient to constitute color of title." *Beverly v. Burke*, 9 Ga. 440, 54 Am. Dec. 351; *Hester v. Coats*, 22 Ga. 58; *Hammond v. Crosby*, 68 Ga. 767. In *Watson v. Tindal*, 24 Ga. 494, 71 Am. Dec. 142, it was held: "A sheriff's deed must be accompanied by the execution under which the land was sold, or

the judgment upon which it issued." In *Boatright v. Heirs of Porter*, 32 Ga. 130, the following ruling was made: "A sheriff's deed being offered in evidence without the production of the execution under which the sale was made, or of any exemplification of the judgment, but it appearing that great diligence had been shown to procure both, held, that the deed was properly admitted in evidence, under the circumstances, upon the faith of its own recitals." Of course, in view of the previous rulings in *Beverly v. Burke* and *Hester v. Coats*, supra, this decision meant that the sheriff's deed was admissible as title, and not merely as color. It was held in *Irby v. Gardner*, 56 Ga. 643, that "a sheriff's deed, duly recorded, should be admitted in evidence without the justice court fi. fa. under which the land was sold; the sale having been made in 1855, and the fi. fa. lost." And it was early held by this court—*Ellis v. Smith*, 10 Ga. 253 (2), citing *Vaughn v. Biggers*, 6 Ga. 188—that the recitals in a sheriff's deed of the fi. fa., and seizure and sale of the property under it, are, when the fi. fa. is lost, prima facie proof, at least, of the facts contained in the deed. While it may not have been expressly held that a sheriff's deed, when accompanied by the judgment only, is admissible as title, and not merely as color, there is certainly a strong intimation in several of the cases which we have cited above that such is the true rule. Be this as it may, however, there can be no doubt that where, as in this case, the sheriff's deed is accompanied by an exemplification of a valid judgment, and proof of the loss of the execution, the deed is admissible as evidence of title, and not merely as color of title.

2. Complaint was made in the motion for a new trial of the admission in evidence, over plaintiff's objection, of a letter written January 29, 1891, by E. J. Burke for Patrick Sweeney, to Mary Maloy, the contents of which, the defendant claimed, amounted to an admission by Patrick Sweeney that the land in dispute was the property of Mary Maloy at the time the letter was written. The court erred in admitting this letter in evidence. According to the testimony of Miles Sweeney, his brother Patrick reconveyed this property to him in 1888, after he returned from Ireland. Miles subsequently went to Ireland again, and, as he testified, left Patrick in possession of the property as his agent, to manage and care for it while he was away, and he had not returned when the letter above referred to was written. The declarations of an agent in the possession of property simply for the purpose of managing it and caring for it for his principal are not admissible to show title to the property out of his principal. An essential condition upon which the admissions of an agent are admissible against his principal is that they be made in pursuance of the

agent's power—within the scope of his authority (Civ. Code 1895, § 5192)—for, if they have reference to acts which the agent had no power to perform, or to any matter foreign to the agency, they stand on the same level as the statements of strangers, and are clearly inadmissible. 1 Gr. Ev. § 113. "A letter is inadmissible to bind a third person in the absence of proof of authority from him to the writer to make the statements and admissions therein contained." *McMath v. Teel*, 64 Ga. 595. "The admissions of an agent only bind his principal when made in the scope of his business as agent, and, if either party relies upon such admissions, he must show they were made in the scope of his business." *Wilcox v. Hall*, 53 Ga. 685. The only power or authority, under the evidence, that Patrick Sweeney had in reference to the property in dispute, at the time the letter in question was written, was to manage and take care of it—rent it, collect the rents, keep it insured and in repair. So he manifestly had no power to impair or discredit his principal's title to the property, if he had any, by making statements in disparagement thereof. An agent cannot dispute his principal's title. Civ. Code 1895, § 3012. In *Olaflin v. Continental Works*, 85 Ga. 27, 11 S. E. 721 (3), it was held that "while * * * [an agent] was intrusted with the possession and management of the business [of the principal] he could use the goods so as to realize some profit to his principal, but could not pay even matured claims in goods discounted twenty-four per cent. from the cost price marked upon them by the principal." In the opinion (page 40, 85 Ga., page 722, 11 S. E.) it was said: "There can be no doubt that the agent violated his duty in admitting, upon an ex parte representation, that his principal had committed such wholesale fraud, especially when he knew so little of the latter's concerns as to be totally surprised on hearing of the outstanding indebtedness, and when he professed to have the intention of continuing the business. An agent cannot deny his principal's title." So it has been held that "the declarations of an agent of a vendee, whose agency is limited to the care and custody of goods after they have passed to the possession of the vendee, are not admissible in evidence to show that the purchase of the vendee was fraudulent." *Hutchings v. Castle*, 48 Cal. 152. On the same line is *Winchester Mfg. Co. v. Creary*, 116 U. S. 161, 6 Sup. Ct. 369, 29 L. Ed. 591. Counsel for the defendant in error contend that the letter was admissible as a declaration of a person in possession of property in disparagement of his own title. Under the evidence, Patrick Sweeney had possession of the property merely as the agent of Miles Sweeney, and his agency was limited to managing and caring for it. The letter contained nothing in disparagement of the title of Patrick, because he had no title when

the letter was written, nor did he claim any. While the declarations of one in possession against his interest are admissible against him and those claiming under him, the rule, as we have shown, does not apply to this case, because Patrick had no interest in the property except as agent for Miles, and the latter did not claim under the former.

3. Error was assigned upon the admission, over plaintiff's objection, of several letters from Miles Sweeney to Patrick Sweeney. These letters, as appears from the motion for a new trial, were objected to as a whole. Some of them, or at least portions of some of them, were clearly admissible, and therefore it was not erroneous to overrule such objection.

4. It appears from a cross-bill of exceptions sued out by the defendant in error that she filed a plea of *res adjudicata* to the present action, in which it was set forth that Miles Sweeney brought an action against Mary Maloy, returnable to the November term, 1894, of Bibb superior court, to recover the property which is the subject-matter of the present suit, in which former action, as the petition therein showed, he relied for a recovery upon the same muniments of title as in the present case; that on January 25, 1897, the former action was dismissed on motion of counsel for plaintiff therein; that in February, 1897, Miles Sweeney brought another action for the same property against Mary Maloy, returnable to the April term, 1897, of Bibb superior court, in which he again relied for a recovery upon the same muniments of title as in the present suit, the petition reciting that plaintiff had voluntarily dismissed his first petition; that to the second suit Mary Maloy filed a plea of abatement, setting up the voluntary dismissal by plaintiff of his first action, and that he had subsequently brought the second suit, involving the same subject-matter, and between the same parties, without having paid the costs and expenses that had accrued in the first suit; that upon this plea of abatement there was a verdict sustaining the same, and a judgment entered thereon abating the second suit; and that such judgment was reviewed by the Supreme Court and was affirmed. By consent of parties the issue raised by the plea of *res adjudicata* was submitted to the court for decision without the intervention of a jury. Upon proof of the facts set up in this plea, the court found against it. Error was assigned upon this judgment of the court in the cross-bill of exceptions. We see no error in the court's ruling. The judgment abating the second suit did not bar the plaintiff from subsequently bringing the present action, after paying all the costs in the first and second suits, as the court found he had done.

Judgment reversed on main bill of exceptions, and affirmed on cross-bill. All the Justices concur.

(119 Ga. 113)

SMITH v. STATE.

(Supreme Court of Georgia. Dec. 8, 1903.)

CRIMINAL LAW — APPEAL — REVIEW — EXCLUSION OF EVIDENCE — INSTRUCTIONS — ARGUMENT OF COUNSEL — NEW TRIAL.

1. It not appearing in the motion for a new trial what the answer of the court stenographer to the question asked him was or would have been, this court cannot consider the complaint that the rejection of his evidence was error.

2. It was not error that the court excluded from the evidence the official stenographer's notes of a dialogue between counsel and a witness on a former trial of the same case, it not appearing *prima facie* that such evidence elucidated any point in the case on trial, and the complaint in the motion for a new trial not showing in what way it injuriously affected the rights of the accused.

3. The assignment of error upon the charge of the court falls within the ruling of this court in *Anderson v. Southern Ry. Co.*, 107 Ga. 501, 83 S. E. 644 (4c), that "when a portion of a charge, which is complained of generally, contains several distinct propositions, and one or more of the same is correct in the abstract, then the general assignment of error is not good and will not be further considered."

4. It did not appear that the evidence objected to, even if inadmissible, was of such materiality that its subsequent withdrawal by the court from the consideration of the jury did not cure whatever harm had been done the accused.

5. The record does not disclose that the alleged improper argument of counsel was made the basis of a motion for a mistrial, or that any objection whatever was made thereto before the trial judge, and therefore it was not error to refuse to grant a new trial on the ground of such argument.

6. The evidence fully sustained the conviction of the accused, and this court will not interfere with the judgment of the court below refusing to grant a new trial.

(Syllabus by the Court.)

Error from City Court of Dublin; J. S. Adams, Judge.

Plummer Smith was convicted of crime, and brings error. Affirmed.

Geo. W. Williams, for plaintiff in error.
G. H. Williams, Sol., for the State.

CANDLER, J. Judgment affirmed. All the Justices concur.

(119 Ga. 131)

CAMP et al. v. VAUGHAN.

(Supreme Court of Georgia. Dec. 8, 1903.)

WILLS — RESIDUARY ESTATE — DESCENT AND DISTRIBUTION — CLAIMS AGAINST UNITED STATES.

1. The officers of the army of the United States, during the late war between the United States and the Confederate States, received and appropriated to the use of the army certain supplies, quartermaster and commissary stores, belonging to Jonathan D. Vaughan, of Paulding county. After the war, Vaughan filed with the United States commissioners of claims, under the act of Congress approved March 3, 1871 (16 Stat. 524, c. 116, § 2), a claim for compensation for these supplies; setting them out in an itemized statement, and averring his loyalty to the United States during the war. Subsequently his petition, under another act of Congress, known as the "Bowman Act," was referred to

the Court of Claims of the United States, and that court found and reported to Congress that there was due and unpaid on this claim the sum of \$1,715, and also that the claimant had been a loyal citizen of the United States. On May 27, 1902, Congress passed "An act for the allowance of certain claims for stores and supplies reported by the Court of Claims under the provisions" of the act just mentioned, and appropriated to J. T. Vaughan, "administrator of the estate of Jonathan D. Vaughan, deceased," said sum of \$1,715. 32 Stat. 207, c. 887. Jonathan D. Vaughan made his last will and testament on the 7th of August, 1879, and died in January, 1881. His will was duly probated in the court of ordinary of Paulding county at the February term, 1881, and his widow qualified as executrix under the will. The will, after providing for the payment of his debts and certain nominal legacies, bequeathed the remainder of his estate to his widow and to James T. Vaughan and Ada Vaughan. His widow having, presumably, died, J. T. Vaughan was appointed administrator of the estate, and to him, as such administrator, the appropriation was made, as before stated. *Held*, that this fund passed under the will to the residuary legatees therein named, and was not a mere gratuity which descended to the heirs at law of Jonathan D. Vaughan under the statute of distributions. *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108; *Erwin v. United States*, 97 U. S. 392, 24 L. Ed. 1065; *Phelps v. McDonald*, 99 U. S. 298, 25 L. Ed. 473; *Williams v. Heard*, 11 Sup. Ct. 885, 140 U. S. 529, 35 L. Ed. 550; *Pierce v. Stidworthy*, 9 Atl. 617, 79 Me. 234, 239; 1 Underhill on Wills, § 51, and authorities cited.

2. The present case is clearly distinguishable, upon its facts, from that of *Ware v. Trustees of Emory College*, 65 Ga. 283, wherein it appeared that after the death of a testator "a grant of land was made by the government of the United States to the heirs and legal representatives of said testator," and this court accordingly held that "the heirs and legal representatives took under the grant, and not under the will"; the testator never having had any interest in the lands, and the grant being in the nature of a mere donation made directly to others after his death.

(Syllabus by the Court.)

Error from Superior Court, Paulding County; A. L. Bartlett, Judge.

Action between Elizabeth Camp and others and J. S. Vaughan. From the judgment, Camp and others bring error. Affirmed.

J. J. Northcutt, for plaintiffs in error. M. V. Sanford, W. E. Spinks, and R. R. Arnold, for defendant in error.

TURNER, J. Judgment affirmed. All the Justices concur.

(119 Ga. 83)

TONEY et al. v. MAYOR, ETC., OF MACON.

(Supreme Court of Georgia. Nov. 28, 1903.)

CITIES—ANNEXATION OF TERRITORY—CONSTITUTIONAL LAW—TITLE OF ACT.

1. The existence of prior statutes permitting the enlargement of the boundaries of the city of Macon with the consent of its city council and of the property owners in the territory proposed to be annexed does not deprive the General Assembly of the power to compel the annexation without the consent of the persons affected thereby.

2. The act of August 12, 1903 (Acts 1903, p. 579), is not variant from its title.

3. There must necessarily be an interval between the annexation and an election, and the fact that those in the new territory are without representation in council until the next municipal election does not render the act void.

4. Such act is not unconstitutional because persons and property in the newly annexed territory may be subject to taxation for the purpose of paying in part the existing indebtedness of the city of Macon.

5. The obligation to pay such taxes arises from the relation created by legal annexation, and is also usually supported by the equitable consideration that the values in the suburb have been increased by proximity to the existing municipality, and by the further consideration that the newly incorporated inhabitants acquire an interest in the public property purchased with the proceeds of previous bond issues and taxation.

6. There is no attempt by special act to absolutely prohibit the sale of liquor in the new territory, the statute merely preventing the city council from granting licenses for such sale, but leaving undetermined the question as to whether they may be obtained from other sources.

7. Ordinances cannot be oppressive or unreasonable, nor can they unfairly discriminate in favor of one class against another.

8. Municipal laws should be general in their operation, but all places in the same city do not necessarily require the same local legislation. 9. There is nothing in the Constitution which prevents the General Assembly from making sanitary regulations peculiarly adapted to the newly annexed territory; and the act of 1903, extending the limits of Macon, could in no event be declared void as a whole because the penalty for not making sewer connections in the new territory was by fine and imprisonment, while under existing ordinances in the old limits the punishment was by fine only.

10. In advance of any attempt to exercise controverted powers, this court will not pass upon the validity of separate and independent clauses, which, if void, would not interfere with the main purpose of the act to extend the limits of the city of Macon.

11. The act of annexation does not deprive the newly incorporated citizens of the equal protection of the laws, nor is it violative of the Constitution of the United States or of this state for any of the reasons set out in the petition.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by J. W. Toney and others against the mayor and council of Macon. Judgment for defendants, and plaintiffs bring error. Affirmed.

Toney and other citizens residing in the territory which by the act of August 12, 1903, was annexed to the city of Macon, filed an equitable petition seeking to enjoin the mayor and council of Macon from taking control of said territory, or from exercising any powers under the act, alleging: (1) That it was void because by previous acts in 1863 and 1900 it had been provided that the boundaries of Macon might be enlarged with the consent of those affected thereby, whereas the last act (1903) enlarged the city without the consent of the citizens and property owners in the new section; (2) that the act was void under the fourteenth amendment to the Constitution of the United States, in that it places upon them the burden of taxation without representation,

they having had no opportunity to vote for mayor and aldermen; (3) that they are thereby rendered liable for the payment of the present bonded indebtedness of the city of Macon, without having had any voice in its creation, or received any benefit from the same; (4) that it imposes fine and imprisonment for failure to connect sewers in the annexed territory, whereas in the original city limits the punishment is fine only; (5) that it discriminates against petitioners in that it allows citizens in the original territory to sell liquor, and forever prohibits citizens in the new territory from engaging therein in the liquor business; (6) that it is in contravention of the Constitution of the state of Georgia as to the prohibition against granting liquor licenses, the imposition of greater penalties for failing to make sewer connections, and in other particulars which are not included in the brief, and therefore treated as abandoned under the practice in this court. The chancellor refused the injunction, and plaintiffs excepted.

M. G. Bayne and Hardeman & Moore, for plaintiffs in error. Dessau, Harris & Harris and Minter Wimberly, for defendants in error.

LAMAR, J. 1, 2. The act of April 18, 1863 (Acts 1862-63, p. 189), and the act of December 13, 1900 (Acts 1900, p. 336), permitting contiguous territory to be annexed to the city of Macon with the consent of the mayor and council and those living in the new territory, did not deprive the Legislature of its inherent power to enlarge the corporate limits without the consent of those affected thereby. Civ. Code 1895, § 1835; *Cheaney v. Hooser*. 9 B. Mon. 330. Besides, the act repeals all existing laws providing for an extension of the corporate limits. Nor is it variant from its title. It clearly indicates an intention to amend the charter, and to provide for an extension of the corporate limits.

3. Nor is the act void because the new territory is made part of two different wards without representation in council until the next election. In the nature of things, there must be an interval between annexation and election. See *Mayor of Americus v. Perry*, 114 Ga. 871 (2), 40 S. E. 1004, 57 L. R. A. 230.

4, 5. The fact that the city of Macon had already incurred a bonded indebtedness did not prevent the General Assembly from annexing contiguous territory, and making all the inhabitants and property within the new corporate limits alike subject to taxation to raise municipal revenue for all legitimate purposes, without respect to the time when some of the liabilities arose to which the revenue is to be applied. *Cash v. Douglasville*, 94 Ga. 557, 20 S. E. 438; *Wade v. Richmond*, 18 Gr. 583; *Smith v. Saginaw*, 81 Mich. 132, 45 N. W. 964; *Layton v. New Orleans*, 12 La. Ann. 515. The liability of those thus newly included in the municipality arises from the legal relation created by statute and the benefits of local government obtained. But it is

also usually supported by the equitable consideration that the population and taxable value of the tract has been increased by proximity to the existing center; and for the further reason that those incorporated therein at once acquire an interest in all the public property belonging to the city, whether paid for out of previous taxes with previous bonds which have been satisfied, or with the proceeds of bonds still due.

6. A part of an act may be valid and a part invalid, and the part which is constitutional will not be defeated by that which is unconstitutional, unless it appears that the latter was so connected with the general scope of the statute that, should it be stricken, effect could not be given to the legislative intent. *Elliott v. State*, 91 Ga. 696, 17 S. E. 1004. None of the provisions alleged to be void are of a character which, if found to be invalid, would defeat the whole act, unless it be that declaring that the mayor and council of Macon "shall never have any authority to permit or license the sale of spirituous, vinous, or malt liquors within said territory; and this proviso shall operate as a contract between the mayor and council of the city of Macon and the people of the territory by this act incorporated into said city of Macon, and shall not be subject to repeal." But this proviso does not, as in *Papworth v. State*, 103 Ga. 36, 31 S. E. 402, and in *Bagley v. State*, 103 Ga. 388, 29 S. E. 123, 32 S. E. 414, undertake by a special law to prohibit and render unlawful the sale of liquor within the new territory. It puts a perpetual limitation on the power of the municipality to grant licenses. It had no such authority in this territory before the act was passed. It got none by its adoption, and, so far as the liquor business is concerned, it is as though the statute extending the boundaries had not been passed. The instances would be rare, and on peculiar facts, when it could be successfully contended that a statute was unconstitutional, not for granting, but for failing to grant, certain police powers. But it will be time enough to decide as to the effect of this prohibition against the grant of licenses when some one undertakes to sell and is prosecuted therefor. It is sufficient to say that an integral part of the contract of annexation is that, so far as the mayor and council of Macon are concerned, they shall not license or permit such sale. If, without their license, one can sell domestic wine, or if he can obtain lawful permission so to do from other authorities, the mayor and council will not be responsible, and the contract in the statute contained will not be violated by them. The act seems purposely to refrain from legislation on the subject of liquor, with a view, so far as that can lawfully be done, of preserving the present status.

7-11. The penalty for failing to make sewer connections is different in the newly annexed territory from that in the old limits of the city. But it does not necessarily follow that because there is a difference of regulations petitioners are thereby deprived of the equal

protection of the laws. Ordinances cannot be oppressive or unreasonable, nor can they unfairly discriminate in favor of one citizen or of one class against another. Municipal laws "should be general in their operation, but all places in the same city do not necessarily require the same local legislation." *Richmond R. R. v. Richmond*, 96 U. S. 529, 24 L. Ed. 734. And, if the city council can thus legislate, there is certainly nothing to prevent the General Assembly from making a distinction in regulations peculiarly adapted to the newly annexed territory. Indeed, there are cases which distinctly rule that the new territory may be incorporated with the old on conditions applicable to the former but not to the latter. *Cash v. Douglasville*, 94 Ga. 557, 20 S. E. 438; *United States v. Memphis*, 97 U. S. 291, 24 L. Ed. 937. Acts of annexation have been frequently attacked—though generally without success—on the ground that the new territory consists of farming lands, and is sparsely settled; that there is no necessity for municipal government; that the inhabitants are so far removed from the center as to be deprived of fire and police protection, and receive no benefits in compensation for the burdens imposed. See *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. Ed. 659, affirming 85 Pa. 170, 27 Am. Rep. 633. There is an utter want of any such attack in this case. Nor does it appear that the petitioners propose to engage in the sale of liquor, or that they own property which will require the sewer connections complained of. *Reid v. Eatonton*, 80 Ga. 755, 6 S. E. 602; *Blanton v. Merry*, 116 Ga. 288, 42 S. E. 211.

No reason has been shown why the act of the Legislature annexing this territory should be declared void as a whole, nor why the city of Macon should be enjoined from exercising the powers therein conferred for the purpose of giving to the citizens of the new territory the benefits of local government and of police and sanitary regulations.

Judgment affirmed. All the Justices concur.

(119 Ga. 159)

HAWKINS v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. Dec. 10, 1903.)

RAILROADS—SALE—VIOLATION OF PUBLIC DUTY—LIABILITY OF PURCHASER—MERGER—DEBTS OF CONSOLIDATED COMPANY—RIGHT OF ACTION—PARTIES—TORTS.

1. Without legislative exemption a corporation charged with a duty to the public remains responsible for the proper discharge thereof, even after a lawful sale or lease.

2. The purchaser or lessee of a railroad company is likewise responsible for the violation of such public duty, where the liability arises from the acts of omission or commission.

3. Where there has been no sale, but a merger, and no provision made for the payment of the debts of the absorbed company, the consolidated corporation is liable for the debts of the former, at least to the extent of the value of the property received.

4. But where there has been a lawful and absolute sale of a railroad, the grantee is not responsible for the existing debts of the grantor.

5. Where, for a consideration furnished by C, A. promises to pay B., the latter, though a stranger to the consideration, may maintain an action on the promise. *Civ. Code 1895, § 3664.*

6. Actions must be brought in the name of the party in whom the legal interest in such contract is vested, and where A. makes no promise to C. the latter cannot maintain a suit on the contract, even though A. undertook therein to pay B.'s debt to C. *Civ. Code 1895, § 4939; Gunter v. Mooney*, 72 Ga. 205.

7. Where the Chattanooga Railroad Company sold its property and vendible franchises to the Central Railway Company in consideration of \$1,300,000 and an agreement by the Central Company to pay the Chattanooga Company's current liabilities, the Central was not subject to a suit by a plaintiff for personal injuries alleged to have been inflicted before the making of the sale.

(Syllabus by the Court.)

Error from Superior Court, Polk County; A. L. Bartlett, Judge.

Action by W. W. Hawkins against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Hawkins, a minor of the age of 18 years, was a brakeman in the employment of the Chattanooga, Rome & Southern Railroad Company (hereinafter called the "Chattanooga Company") and on July 26, 1900, in Polk county, he was negligently run over by the company's engine, and seriously injured. He alleged that about 10 months thereafter, to wit, on May 16, 1901, the Chattanooga Company sold all of its property and franchises to the Central of Georgia Railway Company (hereinafter called the "Central Company"), the consideration, according to the recitals in the deed attached as an exhibit, being \$1,300,000 50-year 4 per cent. gold bonds of the Central Company, secured by a mortgage, the assumption by the Central Company "of the current liabilities of the Chattanooga Company," and the payment of \$5 in cash. It also appears that the sale was made subject to mortgages aggregating \$2,743,000 on the property of the Chattanooga Company. For the consideration named the Chattanooga Company conveyed to the Central Company all of its railroad, real estate, personal property, rights, privileges, and franchises of, or belonging to, or hereafter to be acquired by the Chattanooga Company. It was alleged that "petitioner's claim for damages under said deed and the agreement of consolidation in pursuance of which it was made is covered in said deed, and petitioner says that the Central Railway Company is directly liable to him for damages; that after said deed was delivered the Central * * * Company took possession of said Chattanooga * * * Company's entire line of railway," and all of its assets, both real and personal, "and took over also all the franchises of said Chattanooga * * * Company; * * * that said Chattanooga * * * Company has gone out of existence, * * * has no

line of railroad, no visible property of any kind, and has ceased to do business, having yielded up to the Central * * * Company all its property, franchises, and rights, and it has no organization, no officers or agents, in the state of Georgia or elsewhere, so far as petitioner can find out, or so far as he is advised and believes; and petitioner says that the Central * * * Company is directly liable to him for his damages, and that the property of the old Chattanooga * * * Company, now in the possession and under the control of the said Central * * * Company, is liable to him for his damages; * * * that by reason of the facts hereinbefore set out said Central * * * Company has injured and damaged your petitioner and is indebted to him in the sum of twenty-five thousand dollars, and is liable to him in that sum." The defendant demurred at the first term on the ground that the facts alleged were not sufficient in law for the plaintiff to maintain his action against the defendant: (a) Because there is no privity between the plaintiff and defendant under the contract of sale; (b) because, if defendant is liable in any event, plaintiff cannot maintain his suit until he shall have first recovered judgment against the Chattanooga Company, or without joining the Chattanooga Company with the defendant; (c) because the claim is an unliquidated demand, and not "a current liability" of the Chattanooga Company assumed by the Central Company as part of the purchase money. When, by amendment, the deed was attached as an exhibit to the petition, defendant demurred on the ground that the superior court of Polk county had no jurisdiction, but that the suit should have been maintained in Chatham county, where was located the home office of the Central Company.

Seaborn & Barry and Wright, Bunn & Tra-
wick, for plaintiff in error. J. Branham and
Sanders & Davis, for defendant in error.

LAMAR, J. There is conflict in the authorities as to how far a lessor corporation, charged with a public duty, is liable for the acts of its lessee. But whatever the rule elsewhere, unless there is a legislative exemption, our statute (Civ. Code 1895, § 1864) preserves to the public the liability of the vendor or lessor company, preventing it from escaping responsibility by a transfer of its property or franchises to a nonresident or insolvent, or even to a resident and solvent, grantee. *Singleton v. S. W. R. R.*, 70 Ga. 468, 48 Am. Rep. 574; *Hart v. R. R.*, 33 S. C. 427, 12 S. E. 9, 10 L. R. A. 794; *Harmon v. R. R.*, 28 S. C. 401, 5 S. E. 835, 13 Am. St. Rep. 686. *Contra, Arrowsmith v. Nashville R. R.* (C. G.) 57 Fed. 165. The original company remains liable for the proper discharge of the obligations which it assumed to the public. It may be held responsible, in damages or otherwise, for a failure to perform the same,

even though the act may be committed or omitted by its grantee. Notwithstanding the sale, the duty to carry freight and transport passengers continues; and after the sale or lease a person having a claim for damages by reason of a failure to perform such duty might have maintained an action against the Chattanooga Company, or the Central Company, or possibly both in the same action.

2. It is everywhere recognized that those operating a corporation charged with a duty to the public are subject to its burdens. The franchises are incumbered with corresponding duties, which, like covenants running with the land, are binding upon all who exercise the powers conferred. This principle is codified in Civ. Code 1895, § 1863, which makes the purchaser or lessee liable for its own acts of omission or commission while operating the franchises of another corporation. It is also, of course, solely liable on its private contracts, or for injuries to its own employes. *Seaboard Air-Line Ry. v. Leader*, 115 Ga. 702, 42 S. E. 38; *Georgia R. Co. v. Strauss*, 110 Ga. 191, 35 S. E. 332.

3. But while it is conceded that the vendee is responsible for its own contracts or torts committed since the sale, it is claimed that these sections are not exhaustive of the law on the subject, and that on general principles one railroad cannot, by a transfer of any sort, defeat the rights of creditors, or of persons having claims *ex delicto*, which existed at the time of the conveyance; that the purchaser takes the property burdened with all its pecuniary obligations; and that, therefore, the Central can be made to pay for damages inflicted by the Chattanooga Company upon the plaintiff in December, 1900, although the purchase was not made until May, 1901. In support of this position plaintiff cites *Montgomery & West Point R. Co. v. Boring*, 51 Ga. 582, and *Tompkins v. Augusta Southern R. Co.*, 102 Ga. 442, 30 S. E. 992, holding that the company which succeeds to the charter rights and privileges conferred upon the other is to be regarded as at the same time becoming responsible for all of its debts and liabilities. But those cases are to be construed in the light of the facts. Both were cases of merger, in which the corporate existence of the company against which the plaintiff had a claim had been merged into and consolidated with the company sued. The liability there was analogous to that of the husband for the debts of the wife under the old law of baron and feme. There had been a sort of corporate marriage, in which not only the name of the debtor had been changed, but its legal entity lost in the consolidation. They twain had become one. The suit necessarily had to be against the new creature. The shares of the old stockholders had been surrendered and exchanged for scrip in the consolidated company. There had been no sale or payment of the purchase price; and, as the interests of stockholders were inferior to those of cred-

itors, it would have been mere repudiation to preserve the rights of the shareholders by issuing stock in the consolidated company in exchange for their holdings in the old without protecting or providing for the rights of its creditors. Hence it was held (102 Ga. 443, 30 S. E. 994) that: "Where a consolidation actually takes place between two companies under a written contract providing for the absorption of the one by the other, but making no provision for liabilities against the company which goes out of existence, these liabilities, by operation of law, become binding upon the new company to the extent of the assets of the absorbed company, or to the extent of the latter's ability to perform the contracts out of which such liability arose." See, also, *Morrison v. American Snuff Co.*, 79 Miss. 330, 30 South. 723, and note in 89 Am. St. Rep. 598. But this is not such a case. Here there was no merger, but an absolute sale, and the purchase price was paid. There is no suggestion of any fraud, or attempt to hinder, delay, or defeat the creditors of the Chattanooga Company; no allegation that the price paid was less than the value of the property bought; while it does distinctly appear that the Central paid \$1,300,000 in mortgage bonds for property already incumbered to the extent of \$2,743,000. If, as contended by the plaintiff, the purchaser becomes responsible for all the existing indebtedness of the selling road, the Central Company would be liable not only for claims like his, but for any deficiency on the foreclosure of the mortgage securing the outstanding bonds of the Chattanooga Company, even though the \$1,300,000 paid was the full value of the property bought. There is no principle of law which requires the buyer to pay twice, or more than the property is worth, or more than the contract price. In the absence of any allegation to the contrary, it is fair to presume that the Chattanooga Company, in exchanging the railroad for negotiable bonds, was expected out of the proceeds to pay all its outstanding claims before any distribution was made among its stockholders. But if it failed in the performance of this duty, or if the liquidated debts were secured by liens, or were of prior dignity to the plaintiff's claim, or exceeded the amount received on the sale, the obligation was not upon the Central to supply the deficiency. The plaintiff's misfortune would in such case be similar to that of the many who have claims against insolvent debtors. However, for aught that appears, the plaintiff, after obtaining judgment, may yet recover from the Chattanooga Company, or from its stockholders, if there has been an unlawful distribution to them (Civ. Code 1895, § 1886); or, if his claim be included in the "current liabilities" assumed, he may by appropriate proceedings raise that question with the Central Company.

4. So far as liability for the previous pub-

lic duties is concerned, the law makes both the vendor and vendee responsible for breach of that duty occurring after the sale. It preserves the rights of existing creditors to the extent of permitting a suit against the new corporation where there has been a union, merger, or consolidation of the two corporations. As to claims against one corporation whose property has been purchased by another, the general law would apply prohibiting any transaction in fraud of creditors, and preventing an assignment by an insolvent wherein it or the stockholders reserved any benefit or trust. Civ. Code 1895, § 2695, pars. 1, 2. But in other respects an out and out sale of the property of the corporation is not different from a case in which an individual sells visible property subject to levy in exchange for cash or negotiable instruments which may be put beyond the reach of the levying officer. When a railroad has a right to sell, the ordinary incidents of a sale attach; and, assuming that it is in good faith, and for a fair value, the buyer is not responsible for more than the purchase price. The law does not exact the payment of the vendor's debts by the vendee as a condition precedent to the exercise of the power of sale. The plaintiff had the usual rights of creditors in such cases. He could sue the vendor and garnishee the purchaser, or he could obtain judgment and use his legal or equitable remedies in order to enforce payment thereof. Whether both companies can be joined as defendants in one suit is not before us for determination. In *Dickey v. Kansas City R. Co.*, 122 Mo. 223, 26 S. W. 685, *Wallace v. Ann Arbor R. Co.* (Mich.) 80 N. W. 572 (2), and *Dallas R. Co. v. Maddox* (Tex. Civ. App.) 31 S. W. 702, the railroads were conveyed by deed to the vendor, and the vendee was held not to be liable for the former's debt. The same conclusion was reached in *Hoard v. Chesapeake & Ohio R. Co.*, 123 U. S. 223, 226, 8 Sup. Ct. 74, 31 L. Ed. 130, where the purchase was made at foreclosure sale. The pleadings must be construed as a whole, and the allegation in the petition that the Chattanooga Company sold all of its property and franchises to the Central Company necessarily refers to property other than the \$1,300,000 bonds which were paid, and the franchises must mean those secondary and vendible franchises which may be transferred without destruction of the corporate existence of the vendor. And even if, as alleged, it has "gone out of existence," or if it be no longer transacting business, and has no officer or agent in this state or elsewhere, the Civil Code of 1895, § 1892, provides a method by which service may be perfected so as to find the Chattanooga Company or its stockholders.

5. The plaintiff insists, however, that, even if the Central is not liable as matter of law for torts committed before the sale by the Chattanooga Company, it is liable in this action by reason of the provision in the sealed

contract by which the Central assumed the "current liabilities" of the Chattanooga Company. On this subject there are two lines of authorities. One holds that, where a promise is made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach. *Lawrence v. Fox*, 20 N. Y. 268. The other, recognized in England, in the federal courts, and in several of the American states, is that the consideration must move from the plaintiff, and that a person for whose benefit a promise is made, but who is not a party to the contract, cannot sue the promisor. To this rule there are some exceptions; as where, under the contract between two persons, assets have come into the promisor's hands which in equity belong to a third person. In such a case the third person may sue in his own name, but then the suit is founded rather on the implied undertaking the law raises from the possession of the assets than on the express promise. *National Bank of St. Louis v. Grand Lodge*, 98 U. S. 124, 25 L. Ed. 75; *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667; *Mellen v. Whipple*, 1 Gray, 321. We are, however, relieved from deciding between these divergent authorities in view of the common-law principle as codified in the Civil Code of 1895, §§ 3664, 4939. Under the first of these it is not necessary that the consideration should have been furnished by the plaintiff if there was in fact a promise to him, for, "if there be a valid consideration for the promise, it matters not from whom it is moved; the promisee may sustain his action, though a stranger to the consideration." Thus, where A. makes a promise to B., and the consideration therefor is furnished by C., the promisee, B., may maintain suit thereon. Thus, if property is placed in the hands of an assignee or trustee to be sold and the proceeds applied to the payment of creditors, the latter may sue in equity to enforce the agreement for their benefit (*Bell v. McGrady*, 32 Ga. 257; *Dallas v. Heard*, Id. 604 [2]), or at law for money had and received by the assignee for the plaintiff's use (*Wright v. Damish*, 74 Ga. 828). But where the third person is not named as promisee, and where no trust is created in his favor, but the promisor merely assumes to pay the debt of the other to the third person, the latter cannot maintain an action thereon. Where the Georgia Home Insurance Company purchased the assets of the Empire State Insurance Company, and assumed the payment of indebtedness due or to become due on its policies, and subsequently a policy holder sued the Georgia Home, it was held there was no such privity between it and the assured which would entitle him to a separate action at law against the Georgia Home on the contract made between the two corporations. *Empire State Ins. Co. v. Collins*, 54 Ga. 376; *Pfeiffer v. Hunt*, 75 Ga. 513; *Gunter v. Mooney*, 72 Ga. 205; *Austell v. Humphries*,

99 Ga. 408, 27 S. E. 736. And Civ. Code 1895, § 4939, provides: "As a general rule, the action on a contract, whether express or implied, or whether by parol or under seal, or of record, must be brought in the name of the party in whom the legal interest in such contract is vested, and against the party who made it in person or by agent." The rule preventing the third person from maintaining such action is particularly applicable where there is no specification of the number of names of such creditors or the amount of their demands, for, as stated in *Dow v. Clark*, 7 Gray, 201: "If the plaintiff can maintain this action, so may every one of the other creditors of the corporation, whatever may be their number; and the defendant may be held answerable to persons of whom they never heard. And they will be bound in such actions to litigate the question whether the party who sues them has a legal claim on the corporation." Where the plaintiff's demand is not liquidated, but is based on an alleged tort, the promisor, in the absence of an express agreement, cannot be held to the burden of litigating with the plaintiff on a cause of action he may have against the promisee. On the general subject, see 7 Am. & Eng. Enc. L. (2d Ed.) 105-109, and the many authorities there cited.

These conclusions render it unnecessary to determine whether the plaintiff's claim was "a current liability" of the Chattanooga Company assumed by the Central. The demurrer was properly sustained.

Judgment affirmed. All the Justices concur.

(119 Ga. 234)

SOUTHERN RY. CO. v. MORRIS.

(Supreme Court of Georgia. Dec. 12, 1903.)
CONTINUING NUISANCE—DAMAGES—LIMITATIONS—EVIDENCE—INSTRUCTION—APPEAL—REVIEW.

1. Every continuance of a nuisance which is not permanent, and which can and should be abated, is a fresh nuisance, for which a new action will lie. *Southern R. Co. v. Cook*, 43 S. E. 697, 117 Ga. 286, and citations. Consequently, suit may be maintained for damages growing out of a nuisance of the character indicated, where the damages sued for were inflicted within four years prior to the time of filing suit, though the act which originally caused the nuisance was not done within the period of limitation of the action. *Daniely v. Cheeves*, 21 S. E. 524, 94 Ga. 264 (3).

2. This being an action for damages to the productiveness of the plaintiff's land by reason of an overflow of water caused by the obstruction of a stream by the defendant, it was permissible to show how much the land was capable of yielding before it was overflowed, and to what extent its fertility had been impaired on account of the obstructions placed in the stream. Such damages were not too remote, speculative, or contingent to be made the basis of a recovery.

3. The charge of the court, laying down as the measure of recovery the diminution in the

¶ 1. See Limitation of Actions, vol. 23, Cent. Dig. §§ 304, 305.

rental value of the land, even if incorrect, was not prejudicial to the defendant, and will not work a reversal of the judgment denying a new trial.

4. Points made in the motion for a new trial, but not argued here, will be treated as abandoned, and will not be considered. The evidence authorized the verdict, which was not excessive, and it was not error to overrule the motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Henry County; E. J. Reagan, Judge.

Action by Nancy Morris against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Little & Battle, for plaintiff in error. Westmoreland Bros. and O. J. Hayden, for defendant in error.

CANDLER, J. Judgment affirmed. All the Justices concur.

(119 Ga. 216)

WIGGINS v. STATE.

(Supreme Court of Georgia. Dec. 12, 1903.)

CRIMINAL TRESPASS—EVIDENCE—UNOCCUPIED LAND.

1. One bona fide claiming to be the true owner and entitled to the possession of land cannot be convicted of trespass under Pen. Code, § 220.

2. An agent who bona fide believes that his principal is the owner and entitled to the possession of land cannot be found guilty of violating Pen. Code, § 220, if he goes upon the premises in obedience to the directions of such principal.

3. This section does not apply to open or uncultivated real estate.

4. The verdict was contrary to law, because the evidence wholly fails to show that the land was inclosed or cultivated, as charged in the accusation.

(Syllabus by the Court.)

Error from City Court of Wrightsville; J. S. Adams, Judge.

Sam Wiggins was convicted of trespass, and brings error. Reversed.

The defendant was accused of trespass, in that he "did * * * willfully enter, go upon, and pass over the inclosed or cultivated land of another, after being personally forbidden so to do by Mary Hamilton, she being entitled to the possession for the time being." It appeared that Jenkins had bought an undivided one-half interest in the land at sheriff's sale, and made Mrs. Hamilton a bond for titles, conditioned to make her title to such half interest when she paid the two purchase-money notes. There was a provision in the bond that, "if said notes are not paid at maturity, the above bond herein is void and the sale declared off." It appeared that Mrs. Hamilton failed to pay either of the notes at maturity, and signed what purported to be rent notes. She insisted that she did not read the bond or the rent notes, and supposed that the latter were given for interest, and did not know of the provision rendering the bond void if the purchase

money was not paid. This was denied by Jenkins and the attorney who prepared the papers. After the failure to pay the purchase money, Jenkins sued out a distress warrant, and also filed a petition in the superior court for partition. To this latter proceeding Mrs. Hamilton filed a caveat. It appeared that Jenkins directed Wiggins to go to work upon the land, and while there Mrs. Hamilton ordered the laborer away, and directed him not to come on the land, but that he returned the next day; and on this latter alleged trespass the accusation was based. There is no evidence that the land was inclosed or cultivated, except in so far as it appears from the fact that she referred to it as her field, and the further fact that Wiggins "went to work there, and kept coming and working."

Wm. Faircloth, for plaintiff in error. B. B. Blount, Sol., for the State.

LAMAR, J. In order to quiet possession until final trial on the merits, and to prevent the breach of the peace which might result if one should take the law in his own hands and attempt to enforce his own rights, Civ. Code, §§ 4823-4826, provide the remedy relating to forcible entry and detainer. A prosecution under Pen. Code, § 220, is not intended as a substitute therefor, nor to serve the office of an action of trespass to try title. On the other hand, it is not necessary that the prosecutor should have perfect title in fee simple, in order to avail himself of the protection afforded by Pen. Code, § 220. Even possession is sufficient title to sustain an action of ejectment against a mere trespasser. One "entitled to the possession for the time being" is entitled to the undisturbed enjoyment of such right, and, regardless of who is the true owner, one not entitled to the possession may be convicted of a misdemeanor for going on the land in disregard of the statutory notice if the other elements of the offense appear. This section defines a crime in which a conviction can only be sustained where there is a union or joint operation of act and intention. Pen. Code, § 31. If it appears that the defendant went upon the land in the bona fide belief that Jenkins was the owner and had the right to send him there, his mistake, if it was a mistake, ought not to be punished as a crime. *Miley v. State*, 118 Ga. 274, 45 S. E. 245; *Hateley v. State*, 118 Ga. 79, 44 S. E. 852. There is nothing to indicate that the laborer intended to violate the law, or to willfully trespass on the lands of another. He acted in obedience to the order of his employer, who actually had a deed to the land, and who insisted that Mrs. Hamilton's right of possession under the bond for titles had terminated.

If there was a bona fide entry under claim of title and right of possession in Jenkins, there would be no violation of the statute, which only applies to those who willfully disregard the notice given by the true owner,

or by the one entitled to possession for the time being.

But assuming that the prosecutrix was entitled to the possession; that she gave notice to the defendant not to go on the land; that he willfully disregarded the notice and committed a trespass, with intent to violate the law—the evidence wholly fails to show that the land was cultivated or inclosed. He was not charged with going into or passing over a "field." There is no description of the land on which the trespass is alleged to have been committed; nothing to show whether it was pasture, woodland, or waste land; nothing to indicate that there was any fence or inclosure around it; nothing to show that it had ever been cultivated, or that the prosecutrix ever intended to cultivate it. The unlawful act of the defendant in "working" or "cultivating" the day before the notice would not of itself make the land cultivated, within the meaning of the Code; or, even if an act of trespass could give it that character, there is no evidence as to what part of the place was worked by the defendant on the day of the trespass for which he is prosecuted, nor what kind of work he then was doing—whether cutting down trees, splitting rails, digging ditches, tilling the soil, or doing agricultural work of any sort. No question was made as to the sufficiency of the indictment, but the evidence does not sustain the charge made. The verdict is contrary to law, and a new trial should be granted. *Murphey v. State*, 115 Ga. 201, 41 S. E. 685; *Bryce v. State*, 113 Ga. 705, 39 S. E. 282.

Judgment reversed. All the Justices concur.

(119 Ga. 238)

**CENTRAL OF GEORGIA RY. CO. v.
WALLACE.**

(Supreme Court of Georgia. Dec. 14, 1903.)

APPEAL—AFFIRMANCE—DIVIDED COURT.

1. This case being for decision by a full bench, and the six Justices being evenly divided in opinion, the judgment stands affirmed by operation of law.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Josephine Wallace against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Dorsey, Brewster & Howell and H. C. Erwin, for plaintiff in error. Hoke Smith, H. C. Peeples, and J. J. Hastings, for defendant in error.

PER CURIAM. Judgment affirmed by divided court.

(119 Ga. 230)

OWENS v. MACON & B. R. CO.

(Supreme Court of Georgia. Dec. 12, 1903.)

CARRIERS—REFUSAL TO TRANSPORT LUNATIC—LIABILITIES—NOTICE.

1. The right of other travelers to a safe and comfortable passage warrants a carrier in refusing to receive one who has been adjudged a lunatic, and who, though in charge of attendants, is loudly cursing and using obscene language at the time of boarding the car.

2. Common carriers cannot absolutely refuse to transport persons who are insane, but may in all cases insist that they be properly attended, safely guarded, and securely restrained.

3. Where it becomes necessary to transport a lunatic, who by reason of his violence may endanger the safety or interfere with the comfort of other travelers, the carrier is entitled to seasonable notice, in order that it may make proper arrangements for his transportation.

(Syllabus by the Court.)

Error from Superior Court, Troup County; S. W. Harris, Judge.

Action by J. B. Owens against the Macon & Birmingham Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Under a writ of lunacy in Troup county, before a jury, of which the ticket agent of the railroad was a member, Josh Owens was adjudged insane, and committed to the State Sanatorium at Milledgeville. Being sometimes violent, he was handcuffed and taken to the railroad station by his brother, the plaintiff in error, and another friend, acting as guards. Three tickets from Mountville to Macon were purchased. The train stopped. The insane man was taken toward the passenger car, but the conductor instructed that he should be placed in the apartment ahead of the smoking car. Josh Owens violently resisted being put on the car, though it appears that he was not making any noise or outcry. The general manager of the railroad company happened to be on the train, and, seeing the condition and conduct of the insane person, gave instructions that he could not be carried on the train. The plaintiff replied that the lunatic would be quiet if they could get him on a seat, at which Josh Owens himself, with great noise and vehemence, began swearing, saying that he would not be quiet; and, in reply to the continued objection of the general manager to allow him passage, plaintiff stated that he would be willing to take his brother in the baggage car, which was also declined; witness for the railroad stating at the trial that it was used for carrying express and breakables, and was not in a condition for the transportation of the insane man. The company's agent agreed, however, to transport him in the cab of a freight car due shortly thereafter, which offer was declined on the ground that that train did not make connection at Macon, the point it was necessary to go to in order to reach Milledgeville. There was evidence that, after the refusal to transport,

the passage money was tendered and declined, and that plaintiff was obliged to take his brother in a buggy across the country to another railroad, by which he was subsequently carried to Milledgeville. There was evidence on the part of the company that there were only two passenger coaches, in one of which there were ladies, and the other was divided into two compartments, one end of which was used as a smoker, all the seats of which were occupied by passengers, the other end being used for colored people, and in which there was a colored woman passenger; that the general manager offered to carry the insane man on the next day, if he was then quiet, or he would carry him in the cab of the freight train that passed for Macon a few hours later on the same day. The petition alleged that it was the usual custom of the company to transport lunatics and persons adjudged insane, over its line to Macon, en route to the State Sanatorium, to which allegation the defendant answered that it never refused to transport lunatics when they were quiet and not in such a condition as to render themselves dangerous to passengers, and that it would have transported Josh Owens, had he not been resisting those attempting to put him on the cars, and uttering vulgar language in a loud and boisterous manner, and that when the tickets were sold, prior to the arrival of the train, Josh Owens appeared to be quiet. At the conclusion of the evidence the court directed a verdict for the defendant, and the plaintiff excepted.

H. A. Hall, for plaintiff in error. L. F. Garrard and Longley & Longley, for defendant in error.

LAMAR, J. This was a suit by one of the guards in charge of a lunatic, but it was conceded on the argument here that he could not recover if the company was justified in refusing to transport the lunatic, and we shall therefore consider what was the carrier's obligation to the insane man. The relation of carrier and passenger creates reciprocal duties. One is bound safely to transport; the other, to conform to all reasonable regulations, and so to conduct himself as not to incommode other passengers who have an equal right to a safe and comfortable passage. Those who so act as to be obnoxious may be refused transportation or ejected. The payment of fare and the possession of a ticket do not require the carrier to transport those who are noisy or boisterous, or who threaten the safety of, or occasion inconvenience to, others on the train. But in the case of unfortunates who are not responsible for their disorderly conduct, and who, at best, are involuntary passengers, a different question is presented, calling in each case for the exercise of a wise discretion. On the one hand, regard must be had for the safety and comfort of other travelers, and, on the

other, to the fact that in losing his mind the lunatic has not lost the right to be transported. It may be vitally important that he be taken to a place where he can receive the attention and confinement rendered necessary by his mental state. The carrier cannot absolutely refuse transportation to insane persons, but it may in all cases insist that he be properly attended, safely guarded, and securely restrained. And even where such precautions have been taken, it is not bound to afford him, if violent, transportation in the cars in which other travelers are being conveyed. And while there may be cases in which the convenience of other passengers should yield to the necessities of the unfortunate, the company may decline to receive one who at the time of entering the train exhibits signs of violence which indicate that his presence and conduct would tend to the manifest annoyance of others. So to do would ordinarily be better than to receive him on the promise of his attendants that he would be quiet, and, on the disorder continuing, force upon the carrier the duty of deciding whether he should be ejected at a station where there might not be proper accommodations. Where, however, it becomes essential to transport one who, though violent and noisy, is not responsible for his actions, the company is entitled to seasonable notice, in order that it may make proper arrangements. The action of the defendant in the present case in offering transportation on a later train, whereon others would not be incommoded, was in strict fulfillment of its double duty to the lunatic and the general public. It could not be required to place him in the baggage car, which was not intended for passengers. If the attendants were unwilling for him to be taken in the cab of the freight train, they were at least bound to give the carrier an opportunity to make other arrangements.

We find no authority directly in point, though the following cases bear more or less on the question raised: *Peavy v. Georgia R. Co.*, 81 Ga. 485, 8 S. E. 70, 12 Am. St. Rep. 334; *Atchison R. Co. v. Weber*, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 548; *Paddock v. Atchison R. Co.*, 37 Fed. 841, 4 L. R. A. 231; *Croom v. Chicago R. Co.*, 52 Minn. 296, 53 N. W. 1128, 18 L. R. A. 602, 38 Am. St. Rep. 557; *Louisville R. Co. v. Sullivan*, 81 Ky. 624, 50 Am. Rep. 186; *Willets v. Buffalo R. Co.*, 14 Barb. 585; *Meyer v. St. Louis Ry. Co.*, 54 Fed. 116, 4 C. C. A. 221; *Pittsburg R. Co. v. Vandyne*, 57 Ind. 576, 26 Am. Rep. 68; *Lemont v. Washington R. Co.*, 1 Mackey, 180, 47 Am. Rep. 238, 1 Am. & Eng. R. R. Cas. 263; *Vinton v. Middlesex R. Co.*, 11 Allen, 304, 87 Am. Dec. 714; *Robinson v. Rockland R. Co.*, 87 Me. 387, 32 Atl. 994, 29 L. R. A. 530; *Pearson v. Duane*, 4 Wall. 605, 18 L. Ed. 447.

Although the ticket agent was on the jury inquiring as to the lunacy of Owens, and had notice of his mental state, the latter was

not exhibiting any signs of violence when the ticket was sold; and, though the company was accustomed to convey persons insane, it was not bound to admit to its cars one boisterous, cursing, and using obscene language at the time.

There was no error of law committed, and the verdict was demanded by the evidence. Judgment affirmed. All the Justices concur.

(119 Ga. 226)

WOODLEY v. COKER.

(Supreme Court of Georgia. Dec. 12, 1903.)

ABUSE OF PROCESS—WHEN ACTION LIES—PLEADING—AMENDMENT—PUNITIVE DAMAGES.

1. An action for the malicious use of process in a civil suit will lie where the person of the defendant was arrested or his property attached.

2. The petition set forth a cause of action for the malicious use of bail process in a trover suit, and was not a composite petition setting forth three causes of action, for malicious use of process, malicious arrest, and false imprisonment.

3. In an action for the malicious use of bail process in a trover suit, it is not necessary to allege that the defendant in the suit was actually imprisoned in the county jail. An averment that he was arrested under bail process, and thereby restrained of his liberty, is sufficient.

4. Punitive damages are recoverable in an action for the malicious use of process in a civil suit.

5. An amendment to a petition which, properly construed, is merely an amplification of the original petition, setting forth additional facts explanatory of the cause of action therein set forth, is allowable.

(Syllabus by the Court.)

Error from City Court of Floyd County; John H. Reece, Judge.

Action by G. M. Woodley against W. H. Coker. Judgment for defendant, and plaintiff brings error. Reversed.

C. E. Carpenter and Griffith & Weatherly, for plaintiff in error. McHenry & Maddox, for defendant in error.

COBB, J. Woodley brought suit against Coker, alleging in his petition substantially as follows: Coker has injured and damaged plaintiff in the sum of \$2,000. In 1901 Coker brought suit against plaintiff and Clark Bros. for the recovery of 225 bed slats, and at the time of filing this suit made affidavit to obtain bail, under which plaintiff was arrested and held in custody in the county courthouse for two hours. While never actually imprisoned in the county jail, plaintiff was not allowed by the sheriff to leave town for six days. Plaintiff endeavored to make bond, but was unable to do so. Coker claimed to have a bill of sale to the bed slats, executed by one W. B. Clark, a member of the firm of Woodley & Clark Bros., to secure a debt which Coker claimed Clark Bros. owed him. Plaintiff was in no way bound for the pay-

ment of this debt, and Clark had no authority to sign his name to the bill of sale. When the trover suit was filed, neither the plaintiff, nor the firm of which he had been a member, was indebted to Coker in any sum whatever. The trover suit was filed, and plaintiff was arrested under the bail process for the sole purpose of forcing plaintiff to pay Coker money which he did not owe him, and which Coker knew plaintiff did not owe him. Plaintiff and Clark Bros. filed a petition asking to be released from imprisonment under the bail process, and this petition was granted by the judge of the superior court. Immediately after the release of plaintiff and his associates, Coker dismissed his bail-trover suit, which had been carried on, maliciously and without probable cause, for the sole purpose of collecting from plaintiff money which Coker knew he did not owe. Plaintiff was greatly embarrassed and humiliated by the arrest, which caused many of his friends and acquaintances to lose confidence in him and look down on him. The petition prays for the recovery of both actual and punitive damages. By amendment, plaintiff prayed that he might recover certain sums which he had expended as attorney's fees and otherwise in securing his release from imprisonment, and for time lost by reason of the alleged illegal imprisonment. The petition was dismissed on demurrer, and the plaintiff assigns error upon this ruling, and also upon the refusal of the court to allow an amendment to the petition.

1, 2. It is contended that, although the petition is not divided into counts, it sets forth, as against a general demurrer, three causes of action—for malicious arrest, malicious use of process, and false imprisonment. Taking into consideration the fact that the petition was in one count, and treating the allegations as a whole, it seems to us that the purpose of the pleader was to set forth one cause of action; that is, for the malicious use of bail process in a trover suit, which resulted in the arrest and imprisonment of the plaintiff. Strictly speaking, the term "malicious prosecution" is applicable only to the carrying on of a criminal case. In this sense only is it used in our Code. Civ. Code 1895, § 3843. When damages are sought for the malicious carrying on of a civil suit, the cause of action is not for malicious prosecution, but for the malicious use of process. See Newell on Mal. Pros. § 7. However, the essential elements in a cause of action for the malicious prosecution of a criminal case and the malicious use of process in a civil suit are the same. *Id.* § 8; *Wilcox v. McKenzie*, 75 Ga. 73; *Georgia Loan Co. v. Johnston*, 116 Ga. 630, 43 S. E. 27. See, also, in this connection, *Mitchell v. Railroad*, 75 Ga. 398 (3). In the text-books and encyclopædias, and in the opinions of the judges, including our own, it is frequently said that an action for malicious prosecution will lie for the malicious carrying on, without probable cause, of a civil

suit. But accurately speaking, and especially under our Code, there can be no such thing as an action for the malicious prosecution of a civil suit, but the action is for the malicious use of legal process. When the averments as to the arrest and imprisonment are read in connection with the other allegations of the petition, it becomes apparent that it was not the purpose of the pleader to set forth three distinct causes of action, but simply one for the malicious use of process, and the averments as to the arrest and imprisonment were made simply for the purpose of making complete the cause of action for the malicious use of process. As against a general demurrer, the petition set forth a cause of action, and the court erred in sustaining the demurrer of that character.

3, 4. The court also sustained a special demurrer which was filed to certain paragraphs of the petition. Two of the grounds of this demurrer raised the point that, as it appeared from the allegations of the petition that the plaintiff was not actually imprisoned in the county jail, the averments as to the imprisonment were not sufficient. The averments of the petition were clear and distinct, that the plaintiff was arrested and restrained of his liberty, and was in the actual custody of the sheriff, for two hours, and that for six days the sheriff refused to allow him to leave town. These allegations were sufficient to show that the plaintiff was restrained of his liberty, and it was not necessary to show that he was actually incarcerated in the county jail.

The paragraph of the petition which prayed for punitive damages was demurred to specially. Punitive damages may be recovered in any action sounding in tort where the tortious acts were wantonly or maliciously committed. See *Southern Railway Co. v. O'Bryan* (Ga.) 45 S. E. 1000, and citations.

The other grounds of the demurrer relate to matters which were either explanatory of the cause of action set out, or were set forth merely as matter of aggravation. There was no merit in any of the grounds of the demurrer, and it was error to sustain them.

5. The only remaining question is whether the court erred in refusing to allow the amendment. As the allegations of the amendment simply amplified the averments of the original petition relating to the cause of action for the malicious use of the bail process, it was error to refuse to allow it.

Judgment reversed. All the Justices concur.

(119 Ga. 220)

DAVIS v. BRAY.

(Supreme Court of Georgia. Dec. 12, 1903.)

JUDGMENT—ARREST—TRIAL BY COURT—DEFECTS IN PLEADINGS.

1. "A judgment cannot be arrested or set aside for any defect in the pleadings or record that is aided by verdict or amendable as matter

of form." Civ. Code 1895, § 5365. And it necessarily follows that where a judge of a city court is empowered, in the absence of a demand for a trial by jury, to try a case upon all issues of law and fact involved, a judgment rendered by him without the intervention of a jury is to be regarded as having all the force and effect of a verdict, in so far as amendable defects in the pleadings are concerned.

(Syllabus by the Court.)

Error from City Court of Floyd County; John H. Reece, Judge.

Action by Lizzie M. Bray against Seab P. Davis. Judgment for plaintiff, and defendant brings error. Affirmed.

M. B. Eubanks, for plaintiff in error. Lipscomb & Willingham, for defendant in error.

TURNER, J. Lizzie M. Bray instituted in the city court of Floyd county a suit against Seab P. Davis, alleging that the defendant was indebted to her in the sum of \$750, besides interest, etc. She further alleged that this indebtedness was due upon a certain promissory note assigned to her by the Security Investment Company, to the order of which investment company it was originally payable, which note was dated the 1st day of September, 1900, with interest at the rate of 6 per cent. per annum, payable semiannually, as per interest notes attached. It was further averred that the principal amount of the note became payable by the terms of the note on or before September 1, 1905; but the same paragraph of the petition claimed that "said indebtedness is also due for the taxes which said Davis suffered to become delinquent, now represented by *fi. fas.*" A statement of the amount of these taxes was also set forth, and petitioner alleged that she had taken up these *fi. fas.* A copy of the note was attached as a part of the petition and of the cause of action. In a subsequent paragraph of the petition the plaintiff averred that, "by the terms of the said principal note, time was of the essence of the contract; it being stipulated that, in the case of any default in the payment of taxes assessed against said property before same became delinquent, then the said principal debt, in the discretion of the holder, should become due and payable at the date of such default, regardless of the date of maturity." The plaintiff further showed in her petition that the defendant had broken said contract, in this: that the taxes as set forth in a preceding paragraph were not paid, "by reason whereof the principal debt became due and payable under the contract, and the said Davis became liable to pay your petitioner the aforesaid sums of money, according to the tenor and effect of said notes." It is also to be noted that in another paragraph of the petition the plaintiff alleged that, "to secure the payment of said note, said Seab P. Davis, at the time of making the same, also made and delivered to said the Security Investment Company and assigns a deed to" certain lands described, "which deed was made in conformity

to section 1969 of the 1882 Code of Georgia (2771 of the 1895 Code of Georgia)." The note referred to in the petition was made an exhibit, but the deed just recited was not made an exhibit. At the December term of the court the following judgment was entered up: "There being no issuable defense filed on oath in this case, judgment is rendered by the court for plaintiff, Lizzie M. Bray, against deft., Seab P. Davis, for seven hundred and fifty dollars principal, and eleven and $\frac{5}{100}$ dollars interest to date, and future interest at the rate of six per cent. per annum; and the further sum of \$9.50 dollars cost." At the same term of the court the defendant filed a motion to arrest the judgment, upon the following grounds (in addition to one which was, on the argument before this court, abandoned by his counsel): (1) "Because it appears that said petition does not set out any cause of action against defendant upon which a legal judgment could be predicated against defendant, it appearing that said suit was brought upon a note before the same became due, and no conditions being shown that would authorize suit on the note before due." (2) "Because it appears from inspection of the note sued on that there is no condition in said note making the same fall due on default as to taxes; and, failure to pay interest not being alleged, no right of action exists in favor of plaintiff until said note became due, to wit, September 1, 1906. And construing plaintiff's petition as a whole, and admitting everything that appears as true in the record, plaintiff had no right of action on the note sued on at the time of bringing of said suit." (3) "Because said suit being brought upon said note long before the same became due, and plaintiff relying on conditions not contained in the note sued on, and relying upon conditions varying the terms of the note sued on, and plaintiff further suing for \$67.71 and interest not embraced in said note, said suit was not a suit on an unconditional contract in writing, within the meaning of the law, and no judgment could be legally rendered by the court without first having the verdict of a jury." On hearing the motion in arrest of judgment, it was overruled by the city court, and the defendant excepted. The bill of exceptions specifies, as material to a clear understanding of the errors complained of the original suit, petition and process against the defendant, with the exhibits thereto, the entries thereon, and the judgment of the court entered thereon; also the two tax f. fas. and the deed made by Davis to plaintiff which were before the court when the judgment was rendered; and also the original motion in arrest of judgment, with all entries thereon, and the judgment overruling the same. Subsequently the plaintiff below (the defendant in error) caused the judge of the city court to direct that there also be sent up, as a part of the record, the answer of the plaintiff below to the motion in arrest of judgment.

It is unnecessary to state here the general

rule that a motion in arrest of judgment is to be tried by the record of the case to which it relates. Taking up the grounds of the motion in arrest in their inverse order, it may be admitted that the note sued upon, on its face, matured after the suit was brought, and that the pleader seemed to rely upon the fact that the taxes against the property were in default, as a contingency on the happening of which the note had matured when such default occurred, and before the bringing of the suit. Assuming that this contention was correct, it may also be conceded that this state of things operated to bring the case within those decisions of this court to the effect that such a suit is not one upon an unconditional contract in writing. In such cases, if in the superior court, or in those city courts which are governed by the rules of practice which obtain in the superior court, judgment cannot be rendered by the judge without the verdict of a jury, even though no issuable defense be filed. But in the ninth section of the act establishing the city court of Floyd county it is provided that "the trial of all issues of fact in said court shall be by the court, without a jury, except where either party in a civil case, or the defendant in a criminal case, shall, in writing, demand a trial by jury." Acts 1882-83, p. 538. This section further provides that a "failure to file such a demand at or before the beginning of the trial shall be a waiver of said right" of a trial by jury. In the present case the record does not show that such a demand was filed, or, indeed, that there was any appearance at all by the defendant. It may be that the form of judgment which the city court of Floyd county may render in a contested case is of no consequence, though it is possible that in such a case a different form of judgment may there obtain. The recital in the judgment rendered in this case that there was no issuable defense filed on oath may have been inserted merely to distinguish it from those cases in which a trial is had on regular issues. But even if it be assumed that this recital was an effort to conform in some way to the form of judgments in the superior court, it ought not, in view of the act creating this city court, to be taken to imply that the suit was upon an unconditional contract in writing, because that court, as we have seen, has the power to render a judgment without a jury even in a suit on a contract which is not unconditional, if, as in this case, no demand for a jury trial is made. We therefore hold that this judgment is not void on its face, either because it was rendered by the court without a jury in a suit on a contract which was not unconditional, or because the judgment contains a recital provided for by the rules of the superior court in certain cases.

The other two grounds of the motion in arrest involve very serious questions of practice, and the conclusion reached is not altogether free from difficulty. The petition rather inaptly avers that the note became due

because of the nonpayment of taxes. And it is also true, as claimed in the motion to arrest the judgment, that the copy of the note to which reference is made in another paragraph of the petition, as showing that nonpayment of taxes operated to make it fall due, contains no such stipulation. But the petition also refers to a deed which was given by the defendant to secure the payment of the note. As this latter allegation was made a part of the case, it may, perhaps, be taken for granted that the court had that deed before it. Certainly the petition could have been amended by the insertion and exhibition of that deed in full. May it not very well be presumed that, if such deed had been made a part of the pleadings by amendment, the petition would then have shown that the deed contained a clause which provided that the debt should mature and become payable whenever any taxes assessed against the property were allowed by the defendant to become in default? Certainly some presumptions ought to arise in favor of the proper exercise of its powers by a court of competent jurisdiction, when it appears that the defendant has been duly served, as in this case, and might have had his day in court. Let it also be borne in mind that Civ. Code 1895, § 5365, provides that a judgment cannot be arrested or set aside for any defect in the pleadings or record that is aided by verdict or amendable as matter of form. For an application of this rule, see *Artope v. Barker*, 74 Ga. 462; *Moss v. Stokeley*, 95 Ga. 675, 22 S. E. 692. In the particular matter now under discussion, perhaps as much favor ought to be given to the judgment of the court as to a verdict of the jury.

By the new practice act (Civ. Code 1895, § 4901) it is required that petitions shall set forth a cause of action in orderly and distinct paragraphs, and any averment distinctly and plainly made which is not denied by the defendant's answer shall be taken as *prima facie* true, unless the defendant states in his answer that he can neither admit nor deny such averment, etc. However incorrectly or awkwardly the allegation was made in this petition as to the note maturing on the nonpayment of taxes, still the issue was made. In the case of *W. U. Tel. Co. v. Lark*, 95 Ga. 806, 23 S. E. 118 (3), this language is used: "No issuable defense having been filed, it was, under the provisions of this act, proper for the court to treat as true, without proof, every essential averment of fact distinctly and plainly made in the plaintiff's petition; and, this being so, the plaintiff's right to recover was established." There are many other decisions of this court to the same effect. On the whole, if we are right in assuming that the petition was amendable so as to set out the deed specified in the petition and hereinbefore referred to, and if the practice act is applicable, as we think, and if there is any presumption that the court below properly and fairly did his duty in this matter, it follows

that the motion in arrest of judgment was rightly overruled.

Judgment affirmed. All the Justices concur.

(119 Ga. 225)

WALKER et ux. v. HILLYER.

(Supreme Court of Georgia. Dec. 12, 1903.)

CERTIORARI BOND—CERTIFICATE OF MAGISTRATE—NEW TRIAL.

1. The words "Approved by," signed in his official capacity by the magistrate of the court in which the case was originally tried, were indorsed on a certiorari bond; and the magistrate certified that the plaintiff in certiorari had "paid all costs in the case (amounting to \$6.75), the subject-matter of the * * * petition [for certiorari], and [had] given bond and security as required by law." Held, that there was a sufficient compliance with the statute requiring in such cases the approval and acceptance of the bond, and the giving of the certificate of the payment of all costs that have accrued.

2. The record clearly shows that the verdict in the justice's court was not demanded under the law and the evidence. Consequently this court will not interfere with the first grant of a new trial by the superior court. *Shirley v. Swafford* (decided Nov. 16, 1903) 45 S. E. 722.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; W. M. Henry, Judge.

Action by Caleb Walker and wife against J. F. Hillyer. Judgment for plaintiffs before a justice. From an order of the superior court granting a new trial on certiorari, plaintiffs bring error. Affirmed.

Henry Walker, for plaintiffs in error.
Junius F. Hillyer and Alexander & Hillyer, for defendant in error.

FISH, J. Judgment affirmed. All the Justices concurring.

(119 Ga. 229)

LOVVORN v. JONES.

(Supreme Court of Georgia. Dec. 12, 1903.)

ASSIGNMENT OF ERROR—SUFFICIENCY—NOTICE—DISMISSAL OF CERTIORARI—NEW TRIAL.

1. An assignment of error that the court erred in not dismissing a certiorari "upon the ground that the affidavit for certiorari was not in compliance with the statute for same, and was not sufficient," is without merit, when the record fails to disclose wherein the affidavit was claimed to be defective.

2. Where the record shows a writing signed by the plaintiff, and directed to the defendant in certiorari, purporting to give the latter due notice of the sanction of the writ and the time and place of hearing, and the bill of exception recites that the attorney for the defendant waived the necessity of an affidavit as to the service of such written notice, it was not erroneous to overrule a motion to dismiss the certiorari upon the ground that 10 days' written notice of the sanction of the writ and the time and place of hearing had not been given.

3. As it clearly appears from the record that the verdict in the justice's court was not demanded under the law and the evidence, this court will not interfere with the first grant of a new trial. *Walker v. Hillyer* (this day decided) *ubi supra*.

(Syllabus by the Court.)

Error from Superior Court, Carroll County; S. W. Harris, Judge.

Action between J. L. Lovvorn and J. E. Jones. From an order refusing to dismiss a writ of certiorari, Lovvorn brings error. Affirmed.

R. D. Jackson, for plaintiff in error. Oscar Reese and Brown & Roop, for defendant in error.

FISH, J. Judgment affirmed. All the Justices concur.

(119 Ga. 263)

AIKIN v. PERRY.

(Supreme Court of Georgia. Dec. 14, 1903.)

LANDLORD—FAILURE TO REPAIR—LIABILITIES—NOTICE—DAMAGES—BURDEN OF PROOF.

1. A person upon whom a wrong has been committed is under a duty to use ordinary care and diligence to lighten the consequential damages resulting therefrom. Civ. Code 1895, § 3802; Georgia Railroad Co. v. Eskew, 12 S. E. 1061, 86 Ga. 641 (5, 6), 22 Am. St. Rep. 490; Nicholas v. Tanner, 43 S. E. 489, 117 Ga. 223.

2. In this state a landlord is bound to keep the rented premises in repair, in the absence of an agreement to the contrary; but the tenant cannot recover for any damages resulting from a failure to repair which he could by the exercise of ordinary care have avoided.

3. In the absence of an agreement so to do, the landlord is not bound to repair patent defects in a building of the existence of which the tenant knew at the time the rent contract was entered into. Driver v. Maxwell, 56 Ga. 11 (2); White v. Montgomery, 58 Ga. 204 (1).

4. In the trial of an action against a landlord for damages alleged to have resulted from his failure to repair, when the landlord admits that he had notice of the defects, it is not prejudicial to the tenant to reject evidence tending to show that the landlord had such notice.

5. The law making it the duty of a landlord to keep rented premises in repair, evidence that he did or did not enter into a contract with a third person to make repairs can throw no light on the question of liability.

6. In the trial of an action for damages for a failure to repair against a landlord by a tenant who had been in possession of the premises under a former landlord, the burden is upon the tenant to show that he sustained damage after the contract with the second landlord was entered into, and the amount of such damage.

7. The evidence authorized the verdict, and there was no abuse of discretion in refusing a new trial.

(Syllabus by the Court.)

Error from Superior Court, Carroll County; S. W. Harris, Judge.

Action by W. L. Perry against J. N. Aikin. Judgment for plaintiff, and defendant brings error. Affirmed.

S. E. Grow, Oscar Reese, and R. D. Jackson, for plaintiff in error. Brown & Roop, for defendant in error.

COBB, J. A landlord sued out a distress warrant against a tenant. The tenant sought to set off a sum claimed to be due him as damages on account of the landlord's failure to repair the rented premises. There was

1. See Landlord and Tenant, vol. 32, Cent. Dig. § 537.

evidence warranting a finding that the tenant knew of the defective condition of the premises at the time they were rented, and said nothing about the defects; and there was also evidence authorizing a finding that he did not exercise ordinary care to save himself from damage on account of the defects. All of the assignments of error which were insisted on are covered by the headnotes. The court did not err in refusing a new trial. Judgment affirmed. All the Justices concur.

(119 Ga. 266)

HOLDER v. SCARBOROUGH.

(Supreme Court of Georgia. Dec. 12, 1903.)

EJECTMENT—NONSUIT—EVIDENCE—TITLE OF GRANTOR—DESTRUCTION OF DEED—REVESTING TITLE.

1. Where the plaintiff's lessor introduces a deed to himself, and supports it with testimony which the jury might construe as evidence of adverse possession for seven years, it is not error to refuse a nonsuit.

(a) And when the evidence subsequently introduced by the defendant shows that both parties claim under a common grantor, the refusal of the nonsuit will not be overruled. Civ. Code 1895, § 5004; Hanson v. Crawley, 51 Ga. 529; Werner v. Footman, 54 Ga. 128.

2. J. M. Scarborough purchased land, giving his promissory note for the purchase money, and taking from the vendor a bond for titles. Scarborough subsequently sent to the vendor the purchase money, and requested that a deed to the land be made to him. About 10 days after the money was paid by J. M. Scarborough and the deed made to him, the latter sent the deed back to the vendor, requesting that the deed be destroyed, and that a deed conveying the same land to his brother, J. H. Scarborough, be made. J. H. Scarborough had notice of the former deed. Held, that the destruction of the former deed did not revest the title in the vendor, and he had no title that he could convey to J. H. Scarborough. Held, further, that the direction of a verdict in favor of the lessor, J. H. Scarborough, was error.

3. The other assignments of error in the bill of exceptions are not considered, because the grounds of such exceptions may not recur on the next trial.

(Syllabus by the Court.)

Error from Superior Court, Laurens County; H. G. Lewis, Judge.

Action by J. H. Scarborough against E. J. Holder. Judgment for plaintiff. Defendant brings error. Reversed.

P. L. Wade and Hardeman, Davis, Turner & Jones, for plaintiff in error. John M. Stubbs and Akerman & Akerman, for defendant in error.

TURNER, J. Judgment reversed. All the Justices concur.

(119 Ga. 256)

BATSON et al. v. BENFORD.

(Supreme Court of Georgia. Dec. 12, 1903.)

HOMESTEAD—APPLICATION BY MARRIED WOMAN—VALIDITY—EVIDENCE—EJECTMENT—TITLE.

1. Where a married woman applied for a homestead out of her husband's property, under

Civ. Code, § 2866, and the application or schedule does not affirmatively show that the husband has refused to make the application, the homestead so recorded is void (*Hirsch v. Stinson*, 37 S. E. 365, 112 Ga. 348, and citations), and it is therefore inadmissible in evidence as a muniment of title.

2. An order of a judge of the superior court authorizing the sale of such property as a homestead is likewise inadmissible for the same reason.

3. Where such land is sold, and other land bought in an adjoining county, and the deed taken in the name of the wife, who subsequently borrows money and gives a mortgage on the land so purchased, and such land is sold under foreclosure proceedings, and bought by a purchaser without notice of the alleged homestead or the rights of the husband, the purchaser remaining in possession for 11 years, the children of the husband and wife cannot recover this land either as beneficiaries of the homestead or as heirs at law of their father.

(Syllabus by the Court.)

Error from Superior Court, Baldwin County; H. G. Lewis, Judge.

Action by Mary Batson and others against J. R. Benford. Judgment for defendant, and plaintiffs bring error. Affirmed.

Hines & Vinson, for plaintiffs in error. Allen & Pottle, for defendant in error.

SIMMONS, C. J. Judgment affirmed. All the Justices concur.

(119 Ga. 238.)

BANK OF WRIGHTSVILLE v. MERCHANTS' & FARMERS' BANK OF MILLEDGEVILLE

(Supreme Court of Georgia. Dec. 14, 1903.)

PAYMENT—PLEADING—ACTION AGAINST GUARANTOR—WEIGHT OF EVIDENCE—INSTRUCTIONS.

1. In a suit against a guarantor, no formal plea of payment is necessary to warrant the admission of testimony tending to establish that the liability does not exist inasmuch as the principal debtor has paid the debt guarantied. This is particularly true where the petition alleges that the principal has not paid the debt and the answer denies this allegation.

2. Where the plaintiff contends that the guarantor has not paid a draft covered by the terms of the guaranty, and the defendant insists that such draft was withdrawn, and the amount thereof included in another draft for a larger sum, which was paid by a particular check, which was itself paid, the case does not involve the doctrine of the application of payments under Civ. Code, § 3722, and there was no error hurtful to the plaintiff in the charge on this subject.

3. Even if the charge as to the elements to be considered by the jury in determining the weight to be given evidence was incorrect, it nowhere appears that it was harmful to the plaintiff, for under the record it may have been helpful to him and harmful to the opposite party.

4. There were no errors of law, and the verdict was sustained by the evidence.

(Syllabus by the Court.)

Error from Superior Court, Baldwin County; H. G. Lewis, Judge.

Action by the Bank of Wrightsville against the Merchants' & Farmers' Bank of Milledge-

ville. Judgment for defendant, and plaintiff brings error. Affirmed.

The Bank of Wrightsville sued the Merchants' & Farmers' Bank of Milledgeville on a contract growing out of what the plaintiff designated as a guaranty or letter of credit, by which it contended that the defendant had guarantied the payment of drafts for the purchase of cotton, drawn by Beck, a cotton buyer, on his principal, Smith, if accompanied by bills of lading, and sent to the Merchants' & Farmers' Bank for collection. The plaintiff insisted that drafts were so drawn, presented, and collected, and the proceeds properly remitted for several months by the defendant; that on January 8, 1901, Beck drew seven drafts, aggregating \$11,475—one being for \$1,446.48—with bills of lading attached to each; that plaintiff advanced the money thereon, and forwarded them to the Citizens' Bank of Savannah, which apparently gave credit therefor. The drafts were sent by it to the Merchants' & Farmers' Bank, and by it presented to Smith for payment, but, he being sick, payment was not made, and they were protested on January 12th, and returned. On January 17th the Citizens' Bank sent the drafts to the Bank of Wrightsville, but before doing so detached the bills of lading, awaiting instructions from the bank of Wrightsville. The bills of lading were still held by the Citizens' Bank for the total amount of the former drafts, "except thirty-one bales." The brief of evidence is indefinite, but it seems that new drafts were drawn on the National Bank, to which were attached the bills of lading. Whether this included the one for 31 bales does not appear. There was also evidence of correspondence in August, 1901, in which Smith acknowledged Cook's statement of account, and accepted it as a settlement of the old matter, although he did not think himself liable in agreeing to pay \$25 cash each week, and would give his note for \$900, due November 1st. Cook testified that "bills of lading for about 250 bales of cotton were attached to the seven drafts aggregating \$11,745. These drafts were not paid. Afterwards Smith sent us about \$10,000 on these drafts. He owes a balance of something over \$1,500. I do not know the exact amount." Smith testified for the defendant: "The drafts were presented to me the 12th of January. We cannot handle fractional lots. I did not know those drafts had been protested until I got my mail on the morning of the 14th, when I sent my personal check to the Bank of Wrightsville to take up these bills of lading. The check was on Savannah. These are invoices from Beck, giving me the gradings and weights of cotton. Attached to each is a check on the National Bank of Savannah, to cover these identical drafts, dollar for dollar. One of these invoices seems to be marked thirty-one bales. I sent that back to Beck, requesting him to add nineteen bales. He did so, and,

after having added the nineteen bales, the invoice amounted to \$2,306, instead of \$1,446.48, as originally drawn, representing thirty-one bales. I did not pay that draft with any draft on Savannah. My personal checks amounted to over \$10,000, which left a balance due of \$1,446.48, and when I got my buyer to fill out his number of bales that raised this balance of \$1,446.48 to \$2,306, and that was paid on January 18th, by me, to the Merchants' Bank in Milledgeville. At the time I drew those drafts there was no indebtedness against me in the Wrightsville Bank. On the 18th of January, when I paid the Bank of Wrightsville the draft of \$2,306, I did not think I owed them a cent. I gave no directions as to how that \$2,306 should be applied, because when you buy a bill of lading you buy the draft." The plaintiff, in rebuttal, offered evidence through Cook: "This draft covers fifty bales of cotton, and was drawn by Smith's agent, Beck, and was applied to his general account. After we had given him credit for this amount, he still owed us fifteen hundred and odd dollars. At that time he owed \$2,306, and fifteen hundred and odd dollars besides." Smith, recalled, testified: "On the 18th of January, when I paid this last draft, I did not owe the Bank of Wrightsville a cent, so far as I know. These letters of mine with reference to the thousand dollar compromise relate to a subsequent account in which Mr. Beck and I were mixed up. That happened in March and April. It had nothing whatever to do with these seven drafts sued upon." One of the drafts drawn by Beck on Smith was for \$1,446.48, to which was attached a bill of lading for 31 bales of cotton. As it is customary in the cotton export business only to attach bills of lading for 50 bales, or multiples of 50, the defendant contended that on the return of the drafts which had not been paid on account of Smith's illness Beck was requested to buy 19 extra bales, attach a new bill of lading for 50 bales, and draw therefor; that he did this; that Smith paid the draft—\$2,306.16—which included and was intended as a substitute for the original draft of \$1,446; and that the Wrightsville Bank knew that Smith intended this to be a payment of whatever liability originally existed on the \$1,446 draft. The plaintiff insisted that the payments received were on account of an additional indebtedness due to it by Smith, and that the money received from Smith had been appropriated to the payment of such additional indebtedness. When the evidence of payment was offered, the plaintiff objected on the ground that it was inadmissible under the pleadings, there being no plea of payment filed. The objection was overruled, and a motion for a new trial was made upon that and other grounds.

Daley & Bussey and J. L. Kent, for plaintiff in error. Allen & Pottle, for defendant in error.

LAMAR, J. If the defendant had offered evidence to show that it had paid the amount due by it under the guaranty, it would have been inadmissible, there being no plea of payment filed. But such was not the case. The evidence was offered to contradict a material contention of the plaintiff that "said Smith has failed and refused, and continues to fail and refuse, payment of said balance due." It was not evidence in support of a plea of confession of original liability and avoidance because of subsequent payment, but went to establish the defendant's contention that it was not liable as guarantor because of the fact that the principal, Smith, had settled the debt. The answer distinctly raises the issue, and the evidence in support thereof was relevant and admissible.

The charge of the court in reference to the duty of the plaintiff to apply the \$2,306 was not such as to require a new trial. This was not a case in which the ordinary doctrine of the application of payments controlled. The defendant insisted that the \$2,306 draft, with the bill of lading for 50 bales of cotton, was intended and understood by all the parties to include the amount formerly due on the \$1,446 draft with the bill of lading for 31 bales of cotton. And hence, though probably inaccurate, it was not reversible error to charge that: "If you believe that the draft of \$2,306 covered the amount of a draft for \$1,446, and the Bank of Wrightsville knew that this draft covered this amount, or was intended by Smith to cover this amount, or ought to have known it by the exercise of ordinary diligence, and if Smith finally paid that draft, then I charge you that the Bank of Wrightsville could not have applied the payment of \$2,306 to any general account Smith might have been due to the Bank of Wrightsville, and the Merchants' Bank would not be bound by any such application of payment, if such was made." The charge must be construed in the light of the whole case, and in view of the fact that this is a suit, not against Smith, but against the guarantor. The \$2,306 was the proceeds of a draft for that sum, and had to be applied to the debt represented by the draft. If the \$1,446 was included therein, then by operation of law it also was satisfied and discharged, so far as the guarantor was concerned, regardless of any actual or attempted application of the proceeds to any balance on open account or otherwise. Beck's certificate of the amount of Smith's indebtedness to the Bank of Wrightsville was secondary evidence, not binding on the Merchants' Bank. Beck was not the agent of the defendant, which had the right to cross-examine him.

It is not made to appear by the record how the plaintiff was injured by the charge of the court instructing the jury that they might consider the intelligence of the witnesses in weighing the testimony. For aught that appears, it may have been helpful to the plaintiff and hurtful to the defendant. At

any rate, the plaintiff fails to show that the charge, if erroneous, was harmful.

The evidence for the plaintiff was indefinite, even as to the amount it claimed to be due, dealing in round numbers, and saying that the balance was about fifteen hundred and odd dollars. The guarantor was not liable for any indebtedness on account, but only for drafts with bills of lading attached. But passing that point, and irrespective of the defendant's contention that the verdict was demanded by the evidence because of plaintiff's failure to prove that it had sued Smith to insolvency, we find no error in the rulings or charge of the court.

The evidence for the defendant was amply sufficient to warrant the verdict, and the judgment is affirmed. All the Justices concur.

(119 Ga. 264)

HADAWAY et al. v. SMEDLEY.

(Supreme Court of Georgia. Dec. 14, 1903.)

GIFT OF LAND—POSSESSION BY DONEE—CONVEYANCE BY DONOR—SPECIFIC PERFORMANCE—BONA FIDE PURCHASERS.

1. Where a father in possession of land under a bond for titles, a part of the purchase money being paid, makes a parol gift of the land to a son, and the latter goes into possession, and, on the faith of the gift, makes valuable improvements on the land, and subsequently the father acquires the legal title by a conveyance from the maker of the bond for titles, the title thus acquired by the father passes, by the statute of uses, into the son, and inures to his benefit, in preference to one to whom the father conveyed after he had acquired the legal title.

2. Under such a state of facts, when the son has been ousted from the possession he is entitled to maintain an equitable petition for specific performance by the father, and to have the deeds made by the father canceled, after proving that the purchasers bought with notice of the son's equity, as evidenced by his possession.

(Syllabus by the Court.)

Error from Superior Court, Troup County; S. W. Harris, Judge.

Action by W. T. Smedley against W. M. Hadaway and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Payne & Tye, Longley & Longley, and J. A. Noyes, for plaintiffs in error. T. A. Atkinson and D. J. Gaffney, for defendant in error.

SIMMONS, C. J. The record discloses that in February, 1883, J. M. Smedley purchased a certain tract of land from Houston for \$2,050. He was unable to pay the whole of the purchase money, and made an arrangement with Ferrell whereby the latter was to advance about \$770, the balance, and the deed from Houston was to be made to Ferrell. Ferrell, under the same arrangement, made Smedley a bond for titles. Immediately after this arrangement was made, J. M. Smedley made a parol gift of a part of the land to his son W. T. Smedley. The son, acting on the faith of this gift, went into possession in the same year, and made val-

uable improvements on the land; erecting tenant houses, barns, and stables. Through the years 1884, 1885, and 1886 the son resided upon the land, exercising acts of control and ownership. On February 24, 1886, the father having paid Ferrell the balance of the purchase money on the land, Ferrell made him a deed in accordance with the bond for titles. Owing large sums of money to other persons, the father applied to Ferrell and Longley for a loan and agreed to make them a deed to all of his lands, consisting of more than 1,200 acres, as security. Ferrell and Longley went upon the land, examined it, and concluded to make the loan. They did so, and on February 25, 1886, the day after Smedley had received the title from Ferrell, Smedley secured the loan of about \$7,000 by making Ferrell and Longley a deed to all of his lands, including that which he had given to his son. Later in the same year Longley sold his interest in the land to Ferrell, and conveyed this interest by deed. Smedley, being unable to pay Ferrell, commenced negotiations with the Equitable Mortgage Company for a loan which would enable him to pay Ferrell. In his application to the mortgage company he stated under oath that the land which he proposed to convey to it had been in his possession and the possession of those under whom he claimed for more than 35 years, and that his title had never been in dispute. Freeman represented the mortgage company in investigating the titles and the value of the land. After about two months, during which he went upon the land and examined it, Freeman recommended that the loan be made, and in February, 1889, the negotiations were concluded; the company advancing the money to Smedley, and taking a security deed from him, dated February 14, 1889. Ferrell reconveyed to Smedley by a deed dated February 18th of the same year. The evidence tends to show that, while these deeds were of different dates, they were delivered simultaneously and as part of one transaction. In August, 1896, the Equitable Mortgage Company conveyed the land to the Equitable Securities Company, and the latter, on November 1, 1899, conveyed to Hadaway the premises now in dispute; being a part of the plantation conveyed by Smedley to the mortgage company. From 1883, shortly after the parol gift from the father to the son, the latter remained in actual, open, and notorious possession of the land until the purchase by Hadaway; and Hadaway purchased with full knowledge of the possession of the son. Hadaway and the son having conflicting claims, the son gave up the premises to Hadaway, and brought his equitable petition against his father for specific performance of the parol contract, and for decree that the father is to make him a deed in accordance with the gift, and also against the Equitable Securities Company and Hadaway to cancel the deeds held by them as clouds upon his title. In his petition he stat-

ed, in substance, the facts recited above. The defendants denied generally the allegations in the petition, and claimed that the Equitable Securities Company and Hadaway were innocent purchasers for value, without notice of the gift from the father to the son, and that the father had no right to make the gift while he held under bond for titles, without the legal title. On the trial of the case the jury returned a verdict for the plaintiff—that the father should make title to the land, and the deeds to the other defendants be canceled. Decree was entered in accordance with the verdict. The defendants moved for a new trial. Their motion was overruled, and they excepted.

1. Several of the grounds of the motion for new trial make complaint of charges of the court and refusals to charge. The principles of the charges of which complaint is made are contained in the headnotes. The judge charged these principles, and refused to charge to the contrary. He charged, in substance, that the father, holding the land under bond for titles, with only a part of the purchase money paid, might make a parol gift to the son, and that, if the father subsequently acquired the legal title, it would inure to the benefit of the son. He also charged that, if the son was in possession of the land at the time the father conveyed it to other persons, this possession, if open and notorious and in his own right, was notice to the world of any claim or right the son had in the land. We think the first proposition is well established by the decisions of this and other courts. When a person is in possession of land, having an equity therein, but not the title, and he sells to another, if he subsequently acquires the title it immediately passes, by the statute of uses, into the vendee. It does not stop in the vendor, but passes through him into his vendee, and this is true although the seller may afterward sell and convey to another and different person. This other person would get no title, because his vendor had none to convey; the statute of uses having taken it from him as soon as he acquired it, and put it in the person to whom he had first sold. The same doctrine, in our opinion, applies when a father holding land under a bond for titles, with part of the purchase money paid, transfers it to his son by parol gift, and the son, on the faith of the gift, enters upon the land and makes valuable improvements. The father, holding under bond for titles, with part of the purchase money paid, has an equitable interest in the land. As between the father and son, the gift is complete as soon as the son enters and improves, and the father has then no right to revoke the gift or to sell the land to another. In the case of *Henderson v. Hackney*, 23 Ga. 383, 68 Am. Dec. 529, it appeared that one Nicks drew a lot of land. Before the grant issued to him, and before he paid the grant fee, he sold and transferred his equity to one Henderson. Nicks after-

wards paid the grant fee, and the grant issued to him. He thereupon sold the land to Holcombe, under whom Hackney claimed. This court held, as stated in the second headnote, that "after the draw, and before the grant, the equitable title is in the drawer, and the legal title is in the state for the use of the drawer on his payment of the grant fee. This equitable title is transferable. When transferred, the legal title in the state becomes a legal title for the use of the transferee on the payment of the grant fee. Consequently, on the issuing of the grant to the drawer, the legal title passes through him, without stop into the transferee, by virtue of the statute of uses." This case was cited and approved in *Walker v. Wells*, 25 Ga. 143, 71 Am. Dec. 164. See, also, the reasoning in *Dudley's Lessee v. Bradshaw*, 29 Ga. 17; *Thursby v. Myers*, 57 Ga. 156 (5). In the case of *Parker v. Jones*, 57 Ga. 205, Jackson, J., in discussing this same question, said: "If a vendor convey land to a purchaser before he acquire title himself, and he subsequently acquire the title, does such title inure to the benefit of the vendee, as against subsequent purchasers or mortgagees? We think it does, and such subsequent mortgagee and those holding under him by subsequent conveyances hold subordinate to the title which vested in the first vendee the moment the vendor himself got it." See, also, *Pridgen v. Green*, 80 Ga. 738, 7 S. E. 97. Under these decisions, we hold that Smedley, the father, having paid the larger part of the purchase money, and being in possession of the land under bond for titles, had an equity in the land; that this equity was transferable; and that, the father having given a part of the land to his son, and the latter having, on faith of the gift, taken possession of the land and made thereon valuable improvements, when the father acquired the legal title it inured to the son, and was good as against the father, and against those who subsequently purchased from the father with notice of the son's interest.

2. Complaint is also made in the motion for new trial that the judge erred in charging that "possession of land is notice of whatever right or title the occupant has, to anybody. Well, if * * * at the time Messrs. Ferrell and Longley took a deed from Smedley to this property, this plaintiff was in possession of it—actual possession of it, so it could be seen by any one that he was in possession of it, controlling it, managing it, and in possession of it—then I charge you that fact is equivalent to notice, and they would have got no title from Smedley that would be good as against the title of the plaintiff in this case." This charge seems to have been based upon the Code of 1895, § 3931. If it had been a new principle announced for the first time in that Code, it might not have applied to some of the transactions in this case, but it is not a new principle, and has always been the law in this state, as will be

seen by reference to the opinion of Bleckley, C. J., in *Broome v. Davis*, 87 Ga. 587, 13 S. E. 749, from which this section of the Code was taken. That case has been uniformly followed since by all the cases which discuss this question. The principal complaint of the court's charge was, however, that it did not apply to the facts of this case; that there was no evidence showing that the purchasers from the father had actual notice of the son's equity, or that the son had such possession and for such length of time as to put them upon inquiry. The record discloses that the son took possession of the land shortly after the parol gift, in 1883; that he erected houses and barns upon the place, and resided there most of the time. He cultivated the place by himself and tenants. It is true that, between the time of finishing the cultivation of the crops until the time to commence gathering them, he, being a single man, lived at the home of his father, which was upon another and separate tract of land. For the most of the year he resided upon the place, and exercised acts of ownership and control. The purchasers, in examining the land (and the record shows that Ferrell and Longley examined the land before advancing money upon it), seeing the evidences of the son's possession, should have inquired of the son or of his tenants whether they claimed the land under the father, or in some other right. Had they made such inquiry, particularly of the son, they would probably have learned of the son's claims to the premises. Had the son told them that he had no interest in the premises, then, of course, he would have been estopped, as against them, if he had knowledge or notice of their purpose in making the inquiry. We think it is the duty of a purchaser of land, when he examines the premises and finds them in possession of others than the holder of the legal title, to make inquiry as to the right or interest of the occupants. If the tract he wishes to purchase includes a portion not contiguous to the main tract, and he finds such separated portion in possession of others than the person with whom he is dealing, he should investigate and ascertain upon what right or claim such possession is based. The evidence in this case discloses that the 100 acres of land now in dispute did not originally belong to the plantation of the elder Smedley, and it is separated therefrom by intervening lands of other persons. When Ferrell and Longley went over the place to see whether they should advance money upon it, and they found this 100 acres, separate from the home of the father, in the possession of the son, they should have inquired into the interest or claim of the son. The same rule applies to the purchase of the Equitable Mortgage Company. Its agent took two months to examine the property and the titles. The possession of the son, with his tenants and houses and barns, should at least have put the agent upon inquiry as

to the right of the son to occupy and control the place.

But it is argued that Ferrell conveyed the land to the father on February 24, 1886, and the father made a conveyance, including this same land, to Ferrell and Longley, on February 25, 1886, and that therefore there was but one day intervening, which was not sufficient to put Ferrell and Longley upon notice of the son's rights; that the purchasers should have had reasonable time within which to make their investigation. If one purchases land from another, or takes it as security for a loan, when he knows or ought to know that still another is in possession of it, the doctrine of reasonable time does not apply. The possession is enough to put him upon notice, and he should make inquiry before he purchases or makes the loan. He need not make the purchase or loan until he is fully satisfied as to the title. If he acts within one day, and thus takes but a short time for pursuing his inquiries, he cannot afterward avoid the effect of the notice by claiming that he did not allow himself a reasonable time for investigation. *Carr v. Hilton*, 1 Curt. 390, Fed. Cas. No. 2,437, cited in 21 Am. & Eng. Enc. Law, 585, related to an entirely different state of facts, and is not applicable to a case like the present. The loan by the Equitable Mortgage Company was made after two months for investigation, and during all of this time the son continued in possession of the land. The doctrines applied to the loan by Ferrell and Longley apply with even greater force to the loan by the mortgage company. Freeman, its agent, went upon the land to examine it, and must have had notice as to the son's possession and occupancy. The Equitable Securities Company, the assignee and transferee of the Equitable Mortgage Company, had all the notice that can be given by long-continued possession of land, for it bought the property after the son had been in possession some 13 years.

It may be well to observe that the able and learned judge who tried this case in the court below charged the jury fully as to the principle announced in *Achey v. Coleman*, 92 Ga. 745, 19 S. E. 710, that where land is conveyed to a person who simultaneously conveys it to another as security for a loan, the two conveyances being parts of one transaction, the title passes through the borrower without being affected, as against the lender, by any claims which would have attached, had the title remained in the borrower. The jury found that the conveyance of Ferrell to the father and the conveyances of the latter to Ferrell and Longley were separate and independent transactions, and, there being evidence to support this finding, there was no error in refusing a new trial.

The motion for new trial also complained of a certain charge as being without evidence upon which to base it. This charge was more hurtful to the plaintiff than to the de-

fendants. It was not of such character as to have affected the result, especially as it was cured by a statement made further on in the charge.

There was also a complaint that the judge failed to so restrict certain evidence that it should affect J. M. Smedley only, ruling it out as to the other defendants; but, under the note of the court to the motion, it is clear that the evidence was so restricted, and there was no error in the action of the judge with respect to this evidence.

Judgment affirmed. All the Justices concur.

(119 Ga. 293)

**PRITCHETT v. SAMUEL WEICHEL-
BAUM CO.**

(Supreme Court of Georgia. Dec. 14, 1903.)

**EXECUTION—LEVY—CLAIM OF THIRD PARTY—
VERDICT—NEW TRIAL.**

1. Where a fl. fa. is levied upon a sawmill and fixtures, also 4,000 feet of boards or planks of given measurements, and also 126 sticks of pine timber in a named swamp, and at the trial of a claim interposed to all the judge charges the jury that there is no dispute that the 4,000 feet of lumber of described measurements is subject to the fl. fa., and the jury returns a verdict finding the sawmill and fixtures not subject, but that the lumber is subject, there is no finding as to the sticks of timber, and that part of the issue still remains to be tried.

2. When, in such case, the claimant makes a motion for a new trial, in which there is no complaint of the verdict for ambiguity, and it does not appear that any objection was made to the reception of the verdict, the judgment refusing a new trial must be affirmed, as the issue as to the sticks of timber was not passed upon by the jury, and the only other disputed issue was determined in favor of the plaintiff in error.

(Syllabus by the Court.)

Error from Superior Court, Laurens County; H. G. Lewis, Judge.

Claim case between T. J. Pritchett and the Samuel Weichselbaum Company. Judgment for defendant, and claimant brings error. **Affirmed.**

J. B. Sanders and J. A. Thomas, for plaintiff in error. W. C. Davis, C. A. Weddington, and J. K. Hines, for defendant in error.

SIMMONS, C. J. Judgment affirmed. All the Justices concur.

(119 Ga. 261)

GLAZE v. MILLS.

(Supreme Court of Georgia. Dec. 14, 1903.)

**INJURY TO EMPLOYE—INSTRUCTIONS—CON-
TRIBUTORY NEGLIGENCE.**

1. The plaintiff in the court below alleged that her injuries were received "without any fault on her part." She sought to recover full damages, and did not request a charge upon the law of contributory negligence and apportionment of damages. It was accordingly not error requiring the grant of a new trial for the court to charge the jury that, if they believed that the plaintiff's injuries were caused by the defendant's negligence, as alleged, she would be entitled to recover, "provided that the plain-

tiff's negligence did not contribute to the injury." *Pierce v. Atlanta Cotton Mills*, 4 S. E. 381, 79 Ga. 782; *Hill v. Callahan*, 8 S. E. 730, 82 Ga. 109; *Ingram v. Hilton & Dodge Lumber Co.*, 33 S. E. 961, 108 Ga. 197 (6). Especially is this true where it appears that elsewhere in his charge the judge correctly instructed the jury as to the degree of diligence required of one situated as the plaintiff claimed to have been at the time she was injured.

2. The other charges complained of were correct in the abstract, and, there being no complaint in the motion for a new trial that any of them were not adjusted to the facts of the case, no reason is pointed out why the giving of them affords cause for granting a new trial. *Central Ry. Co. v. Goodson*, 45 S. E. 680, 118 Ga. —; *Binion v. Ga. So. & Fla. Ry. Co.*, 45 S. E. 276, 118 Ga. 282.

3. The evidence warranted a finding for the defendant, and it was not error to overrule the plaintiff's motion for a new trial, based on the general grounds that the verdict was contrary to law and the evidence.

(Syllabus by the Court.)

Error from City Court of Polk County; F. A. Irwin, Judge.

Action by S. D. Glaze, by a next friend, against Josephine Mills. Judgment for defendant, and plaintiff brings error. **Affirmed.**

Griffith & Weatherly, Beall & Edwards, and Sanders & Davis, for plaintiff in error. Bunn & Trawick, for defendant in error.

CANDLER, J. Judgment affirmed. All the Justices concur.

(119 Ga. 262)

JOHNSON et al. v. WINKLES.

(Supreme Court of Georgia. Dec. 14, 1903.)

NEW TRIAL—REVIEW.

1. This case is controlled by the well-settled rule that the discretion of the trial judge in granting a first new trial will not be controlled unless the verdict rendered was demanded by the evidence.

(Syllabus by the Court.)

Error from Superior Court, Haralson County; A. L. Bartlett, Judge.

Claim case by S. J. Winkles against William Johnson and others. Verdict for defendants. From an order granting a new trial, they bring error. **Affirmed.**

Griffith & Weatherly, for plaintiffs in error. W. R. Hutcheson, for defendant in error.

COBB, J. This was the first grant of a new trial in a claim case in which the property was found subject. The plaintiffs in execution insist that the verdict was demanded, because their evidence made a prima facie case, by showing possession in the defendant in execution since the judgment, and the uncontradicted evidence showed that, if the claimant had title at all, he acquired it after the levy. This may be conceded, but there was a direct conflict in the evidence as to whether the defendant had been in possession of the property since the judgment. A

witness for the plaintiffs testified that he had, but there was evidence for the claimant authorizing a finding that he had not. The claimant testified that the mule levied on had never belonged to Neil, the defendant in execution, but was owned by one Riddlespurger. He then testified: "The day the mule was levied on, Will Riddlespurger was in Cedartown with the mule. The deputy sheriff did not see the mule the day it was levied on." And also that "Will Riddlespurger had the mule in his possession all the time from the time the mule was purchased until it was taken possession of by the bailiff, the officer from whom I got the mule." The purchase referred to took place before the levy of the execution involved in this case, and the possession by the bailiff was by virtue of the levy of another execution made after the levy to which the claim was filed. It thus appears that there was ample evidence to warrant a finding that the presumption of title in the plaintiffs in execution arising from evidence of possession in the defendant since the judgment had been rebutted. The jury would therefore have been authorized to find that the plaintiffs had failed to make out their case. The well-settled rule that the first grant of a new trial will not be interfered with, unless the verdict was demanded by the evidence, is applicable. It is not necessary to determine now what disposition should be made by the sheriff of the property in controversy in the event a verdict should be rendered finding the property not subject on a similar state of facts as that disclosed by the present record.

Judgment affirmed. All the Justices concur.

(119 Ga. 271)

EQUITY LIFE ASS'N v. GAMMON.

(Supreme Court of Georgia. Dec. 14, 1903.)

FOREIGN INSURANCE COMPANIES—ACTION—VENUE—RESIDENCE—AGENT APPOINTMENT BY INSURANCE COMMISSIONER—REMAND—AMENDMENT.

1. The venue of suits against foreign insurance companies maintaining an agency in this state is fixed by Civ. Code 1895, § 2145, in the county where such agency is located, or where the agency was located at the time the contract was made or the cause of action accrued.

2. Where the contract was made in this state, but the company maintained no agency here, the suit may be brought in any county where the company may be found.

3. A foreign insurance company which fails to maintain an agency does not, by appointing, or having the Commissioner of Insurance to appoint, an agent upon whom service may be perfected, under Civ. Code 1895, § 2057, acquire a fixed residence in the county of such agent's residence.

4. Where the contract was made in Carroll county, and a suit was there brought, and the agent, who resided in Floyd, acknowledged service, the court of Carroll county had jurisdiction to try the cause.

5. Where a foreign insurance company maintained no place of doing business, but appointed an agent, under Civ. Code 1895, § 2057, and

such agent absented himself from the state, the Insurance Commissioner could appoint a successor, with authority to acknowledge and receive service of process in behalf of such company in all proceedings that might be instituted against it, on contracts here made, in any court in this state.

6. The power of the Commissioner to appoint successors to the agent originally named, and the authority of the latter to acknowledge and receive service, continues so long as there is any necessity to sue the company for breach of contracts made in this state.

7. A judgment overruling a demurrer having been reversed by the Supreme Court, the losing party gave notice to the trial judge of an intention to present an amendment to the petition. When the remittitur was presented, the court refused to make it the judgment of the lower court before a day named; stating that he had granted the losing party until that time within which to prepare and present the proposed amendment. It is not made to appear wherein the prevailing party was damaged, and this court will not interfere with the discretion of the trial judge in such matters.

(Syllabus by the Court.)

Error from City Court of Carrollton; W. O. Hodnett, Judge.

Action by M. A. Gammon against the Equity Life Association. Judgment for plaintiff, and defendant brings error. Affirmed.

For opinion on former appeal, see 44 S. E. 978.

Mrs. Gammon sued the Equity Life Association in Carroll county on a policy issued in said county on the life of her husband, alleging in the original petition that, while the defendant had been doing business in Georgia, it "now has no public place for doing business in this state, and has no person in office in this state upon whom service of process can be perfected"; that it had not appointed an agent to receive service of process, or upon whom process could be served; and that the Insurance Commissioner had appointed John C. Printup, of Floyd county, under the provisions of Civ. Code, 1895, §§ 2057, 2058. The Supreme Court having ruled that, the Commissioner having no authority to appoint an agent in the first instance, the service was nugatory, plaintiff's counsel gave notice of an intention to amend the petition before the remittitur was filed; and, when counsel for the successful company presented an order making the judgment of the Supreme Court the judgment of the city court of Carrollton, the judge declined, stating that he had notified counsel for Mrs. Gammon that he would allow him until a date named to file the amendment, to which counsel for the insurance company filed exceptions pendente lite. Later, and within the time fixed by the court's permission, plaintiff amended her petition by striking the second, third, and fourth paragraphs of the original petition, in which the failure to appoint an agent had been set out, and therein alleged that defendant transacted business in this state, but had no agency or public place of transacting its business, and now has no officer in this state upon whom

service of process can be perfected; that when, in 1890, the company first sought to transact business in Georgia, it filed with the Insurance Commissioner a written power of attorney authorizing B. E. Proctor, of Chat-ham county, to acknowledge and receive service of process upon any proceedings that might be instituted against it in any court of this state, and that the authority of Proctor should continue until revoked, when another person might be appointed as such attorney; that subsequent to Proctor's appointment he absented himself from the state, whereupon the Insurance Commissioner appointed John C. Printup, of Floyd county, as his successor, as a person upon whom service of process might be made. This appointment was made prior to the filing of this suit. It appears from the record that process issued October 22, 1902, and that Printup, as attorney appointed by the Insurance Commissioner, acknowledged service and waived copy October 24, 1902. To the petition as amended the company demurred on the grounds that the declaration does not set out any facts authorizing any court of Carroll county to take jurisdiction, for that it sets out that the only agent of the defendant upon whom service can be perfected is a resident of Floyd county, and that the papers, on their face, show that Printup, in violation of the authority vested in him, acknowledged service.

Sidney Holderness, for plaintiff in error.
R. D. Jackson, S. E. Grow, and Brown & Roop, for defendant in error.

LAMAR, J. When the case was here before, it was decided that service upon Printup was not service upon the company; that if the company did not in the first instance designate an agent under Civ. Code 1895, § 2057, it was a misdemeanor for its agents to transact business in Georgia; that the statute nowhere authorized the Commissioner of Insurance in the first instance to appoint an agent to receive service, although he had the power to name a successor to one already legally appointed, whenever the latter absented himself from the state. The amendment cures the defect, the allegation being that the company, when it first began to do business, had designated Proctor to receive service; that Proctor had absented himself from the state; and that, in conformity with the statute, Printup had been duly appointed as his successor. It does not appear whether the appointment by the Commissioner was made before or after the company's withdrawal from the state, nor when it ceased to do business in Georgia. Nor are these things material, even under *Cady v. Associated Colonies* (O. C.) 119 Fed. 420 (5); *Friedman v. Empire Life Ins. Co.* (O. C.) 101 Fed. 535; and other decisions holding that the company must be doing business in the state, as a condition precedent to authorize the

power of appointment by the Commissioner, or to make valid the service on the agent. While there is no allegation on the subject, the company is presumably collecting or receiving premiums on its outstanding Georgia policies. At any rate, it has business of a most important character, in carrying out the contracts made, and in defending suits here instituted for the alleged breach thereof; and the power of appointment in the Commissioner, and the authority of the agent thereunder, continue as long as there is any necessity to perfect service in suits for the violation of contracts made in this state. Civ. Code 1895, § 2058; *Mutual Ass'n v. Phelps*, 23 Sup. Ct. 707, 47 L. Ed. 987; *Mutual Life Ins. Co. v. Spratling*, 172 U. S. 603, 19 Sup. Ct. 308, 43 L. Ed. 569. There was no special demurrer on this point; the only issue being whether the agent had exceeded his authority in making an acknowledgment, and whether the suit should proceed in Carroll or Floyd county. While it is alleged that the contract was made in Carroll, it appears that the company now maintains no agency in this state.

But it does not follow that, because there is no agency, there can be no suit. So to hold would be to enable the company to take advantage of its own wrong. The statute was never intended to authorize a foreign corporation to make contracts, and then, by discontinuing business, to escape liability to suit here on such contracts. It was permitted to solicit business on condition that it would appoint some agent upon whom service could be made, and upon the further condition that, if that agent absented himself, the Insurance Commissioner could designate some one as his successor.

The contract having been made here, and the company being suable in this state, the only question to be determined is where that suit shall be brought. There being no agency, and therefore no venue fixed under Civ. Code 1895, § 2145, the company is to be treated as a nonresident, and suable here wherever it can be found. Compare Civ. Code 1895, § 4954; *National Bank v. Southern Co.*, 55 Ga. 390; *City Fire Ins. Co. v. Carrugi*, 41 Ga. 660; *Williams v. E. T. V. & Ga. R. Co.*, 90 Ga. 520, 16 S. E. 303. It is found wherever service can be perfected on its authorized attorney, and this is wholly independent of such attorney's residence. The statute declares that the agent may acknowledge service of process in behalf of such company in all proceedings that may be instituted against such company "in any court in this state," not in any court of the county in which he resides. When Printup acknowledged service of a suit in Carroll county, there is enough on the record to show that the company was found in that county. In *Stone v. Travelers' Ins. Co.*, 78 Mo. 653, under a statute with provisions practically identical with those contained in Civ. Code 1895, §§ 2058, 2059, a suit was brought against

a nonresident company in Linn county. The writ of summons was directed to the sheriff of St. Louis, which by a statute is placed upon the same footing as a county, and there served upon the agent designated by the statute. It was ruled that "suits against foreign insurance companies are not required to be brought in the county in which the agent appointed * * * to receive service of process resides. They may be brought in any county in the state, and, if the agent lives in another county, the writ is to be directed to the sheriff of the latter county." Hough, C. J., said: "The sheriff of Linn county has no general power to serve process beyond the limits of his county, and there is no special provision in cases like the present authorizing the sheriff to serve process in any other county. As the section quoted authorizes process issued by any court in the state to be served upon the agent or attorney of the foreign insurance company appointed to receive service, such agent may, of course, be served whenever found in this state." Compare Civ. Code 1895, § 4989; *Mitchell v. S. W. R. R.*, 75 Ga. 404. The case of *N. Y., etc., R. R. v. Estill*, 147 U. S. 591, 13 Sup. Ct. 444, 37 L. Ed. 292, is much in point, for suit was brought against a foreign corporation in Saline county, and process served upon an agent in St. Louis by the sheriff of St. Louis. It was held that the service was good, "and that the defendant was within the provisions of the Missouri statute which made nonresidents suable in any county of the state"; the ruling in the *Stone Case* being cited and followed. So, in *People v. Justices (Com. Pl.)* 11 N. Y. Supp. 773, it appeared that a foreign corporation was liable to suit in the state of New York. Action was brought against it in the city court of New York, and service made upon the Superintendent of Insurance, who had an office in Albany. The court said (Daly, J.): "Ordinarily a summons in an action in the city court of New York cannot be served without the city of New York, but an exception was evidently intended by the Legislature in the case of actions against foreign insurance corporations; for the city court is given jurisdiction of such actions, and the Legislature has provided that process against such corporations may be served upon the Superintendent of Insurance. This officer has his office in Albany, and there the process must be served upon him. We must conclude, therefore, the Legislature intended city court process to be served upon him there." And in *Boyer v. Northern Pacific Ry. Co.* (Idaho) 66 Pac. 826, it was held that a foreign corporation does not acquire a fixed residence in the state by designating an agent upon whom process may be served, under the provisions of section 2635 of the Revised Statutes of that state, which requires the company to designate such agent.

In the multiplication of corporations, and the increase of their business beyond the lim-

its of the parent state, conditions arose which demanded a modification of the old ruling that, as they could not migrate, neither could they be sued, except where incorporated. It was a mere fiction that they could not migrate, for in fact they did business, entered into contracts, made profits, maintained agencies, and had agents in foreign states. They were there present in the person of the agent, and, if there for the purpose of doing business, they were also there present in his person for the purpose of being sued. In going into the foreign state, for the purpose of doing business, it at the same time submitted itself to the jurisdiction of its courts in suits arising out of contracts made in the course of such business. There is, then, no question of jurisdiction, but only one of venue and service, to be determined by the laws of the state applicable to those subjects. They can be sued in the counties in which they maintain agencies, or, if none, then in any county where they may be found in the person of the agent. Civ. Code 1895, §§ 4954, 1899. If a foreign insurance company maintains an agency, Civ. Code 1895, § 2145, requires that suit be brought in the county in which such agency is located; but where there is no agency it sets the matter at large, and the courts of any county in which the company may be found, or in which service may be lawfully perfected, have the power to determine the liability of the company on the contracts here made. If the case is not to be governed by section 2145, it falls under the broad provisions of section 2057, requiring the company in the first instance to appoint, and authorizing the Commissioner in the second instance to name a successor "to acknowledge or receive service of process, and upon whom process may be served, for and in behalf of such company, in all proceedings against such company in any court of this state, or any court of the United States in this state, and consenting that service of process upon any agent or attorney appointed under the provisions of this section shall be taken and held to be as valid as if served upon the company." Section 2058, in providing for the appointment of a successor, declares that the appointment "shall be as valid as if made by the company," and that service of process as aforesaid, issued by any such courts as aforesaid upon any such attorney appointed by the company or by the Insurance Commissioner, shall be valid and binding, and be deemed personal service upon such company so long as it shall have any obligations or liabilities outstanding in this state, although such company may have withdrawn, been excluded from, or ceased to do business in this state."

Ordinarily no notice need be given the opposite party upon taking an order making a remittitur from this court the judgment of the lower court. Civ. Code 1895, §§ 5597, 5598. But where the judge, before the presentation of the order, is notified of an inten-

tion by the losing party to offer an amendment, the prevailing party is entitled to be heard on the question as to whether it shall be allowed. The time when this shall be determined is in the discretion of the presiding judge, and, unless some legal damage results from the delay, or there is some abuse of discretion, this court will not interfere. There may be cases in which the trial judge ought to make the remittitur the judgment of the lower court without delay, or with little delay. Where plaintiffs in error have been restrained of their liberty, and, as a result of the reversal, are entitled to a discharge, or where property has been placed in the hands of a receiver, or injunctions have been granted, or it has been decided that the court below erred in refusing to appoint a receiver or grant an injunction, the remittitur should be promptly made the judgment of the lower court. Civ. Code 1895, §§ 5597, 5598. The present case presented no such facts calling for immediate action.

Judgment affirmed. All the Justices concur.

(119 Ga. 243)

MACON, D. & S. R. CO. v. HIGHTOWER.

(Supreme Court of Georgia. Dec. 12, 1903.)

RAILROADS—KILLING STOCK—SUFFICIENCY OF EVIDENCE.

1. There being some conflict in the evidence as to whether the engineer on the locomotive which struck and killed the animal, for the value of which suit was brought, exercised all ordinary and reasonable care and diligence to prevent striking it, and the jury having returned a verdict in favor of the plaintiff for its proved value, there was no error committed in refusing to sanction the petition for certiorari; the only assignment of error therein being that the verdict was contrary to law and the evidence.

(Syllabus by the Court.)

Error from Superior Court, Laurens County; H. G. Lewis, Judge.

Action by R. H. Hightower against the Macon, Dublin & Savannah Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Akerman & Akerman, for plaintiff in error. S. B. Baker, for defendant in error.

FISH, P. J. Judgment affirmed. All the Justices concur.

(119 Ga. 243)

PASCHAL v. HUTCHINSON et al.

(Supreme Court of Georgia. Dec. 12, 1903.)

SUPERIOR COURT—JURISDICTION—LOST HOMESTEAD PAPERS—ESTABLISHMENT.

1. No jurisdiction is conferred upon the superior court by the Civil Code of 1895, § 4745 et seq., to establish copies of a lost schedule and plat of a homestead proceeding which had never been recorded in the office of the clerk of the superior court as required by law. These sections relate solely to the establishment of

lost private papers, and the homestead and plat do not become private papers until they have been recorded as required by law.

(Syllabus by the Court.)

Error from Superior Court, Putnam County; B. D. Evans, Judge.

Action by B. I. Paschal, trustee, against R. W. Hutchinson and others. Judgment for defendants, and plaintiff brings error. Affirmed.

W. T. Davidson, for plaintiff in error. Warner & Preston, for defendants in error.

COBB, J. When this case was here before (116 Ga. 736, 42 S. E. 1010), it was held that, after the schedule and plat of a homestead have been recorded in the office of the clerk of the superior court as required by law, they, as muniments of title, become the property of the applicant and beneficiaries of the homestead, and are in no sense to be considered as office papers either of the superior court or the court of ordinary; that the applicant and beneficiaries have the same interest in these papers as they would in a deed under which they claim title; and that the superior court has jurisdiction to establish copies of such papers after they have been recorded. When the case came on to be heard a second time, the petition was so amended as to allege that the schedule and plat of the homestead had never been recorded in the office of the clerk of the superior court. To the petition as amended the defendants demurred upon the ground that, as the papers had never been recorded as required by law, the superior court had no jurisdiction to establish copies of the lost papers. This demurrer was sustained, and the plaintiff excepted.

When all the papers which are required by law to make a complete homestead or exemption under the provisions of the Constitution have been filed with the ordinary, and every act necessary to the setting apart of the homestead has been done, the law required the ordinary to hand "the same" to the clerk of the superior court, who is required to record "the same" in a book to be kept for that purpose in his office. Civ. Code 1895, § 2835. It is argued that this law does not require the record of the application, but only of the schedule and plat. Even if the word "schedule" was not intended by the General Assembly to embrace all of the proceedings in connection with the homestead except the plat, we think the words "the same," wherever they occur in the section, refer to the entire proceedings, including the application. It certainly was not the intention of the General Assembly that simply a fragment of the homestead proceedings should be recorded. It is now the settled law of this state that, after the homestead proceedings have been recorded in the office of the clerk of the superior court, they become the private papers of those interested

in the homestead estate. *Paschal v. Turner*, 116 Ga. 736, 42 S. E. 1010, and citations. In *Dunagan v. Stadler*, 101 Ga. 477, 29 S. E. 440, it was held that the ordinary, in entertaining applications for homesteads allowed by the Constitution, and passing upon questions raised, and in finally acting upon the applications, acts in a judicial capacity, and constitutes a court. It would seem, therefore, that, as long as there is any duty to be performed by the ordinary in connection with such an application, the papers connected therewith are office papers of a court; and the question to be determined is at what stage in the proceeding required by law to set apart a homestead do these papers cease to be office papers of the court, and become the private property of those interested in the homestead?

As the law requires the ordinary, after his approval of the homestead papers, to hand the same to the clerk of the superior court, and under the terms of the statute the clerk is required to record the same, it would seem to follow that these papers do not lose their character as office papers until every duty required by law of a public officer in connection therewith has been performed. Neither the applicant nor the beneficiaries would have a right to demand these papers until both the ordinary and the clerk have performed all their duties in connection therewith. The law requires the ordinary, sitting as a court, to pass judicially upon the question as to whether a homestead should be allowed, and requires the clerk to record this judgment of the ordinary, in order that the public may be notified of the change that has been brought about in the title to the property involved. The public is interested in the due regularity of the proceedings before the ordinary, as well as the due record of the entire proceeding in a book regularly kept for that purpose in the office of the clerk of the superior court. As long as the public has any interest in the matter, the papers cannot become mere private papers. Our conclusion, therefore, is that the homestead papers do not become muniments of title of those interested in the homestead until they have been duly recorded in the office of the clerk of the superior court. As those interested in the homestead would have no right to demand at this stage of the case the possession of the papers, to be held as muniments of title, the superior court would be without jurisdiction to establish them as such at any stage of the proceeding prior to the final record in the clerk's office. While this point was not directly ruled when the case was here before, the conclusion now reached was to be inferred from the ruling then made. So long as the papers continue office papers of the homestead court presided over by the ordinary, that court, in the exercise of its inherent power, may establish copies of the same whenever lost. See 19 Am. & Eng. Enc. L. (2d Ed.) 559. If, after

the ordinary has indorsed his approval upon the schedule and plat, and handed the same to the clerk, the papers can no longer be considered office papers of the homestead court presided over by the ordinary, it may be that the superior court, in the exercise of its chancery powers, upon a regular petition and process, would have authority to establish the papers. See, in this connection, *Bisp. Prin. Eq.* § 177; *Griffin v. Fries*, 23 Fla. 173, 2 South. 266, 11 Am. St. Rep. 351; 19 Am. & Eng. Enc. L. (2d Ed.) 555; 13 Enc. P. & P. 351. But upon this question we now express no opinion. The present application was not an appeal to the chancery powers of the superior court, but was under the provisions of the statute of 1856 (Acts 1855-56, p. 238), embodied in the Civil Code of 1895, § 4745. The case made by the petition not being for the establishment of private papers, the application was not within the terms of that section, which relates solely to the establishment of lost private papers.

Judgment affirmed. All the Justices concur.

(119 Ga. 241)

FOUNTAIN v. WHITEHEAD et al.

(Supreme Court of Georgia. Dec. 12, 1903.)

LANDLORD AND TENANT—SUBLETTING—RATIFICATION—DISTRAINT.

1. Where the owner of land rents it to a tenant, and the latter sublets it, the landlord has a right to elect to treat the subtenant as his own tenant. If he does so, and distrains against the subtenant, he cannot do so for more than the contract price of rental agreed upon between himself and the original tenant. If the original tenant agreed to pay the landlord a part of the rent in money or in a portion of the crop, and part in certain improvements on the premises, the landlord may distrain for the value of the improvements, as well as for the money or the portion of the crop; but, in order to recover the value of the improvements, the same must be alleged in the affidavit.

(Syllabus by the Court.)

Error from City Court of Dublin; J. S. Adams, Judge.

Action by Mrs. James Whitehead and another against T. B. Fountain. Judgment for plaintiffs, and defendant brings error. Reversed.

Jas. A. Thomas, for plaintiff in error. Phil. P. Johnston and Peyton L. Wade, for defendants in error.

SIMMONS, C. J. Mrs. Shewmake died, leaving certain lands, in which, under a will, she had a life estate. In 1899, through her agent, she had rented a house and eight acres of this land to Robinson; the agreed annual rental being 213 pounds of lint cotton, for which Robinson gave his note each year. Robinson also contracted with the agent to clear up a four-horse farm by January 1, 1903, and until that date he was to have the use of this cleared land in consideration of his clearing it. Robinson in 1900 and 1901 had cleared about 70 acres of the

land, and, as a four-horse farm embraced about 120 acres, he had still 50 acres to clear. In 1902 Robinson rented the land which he had cleared to Fountain. What rental Fountain agreed to pay Robinson, does not clearly appear. Mrs. Shewmake's death was in 1901, and the lands were divided among her children according to the terms of the will creating the life estate. In the division the lands rented to Robinson, including the land which he was to clear, fell to Mrs. Whitehead and Mrs. Johnston. In September, 1902, they, through their agent, having previously demanded rent of Fountain, had a distress warrant issued against him; claiming that he, as their tenant, was indebted to them for rent in the amount of 2,500 pounds of lint cotton, of the value of \$200. This distress warrant was levied upon the crops of Fountain grown upon the land. Neither in the affidavit nor in the distress warrant was reference made to the contract to clear the land. Fountain filed a counter affidavit alleging that the sum distrained for was not due, and that he was not, and had never been, tenant of the plaintiffs. The papers were returned to the city court of Dublin, and at the trial the jury returned a verdict in favor of the plaintiffs for \$200, with interest and costs. Fountain moved for a new trial. The motion was overruled, and he excepted.

The view we take of the case renders it unnecessary to discuss all of the grounds made in the motion for new trial. One of them was that the verdict was contrary to law and the evidence. We think the court erred in not granting a new trial upon this ground. The evidence shows that Robinson rented a house and 8 acres of land for a certain amount of cotton, and that he was to clear 120 acres of other land, which he was to use until January, 1903, free of rent. In 1902 he rented to Fountain a portion of the land which he had cleared—some 70 acres. It thus appears that Robinson was not indebted for any rent upon this portion of the land. He had paid the rent for this much of the land (if the contract was one of rental at all) by clearing it, and it was his right to cultivate it, if he wished to do so. Had he cultivated it himself, it is clear that plaintiffs could not have collected rent from him for this 70 acres. He chose, however, to rent it to Fountain, instead of cultivating it himself, and the plaintiffs were no more entitled to collect rent from Fountain than they would have been from Robinson. It is true that Robinson agreed to clear up 120 acres, and that of this he failed to clear up some 50 acres. This was a violation of his contract, for which we think Fountain was not liable. Nor could Fountain be held liable as a subtenant whom the landlord had elected to treat as tenant. This is true for

at least two reasons: (1) The rent was not due until 1903; and (2) the affidavit upon which the distress warrant was based did not mention the failure to clear up the land, and the value of clearing it. In *Wilkins v. Talliafero*, 52 Ga. 208, the case relied upon by the defendants in error, the landlord was allowed to distrain for failure to "fix" a kitchen; proper affidavit being made as to the value or cost of such repairs. In this case there was no allegation as to the value of clearing the land, and the landlord could not recover. In view of the affidavit made in this case, evidence as to the value of clearing the land was irrelevant and inadmissible, for in no view of the case was the value of the land for rent in issue.

Judgment reversed. All the Justices concur.

(119 Ga. 238)

ELLIS v. FARMER et al.

(Supreme Court of Georgia. Dec. 12, 1903.)

COURTS—JURISDICTION—RESIDENT AND NON-RESIDENT DEFENDANTS.

1. Suit was brought in a certain county against F., a resident of the county, and S., a resident of another county, by a married woman, alleging that the petitioner had bought certain land situated in the county wherein the suit was brought from one G., and had partially paid for it; that S. had paid the balance of the purchase money for her, and had taken a conveyance from G., giving petitioner a bond for titles, agreeing to convey the land upon the payment of the amount advanced and certain other amounts, which really represented indebtedness of petitioner's husband to S.; that petitioner had fully paid all that was her own debt, and was not bound for the debts of her husband; that she had left the land, and F. and S., with full knowledge of the facts, had gone into possession, F. holding as the tenant of S. The petition prayed that the title to the land be decreed to be in petitioner, that she recover against F. and S. for the mesne profits, that S. be decreed to execute to her a deed to the land, and that certain notes given S. for the debts of petitioner's husband be delivered up and canceled. *Held*, following the rulings in the cases of *Clayton v. Stetson*, 28 S. E. 983, 101 Ga. 634, *Vizard v. Moody*, 41 S. E. 997, 115 Ga. 491, and *Townsend v. Brinson*, 43 S. E. 748, 117 Ga. 375, that, no substantial equitable relief being prayed against F., the resident defendant, the court had no jurisdiction to grant the equitable relief prayed against S., the non-resident, and the judge did not err in sustaining his demurrer based upon that ground.

(Syllabus by the Court.)

Error from Superior Court, Fayette County; E. J. Reagan, Judge.

Action by K. C. Ellis against Wesley Farmer and others. Judgment for defendants, and plaintiff brings error. Affirmed.

W. L. Watterson and J. F. Golightly, for plaintiff in error. J. W. Wise, for defendant in error.

SIMMONS, C. J. Judgment affirmed. All the Justices concur.

(119 Ga. 237)

MACON, D. & S. R. CO. v. McLENDON.

(Supreme Court of Georgia. Dec. 14, 1903.)

RAILROADS—INJURY AT CROSSING—CONTRIBUTORY NEGLIGENCE—DAMAGES—INSTRUCTIONS.

1. Though a traveler upon a public highway, in approaching a railroad crossing, may not observe that amount of care and diligence which would be exercised under like circumstances by an ordinarily prudent person, he is not necessarily precluded from recovering for injuries to his person or property, received on the crossing, if, after it is apparent that the engineer of the railroad company is disobeying the provisions of section 2222 of the Civil Code, which require the blowing of the whistle and the checking of the train on approaching public crossings, he exercises ordinary care and diligence in endeavoring to escape the consequences of the company's negligence. *Comer v. Barfield*, 31 S. E. 89, 102 Ga. 485. Applying this principle to the evidence submitted by the plaintiff in the present case, the court did not err in refusing to grant a nonsuit.

2. In an action for damages against a railroad company for injuries sustained by reason of the negligent running of the defendant's locomotive and train of cars, wherein damages are claimed for physical pain and suffering, and also for inability to labor occasioned by such injuries, as well as for the cost of medicine and other expenses, it is erroneous for the court to charge, without qualification, that "in every tort there may be aggravating circumstances, either in the act or in the intention, and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff. In some torts the entire injury is to the peace and happiness of the plaintiff. In such cases no measure of damages can be prescribed, except the enlightened conscience of the jury." *Southern Ry. Co. v. O'Bryan* (decided Dec. 10, 1903) 45 S. E. 1000, and cases cited.

(Syllabus by the Court.)

Error from City Court of Dublin; J. S. Adams, Judge.

Action by Simon McLendon against the Macon, Dublin & Savannah Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

Jno. M. Stubbs and Akerman & Akerman, for plaintiff in error. Davis & Sturgis, Sanders & Davis, and J. K. Hines, for defendant in error.

FISH, P. J. Judgment reversed. All the Justices concur.

(119 Ga. 239)

SMITH v. SMITH.

(Supreme Court of Georgia. Dec. 12, 1903.)

DIVORCE—CRUELTY—EVIDENCE—DISQUALIFICATION OF JUROR.

1. In the trial of an action for divorce, brought by a husband against his wife on the ground of alleged cruel treatment, it is not error to reject evidence that she constantly quarreled with, abused, and insulted her husband, and, by slandering him to her neighbors, injuriously affected his practice as a physician, and that she also spoke insultingly and abusively of his children and a former wife, their mother.

2. Nor is it error, in the trial of such a case, to reject evidence that the wife was an habitual user of morphine, and almost all of the time under its intoxicating influence.

3. A juror is not disqualified by reason of the fact that he is the brother of the wife of defendant's brother, who actively assisted in the defense of the divorce suit.

4. The evidence amply warranted the jury's finding, and there was no abuse of discretion in denying a new trial.

(Syllabus by the Court.)

Error from Superior Court, Upson County; E. J. Reagan, Judge.

Action by S. H. Smith against L. F. Smith for divorce. Judgment for defendant, and plaintiff brings error. Affirmed.

J. Y. Allen, for plaintiff in error. Worrell & Riddgill, for defendant in error.

COBB, J. Smith filed a petition praying for a total divorce from his wife on the ground of cruel treatment. She answered, denying the material allegations of the petition, and praying that a divorce be denied plaintiff, but granted to her, on the same ground as that upon which the plaintiff's petition was based. The jury returned a verdict finding that neither party was entitled to a divorce. The wife acquiesced in the verdict, but the husband filed a motion for a new trial, which was overruled, and he brought the case to this court.

1. The great majority of the grounds of the motion complain of the rejection of evidence to the effect that the wife constantly quarreled with, abused, and insulted her husband, and, by slandering him to her neighbors, injuriously affected his practice as a physician, and also spoke insultingly and abusively of his children and his first wife, their mother. In *Ring v. Ring*, 118 Ga. 183, 44 S. E. 861, it was ruled that cruel treatment, to be a ground for divorce, "is the willful infliction of pain, bodily or mental, upon the complaining party, such as reasonably justifies an apprehension of danger to life, limb, or health." Under the operation of this wholesome rule, none of the evidence rejected would have authorized the granting of a divorce to the plaintiff. All of the evidence rejected was irrelevant and inadmissible.

2. Complaint is also made that the court rejected evidence to the effect that the wife was an "habitual morphine eater, and almost all of the time under its intoxicating influence." In *Ring v. Ring*, supra, it was expressly ruled that the habitual and intemperate use of morphine would not, alone, constitute such cruel treatment as to authorize a divorce on that ground. It was therefore entirely proper to reject this evidence, as it furnished no ground for a divorce, and could only prejudice the defendant before the jury.

3. A new trial was also asked on the ground that one of the jurors was the brother of the wife of defendant's brother, who actively assisted in the defense. This did

not disqualify the juror. *Central Railroad Co. v. Roberts*, 91 Ga. 513, 18 S. E. 315; *Keener v. State*, 97 Ga. 388, 24 S. E. 23.

4. The finding of the jury was amply supported by the evidence, and there was no abuse of discretion in refusing a new trial.

Judgment affirmed. All the Justices concur.

(119 Ga. 246)

DANIEL v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. Dec. 12, 1903.)

WRIT OF ERROR — DISMISSAL — WRONGFUL DEATH — CONTRIBUTORY NEGLIGENCE.

1. While the practice is deprecated, it is not a ground to dismiss a writ of error that the portions of the record material to a clear understanding of the issues involved are brought to this court in the bill of exceptions under the certificate of the trial judge, instead of being specified in the bill of exceptions and sent up as a separate transcript under the certificate of the clerk of the court below. *Simmons, O. J.*, dissenting.

2. Under the evidence for the plaintiff, her husband, for whose homicide she sued, could, by the exercise of the skill and diligence to protect himself required by law, have avoided the injuries which caused his death. A judgment of nonsuit was therefore proper.

(Syllabus by the Court.)

Error from Superior Court, Morgan County; H. G. Lewis, Judge.

Action by L. A. Daniel against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Turner & Adams and E. W. Butler, for plaintiff in error. Dessau, Harris & Harris, for defendant in error.

CANDLER, J. Upon the call of this case in this court the defendant in error moved to dismiss the writ of error, the grounds insisted upon being (1) that the plaintiff in error has attempted to embody the record in the bill of exceptions, contrary to law; (2) that there is no transcript of the record ordered sent up, which is contrary to law; (3) that the judge, in certifying the bill of exceptions, does not certify that no transcript is necessary. Prior to the act of the General Assembly "prescribing the manner of taking cases to the Supreme Court" (Acts 1889, p. 114), this motion would have been good. But following the several decisions of this court construing the act in question, and also the act approved December 22, 1892 (Acts 1892, p. 113), which had the same general purposes in view, we are satisfied that to dismiss this writ of error on the grounds set forth in the motion would be not only to violate the letter, but to destroy the spirit, of both these acts. The act of 1889 provides a plain and distinct manner for bringing cases to this court, even giving a form for the certificate of the trial judge. Under the terms of that act it seems to us that the better practice would be to specify such parts

of the record as may be necessary for an understanding of the questions which it is sought to have reviewed, and have the same sent to this court under the certificate of the clerk of the court below. This, indeed, is the almost universal practice of the bar of the state at this time. But, while this is true, we cannot hold that it is illegal to set out in the bill of exceptions the material parts of the pleadings and of the evidence introduced on the trial, with a recital that at the conclusion of the evidence introduced for the plaintiff the court, on motion, granted a nonsuit, and dismissed plaintiff's case; the bill of exceptions then assigning error in due form upon the order of the court granting a nonsuit. What more do we need for a clear understanding of the error complained of? The trial court certifies that the bill of exceptions "contains all of the record and all of the evidence material to a clear understanding of the errors complained of," and he also certifies in terms to the truth of every allegation of fact made in the bill of exceptions. The plaintiff in error sets out his petition, that we may see on what he relied for a recovery, and the answer of the defendant, showing to what extent the petition was admitted and wherein it was denied. Then follows a brief of the evidence introduced on the trial. Thus, under the certificate of the judge, we are easily enabled to determine whether, by admission or proof, or admission and proof, the plaintiff's case as laid is made out. If, in a given case, more of the record is needed than is set out in the bill of exceptions or specified therein, it is made the duty of this court to send to the clerk of the court below, and have it duly transmitted. We are prohibited from dismissing any writ of error, if the record contains enough to enable us to decide the questions raised, or if we can by our own efforts secure enough to enable us to understand them. Such was the construction placed upon Civ. Code, § 5569, by Justice Lumpkin, in the case of *Gregory v. Daniel*, 93 Ga. 795, 20 S. E. 656, in which case no part of the record whatever was specified in the bill of exceptions.

Speaking for myself, an examination of the act of 1889 leads me to the conclusion that it was not the legislative intention that parts of the record other than the brief of the evidence (which might or might not be so brought) be put into the bill of exceptions, but rather that it was in contemplation that such parts of the record as were material should be specified in the bill of exceptions, and sent as a transcript by the clerk below to this court. But we are thoroughly committed to the proposition that record matter other than the brief of evidence may be set out in the bill of exceptions and certified to by the judge, and that when such is done the same matter is not to be brought up in a transcript of the record certified by the clerk. In the case of *Brittain v. Griggs*, 88 Ga. 232, 14 S. E. 609, the bill of exceptions

contained a statement that the motion for a new trial was overruled, and by fair implication disclosed the fact that certain specific grounds which were set forth in the bill of exceptions were contained in the motion. This court refused to dismiss the writ of error. In the case of *Burkhalter v. Oliver*, 88 Ga. 473, 14 S. E. 704, which was heard at the same term, the bill of exceptions contained a statement that a verdict was rendered in a certain amount against the plaintiff in error, and that a motion for a new trial was made and overruled, and error was assigned on the refusal of the court to grant a new trial on each ground of the motion, the language of each ground being quoted in the assignments of error. A motion was made to dismiss the writ of error on the ground that the verdict and the motion for a new trial were not specified as parts of the record to be sent up, and were not embraced in the transcript of the record before this court. In the opinion (page 477, 88 Ga., page 705, 14 S. E.) Chief Justice Bleckley said: "That certain facts, such as the amount of a verdict and the grounds of a motion for a new trial, appear of record, will not hinder the same facts from being stated in the bill of exceptions and verified by the certificate of the judge. True, this could not be done, under the prior law, and may not be the best practice under the act of 1889, but there is certainly nothing in that act which prohibits it, and the general spirit and policy of the act is to have no more of the record brought up than is necessary." See, also, *Hawkins v. Americus*, 102 Ga. 790, 30 S. E. 519, where it is laid down that a writ of error will not be dismissed because no part of the record is specified, the bill of exceptions containing enough to enable this court to ascertain the real questions in the case. In *Scott v. Whipple*, 116 Ga. 214, 42 S. E. 519, it was said that "no bill of exceptions can be dismissed on account of the negligence of the plaintiff in error in failing to incorporate or specify evidence or record which is material to his case." See, also, *Ahrens Mfg. Co. v. Patton Sash Co.*, 94 Ga. 247, 21 S. E. 523; *Continental Ins. Co. v. Wickham*, 110 Ga. 129, 35 S. E. 237. In *Lester v. Equitable Co.*, 92 Ga. 576, 17 S. E. 675, the writ of error was dismissed, because the plaintiffs in error not only "failed to brief the evidence as required by law," but "incorporated needlessly in the bill of exceptions all of the pleadings, thus aggravating the very evil which the act of 1889 for bringing cases to this court was in a large measure intended to prevent." In *Delk v. Pickens*, 92 Ga. 576, 17 S. E. 862, the writ of error was dismissed because the plaintiff in error copied in full in the bill of exceptions the material portions of the record, and also specified the same to be brought up in the record, "in violation of both the letter and the spirit of the act of 1889, prescribing the manner in which cases shall be brought to this court,

by duplicating, instead of abbreviating, the record." It will be seen that the two last cases were dismissed for bringing too much, rather than too little, to this court. In the present bill of exceptions we have everything that is necessary to a clear understanding of the alleged errors complained of, the certificate of the trial judge verifying the truth of every statement of fact recited and the correctness of every paper set forth. The judge still further certifies that the bill of exceptions contains all of the record and all of the evidence necessary to a clear understanding of the case. While, as before stated, we deprecate the practice of bringing matters of record up in this way, we cannot hold that it is illegal, and the motion to dismiss the writ of error is therefore overruled.

2. The burden was upon the plaintiff to show a lack of ordinary care on the part of the company, and also to show that at the time he was killed the deceased was in the exercise of due diligence to protect himself. It appears that the deceased was digging under an embankment, and that those in charge of the work sent men to the top of the embankment to drive wedges in the earth to prize it loose. This, however, was done in full view of the deceased, and all that was necessary for him to ascertain that the wedges were being driven was for him to "look up and see them." A witness for the plaintiff, who was working within three feet of the deceased, testified that he knew at the time that the wedges were being driven, that the object in driving them was to make the dirt cave in, and that the men went up on the embankment for that purpose. He further testified that the deceased had an equal opportunity with himself of knowing these facts, that both of them were present when the men were ordered to drive the wedges, and that the order was given in a tone loud enough for the deceased to hear it. We think, without saying more, that this case falls squarely within the ruling of this court in *Ga. R. Co. v. Ivey*, 73 Ga. 499; *Reid v. Central R. Co.*, 81 Ga. 694, 8 S. E. 629; *Georgia R. Co. v. Nelms*, 83 Ga. 70, 9 S. E. 1049, 20 Am. St. Rep. 308; *Western & Atlantic R. Co. v. Jackson*, 113 Ga. 355, 38 S. E. 820; and *Atlantic & B. Co. v. Reynolds*, 117 Ga. 47, 43 S. E. 456. The plaintiff's husband assumed the ordinary risks of his employment, and was bound to exercise his own skill and diligence to protect himself. The deceased was chargeable with knowledge of the physical fact that in undermining dirt, when the support is removed, the dirt will either topple over or cave in. At the time of the injuries which caused his death he was digging under an embankment, while others, in plain view of him, were driving in wedges to force away the overhanging earth. The plaintiff's own evidence, in our opinion, clearly demonstrates that the deceased could, had he used the skill and diligence required

of him by law to protect himself, have avoided the injuries which caused his death; and the grant of a nonsuit was therefore proper. Judgment affirmed. All the Justices concur.

(119 Ga. 203)

STANDARD WAGON CO. OF GEORGIA v. D. P. FEW & CO.

(Supreme Court of Georgia. Dec. 14, 1908.)

PARTNERSHIP—LIABILITIES—PURCHASE BY PARTNER—NOTICE—SCOPE OF BUSINESS.

1. A partnership is not liable on a note given by one of the partners for the purchase of goods bought and used for his own private benefit, when such note is still in the hands of the vendor, and the purchase of such goods was not authorized or ratified by the other partners, and was an act neither actually nor apparently within the scope or ordinary course of the partnership business.

2. One dealing with a partnership is chargeable with notice of the character of the partnership business as conducted; and if a person take from one of the partners a note signed by him in the firm name as payment for goods supplied such partner, the payee is bound to know whether the transaction is within the apparent scope of such business.

3. It follows that, where a suit against a partnership on a promissory note signed by one of the partners is defended by the copartners on the ground that the note was given for the purchase of goods for their partner's own private use, and was not the act of the partnership, and on the trial there is evidence that the partner signing the note gave it for the purchase of goods for his own use which were not used for the benefit of the firm, and that the transaction was not within the real or apparent scope of the partnership business, and was not authorized or ratified by the other partners, it was error to charge that the payee could recover if he had no notice that the act was beyond the scope of the business, could not have known it by the use of ordinary care, and honestly believed he was dealing with the firm in a partnership transaction.

(Syllabus by the Court.)

Error from Superior Court, Morgan County; H. G. Lewis, Judge.

Action by the Standard Wagon Company of Georgia against D. P. Few & Co. Verdict for plaintiff. From an order granting a new trial, it brings error. Affirmed.

George & Anderson, for plaintiff in error. E. W. Butler, for defendant in error.

SIMMONS, C. J. Suit was brought in a justice's court by the Standard Wagon Company of Georgia against Few & Co., a partnership, upon a promissory note. On appeal to the superior court the jury returned a verdict for the plaintiff. The trial judge granted a motion for a new trial. Upon the second trial the jury again found for the plaintiff. Upon motion this verdict was also set aside, and a new trial granted. To this judgment the plaintiff excepted. From the record it appears that the note sued on was signed by one Jackson, a member of the defendant partnership, in the name of the firm. The defendants, the other partners, in their answer

admitted the signing of the note by Jackson in the name of the firm, but alleged that the note was given for the purchase of goods for Jackson's own private use, and was not the act of the partnership. From the evidence it appeared that the note was given the plaintiff by Jackson for the purchase price of a phaeton. The decided preponderance of the evidence—if, indeed, there was any to the contrary—showed that this phaeton was never used or handled by the partnership, and that the partnership received no benefit therefrom. It was shown that the partnership was a trading concern doing a general mercantile business and dealing in general supplies, mowing machines, hay rakes, and harvesters. Neither before nor after the time of the purchase of this phaeton did the partnership deal in any vehicles of any kind. Jackson was the managing partner. The partnership agreements did not contemplate a dealing in vehicles, the defendants did not hold themselves out as dealers in vehicles, and the partnership books did not contain any entry of this transaction. The defendants did not know of the purchase of the phaeton or the giving of the note therefor, and did not authorize or ratify the same.

The motion for new trial contained a number of grounds, but the judge granted the new trial upon two of them only. One of these it is unnecessary here to mention. The other was that the court had erred in charging the jury as follows: "If the signing of the note was done by a member of the firm, and the plaintiff had no notice that the act was not within the legitimate business of the firm, and could not have known it by the exercise of ordinary care, and plaintiff honestly believed it was dealing with the firm in a partnership transaction, the defendants would be liable in this case." If there was any error in this charge, then the trial judge did not err in granting a new trial. Partners have, of course, the right to bind each other by contracts made with third persons who have no notice of any special restrictions of the partnership powers, provided the transaction is within the general scope of the partnership business. Nor is the copartner relieved from liability on a contract made by his partner because of a limitation in the partnership agreements unknown to the other party, when the act or transaction is within the apparent scope of the business. If persons hold themselves out as general partners, each is bound by the transactions of the other within the real or apparent scope of the business in which they are engaged, or within the scope of other like enterprises in the same community. In order to bind one by the acts of another, however, some real or apparent authority must appear. "The liability of one partner for acts and contracts done and made by his copartners without his actual knowledge or assent is a question of agency. If the authority is denied by the actual agreement between the

partners, with notice to the party who claims under it, there is no partnership obligation. If the contract of partnership is silent, or the party with whom the dealing has taken place has no notice of its limitations, the authority for each transaction may be implied from the nature of the business according to the usual and ordinary course in which it is carried on by those engaged in it in the locality which is its seat, or as reasonably necessary or fit for its successful prosecution. If it cannot be found in that, it may still be inferred from the actual, though exceptional, course and conduct of the business of the partnership itself as personally carried on with the knowledge, actual or presumed, of the partner sought to be charged." *Irwin v. Williar*, 110 U. S. 505, 4 Sup. Ct. 163, 28 L. Ed. 225. "When the business of a partnership is defined, known, or declared, and the company do not appear to the world in any other light than the one exhibited, one of the partners cannot make a valid partnership engagement except on partnership account. There must be at least some evidence of previous authority beyond the mere circumstance of partnership to make such a contract binding. If the public have the usual means of knowledge given them, and no acts have been done or suffered by the partnership to mislead them, every man is presumed to know the extent of the partnership with whose members he deals; and when a person takes a partnership engagement, without the consent or authority of the firm, for a matter that has no reference to the business of the firm, and is not within the scope of its authority or its regular course of dealing, he is, in judgment of law, guilty of a fraud." 3 Kent's Com. (14th Ed.) *43; *Venable v. Levick*, 2 Head, 351; *Dickinson v. Valpy*, 10 B. & C. 128, 21 Eng. Com. Law, 68. "If a partner does an act for a purpose apparently not connected with the firm's ordinary course of business, he is not acting in pursuance of any apparent authority, and the firm will not be bound unless the partner in fact had authority. If, for instance, a partner pledges the credit of the firm for a purpose apparently not connected with its ordinary course of business—e. g., for the purpose, to the knowledge of the creditor, of paying his private debts (*Leverson v. Lane* [1862] 13 C. B. N. S. 278; *In re Riches* [1864] 4 De G., J. & S. 581; *Snaith v. Burridge* [1812] 4 Taunt. 684)—the firm is not bound unless he is in fact specially authorized by the other partners (Part. Act 1890, § 7). The onus of proving such authority is on the creditor, and it is not sufficient for him to prove that he honestly believed there was such authority (*Id.*, and *Kendal v. Wood* [1871] L. R. 6 Ex. 243), unless the other partners are by their conduct estopped from denying the authority (*Id.*)." 9 Enc. Laws of Eng. 461. The creditor cannot shield himself behind his ignorance of the authority of the partner with whom he deals, even though

he may have exercised ordinary care to ascertain it. He must, in order to bind the partnership, either show express authority or facts from which the law will imply authority. If he cannot show either, he cannot hold the partnership. He must, at his peril, in dealing with a single partner, ascertain the actual or apparent authority of such partner. In other words, when he deals with a member of a partnership in a matter as to which such member has no express authority, he is chargeable with notice of the apparent character and scope of the partnership business. It was therefore error to charge that the test of liability of the partnership was the honest and reasonable belief of the plaintiff. As was said by Lush, J., in *Kendal v. Wood*, L. R. 6 Ex. 254, "The mistaken belief that the one partner had that authority cannot prejudice the right of the other, if the other did nothing to induce such a belief."

We express no opinion as to the evidence in this case, or as to what the verdict of the jury should be. The trial judge granted a new trial because he thought that the case had been submitted to the jury under incorrect instructions. We agree with him in this view, and therefore affirm his judgment granting a new trial.

Judgment affirmed. All the Justices concur.

(119 Ga. 298)

CRIBB v. PARKER, Judge.

(Supreme Court of Georgia. Dec. 17, 1903.)

INSANITY—INQUISITION AFTER CONVICTION—REPEAL OF STATUTE—EFFECT—PENDING CASES—SUSPENSION OF SENTENCE—MANDAMUS.

1. Pen. Code 1895, § 1047, as amended by the act of December 21, 1897 (Acts 1897, p. 41; Van Epps' Code, § 6757), was repealed by the act of August 17, 1903 (Acts 1903, p. 77), providing for the abolition of trials or inquisitions after conviction as to the sanity of persons accused of capital offenses.

2. The third section of the repealing act, which provided that that act "shall not apply to any pending case," has application only to inquisitions of insanity pending under Act 1897, p. 42.

3. After the date of the passage of the repealing act a judge of the superior court had no jurisdiction to entertain an original application for an inquisition of insanity under Act 1897, p. 41, or to grant an order suspending the sentence in the case.

4. Even if the refusal of a judge to entertain such an application is such a decision as would authorize the applicant to tender a bill of exceptions complaining thereof, the judge, when signing such a bill of exceptions, has no authority to grant an order suspending the sentence merely because the bill of exceptions has been signed.

5. Even if this court has jurisdiction by mandamus in any case to compel a judge of the trial court to grant an order suspending the sentence in a criminal case, for the reason that the granting of such an order is a necessary part of the bill of exceptions, this court has no jurisdiction to issue the writ of mandamus for such purpose in a case where, at the time the judge signs the bill of exceptions, he has no jurisdiction over the sentence sought

to be suspended. *Haskens v. State*, 40 S. E. 997, 114 Ga. 837.

(Syllabus by the Court.)

Application by Lee Cribb for writ of mandamus to Parker, judge. Writ denied.

Quincey & McDonald, for applicant.

PER CURIAM. Mandamus nisi denied.

(133 N. C. 761)

STATE v. BOGGAN.

(Supreme Court of North Carolina. Dec. 19, 1903.)

HOMICIDE—MURDER IN THE FIRST DEGREE—EVIDENCE—SUFFICIENCY—INSTRUCTIONS—PREJUDICIAL ERROR—EVIDENCE—DYING DECLARATION—NEW TRIAL—MISCONDUCT OF JURY—PRESUMPTION—DISCRETION OF TRIAL COURT.

1. In a prosecution for homicide, declarations of deceased that defendant shot him were competent as dying declarations, where it was shown that deceased was informed the morning after the homicide that the wound would probably prove fatal, and just before making the statements on the following morning he stated that he was getting weaker, believed he was going to die, and that the doctors had so informed him.

2. In a prosecution for homicide, evidence examined, and held sufficient to authorize a conviction of murder in the first degree.

3. In a prosecution for homicide, defendant could not complain of a refusal to instruct that he could not be convicted of manslaughter, where there was uncontradicted evidence, except as to his identity, of murder in the first degree.

4. Where it is shown in a prosecution for homicide that there was opportunity to influence the jury, but not that the jury was actually influenced, the granting of a new trial is in the discretion of the trial judge.

5. The presumption is in favor of the integrity of a verdict, and the burden is on the assailant thereof to show that the jurors were improperly influenced, or that their conduct was such that, as a matter of law, there was "no trial."

6. In a prosecution for homicide, it was shown on motion for a new trial that the jury was quartered in a hotel adjoining the alley in which the killing occurred, and that on two occasions the jury were conducted through the alley to the privy. In reference to these facts, the court found that while the jury could and did see the circumstances as to light, etc., surrounding the killing, they made no mention of any such things, and did not remark thereon in their deliberations or anywhere else. *Held*, that the court's findings would be construed to indicate that the jury were not influenced by what they saw, and its refusal to set aside the verdict would not be disturbed.

Montgomery, J., dissenting in part.

Appeal from Superior Court, Anson County; C. M. Cooke, Judge.

Will Boggan was convicted of murder in the first degree, and appeals. Affirmed.

The following are the instructions of the trial court:

"(1) All murders which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by another kind of willful, deliberate, and premeditated killing,

or which shall be committed in the perpetration of or attempt to perpetrate any arson, rape, robbery, burglary, or other felony, shall be deemed to be murder in the first degree, and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree. Any other wrongful killing of a human being is manslaughter.

"(2) Murder in the second degree is the willful and unlawful killing of a human being with malice.

"(3) But to make the killing murder in the first degree, it must not only be done with malice, but, unless perpetrated by means of poison, lying in wait, imprisonment, starving, or torture, or committed in the perpetration or the attempt to perpetrate some arson, rape, robbery, burglary, or some other felony, it must be committed with deliberation and premeditation.

"(4) General malice is wickedness; a disposition to do wrong; a diabolical heart, regardless of social duty, and fatally bent on mischief. Particular malice means ill will; a grudge; a desire to be revenged on a particular person. Malice, also, in respect of the rule for the proof of its existence, is either implied or expressed. Implied malice is when the law presumes its existence. The law presumes malice from the use of a deadly weapon, and, when it is admitted or proved that the slaying was with a deadly weapon, the burden is upon the accused to satisfy the jury, not beyond a reasonable doubt, but to satisfy them of the existence of facts and circumstances in mitigation, and sufficient to reduce the offense below murder in the second degree. Mere words, however opprobrious and insulting, are not legal provocation for the use of a deadly weapon, and cannot be allowed as sufficient to reduce the offense below murder in the second degree, when the killing is with a deadly weapon.

"(5) A deliberate and premeditated killing can only be where there is a murderous intent and purpose in the heart, formed before, and not simultaneously with, the killing, and a steadfast resolve and deep-rooted purpose to kill the deceased, after carefully considering the consequences.

"(6) Dying declarations of the facts of the killing and of the person who did it are competent, but should be received with caution.

"(7) Of every fact material and essential to the guilt of the prisoner of any one of the offenses the jury must be satisfied beyond a reasonable doubt, and, upon a consideration of the whole evidence, the jury must be satisfied beyond a reasonable doubt that the defendant is guilty, before they could find him guilty of any one of the offenses.

"(8) The court instructs you that in this case the defendant is guilty of at least murder in the second degree, or nothing. It will be your duty to consider first if he be guilty of the homicide, and then whether it be murder in the first or second degree.

"(9) Upon the question of identity, the court

instructs you that the state must satisfy you beyond a reasonable doubt that the defendant is the man who fired the fatal shot that killed John Sullivan, and if the state has failed to satisfy you beyond a reasonable doubt that the defendant is the man who fired the fatal shot, or if, after considering and weighing all the evidence, your minds are left in painful doubt and uncertainty upon that point, it would be your duty to acquit the defendant; and upon this question it will be your duty to consider all the evidence offered by the state, including the dying declarations of the deceased that the defendant was the man who shot him, as testified by the witness Crawford, the widow and brothers of the deceased, if you shall find the facts testified to be true; and the evidence of the witnesses Starnes and Morgan that they saw the man shoot the deceased; that, while they did not know the name of the defendant, they knew the man, and did recognize him as soon as they saw him, and that it was the defendant; and also their evidence that they recognized his voice the first time they heard it afterwards as the voice of the man who shot the deceased; if you shall find the facts testified to by them to be true; and also the evidence in corroboration of the said Starnes and Morgan, if those witnesses who testified to hearing the said Starnes and Morgan say, after the shooting, and before they saw the said defendant, thereafter, that they did not know the name of the man who did the shooting; that they would know him if they should see him again; if you shall find the said facts to be true. You will also consider the evidence of the witness Starnes that the man who shot the deceased had on a short, light-colored overcoat, and a brown derby hat, and of Morgan that he had on a light-colored overcoat, and the evidence of the witnesses who testified to seeing the defendant that night, and that he had on a light-colored overcoat and a brown derby hat, if you should find these facts to be true; and you will also consider the evidence of the witnesses of the general bad character of the defendant. And you will also consider the evidence of the witnesses who testified to seeing the defendant, on the night the deceased was shot, at a point on the street not far from where the shooting occurred, with a pistol in his hands, and the evidence of the witnesses that the defendant and the deceased were quarreling, that night and not far from the place of the shooting, and not long before the shooting occurred—provided you shall find the facts to be true; and upon this question you will consider all the evidence that is in favor of the defendant, including the fact that the shooting occurred in the night time in the alley; that neither Starnes nor Morgan knew the man by name, and their failure to tell who it was that did the shooting immediately after the shooting, and the testimony of these witnesses who testified that Starnes and Morgan stated soon after the shooting that they did not know the man who shot Sullivan; the evidence of the witnesses

who testified that Will Boggan did not wear a light-colored overcoat, and did not own one, and that he did not have a brown-colored derby hat. You will also consider the evidence of the defendant himself that he was not the man who shot the deceased; that he was not at the place where he was shot, but that he had left town before it occurred, and had gone by his home, and shortly afterwards had gone, in company with Monroe Ledbetter, Jean Tysen, Thomas Boggan, Frank Sturdivant, Walter Howell, Garfield Howell, and Jesse Willoughby, to a point in some woods more than a mile from town, and where he and they had remained playing cards until a late hour in the night; and also the evidence of Monroe Ledbetter that he went with the defendant from town before the shooting occurred, and was with him on the way to and over in the woods until a late hour in the night; and also the testimony of Frank Sturdivant, Jean Tysen, Garfield Howell, and Thomas Boggan that they got up with the defendant and Monroe Ledbetter, and accompanied them to the woods for the purpose of playing cards, and that they remained there with the defendant until a late hour of the night; and the testimony of Cornelia Ledbetter and Nellie Boggan to the fact that Boggan and Ledbetter were at their respective homes between nine and ten o'clock, and left with their lanterns; and the evidence that the defendant, after his return from the woods, on being informed by his wife that the officer had been at his home to arrest him on the charge of shooting the deceased, came at once to town, and sought the officer, and inquired the cause of his arrest; and you will also consider the evidence as to the good character of Monroe Ledbetter, Jean Tysen, Tom Boggan, and Frank Sturdivant, and Anna Johnson, Cornelia Ledbetter, and Nellie Boggan, and of the bad character of Judge Starnes. You will also consider the evidence of the witness who testified to measuring the rubber overshoe that defendant had on, and then applying the measure to tracks made by some one wearing apparently rubber shoes, going away from the place of the killing, and that the measure of the tracks was one-eighth inch shorter than the measure of the other soles. The court does not claim to have herein called your attention to all the evidence in the case, but you will consider all the evidence, and allow to it such weight as you may find it entitled to.

"(10) If you shall find beyond a reasonable doubt, after considering all the evidence in the case, that the defendant fired the shot that killed the deceased, and if you shall further find beyond a reasonable doubt that the defendant, moved by feeling of revenge and ill will towards the deceased, had, after considering carefully the consequences, coolly and deliberately formed the murderous purpose against the deceased, and, with the steadfast resolve and intent to kill the deceased, and with deliberation and premeditation, fired the said shot, then you will

find the defendant guilty of murder in the first degree; but, if you shall not be so satisfied beyond a reasonable doubt, you will find the defendant not guilty of murder in the first degree. And upon the question of premeditation and deliberation the court instructs you that the killing with the pistol, while it is a presumption of malice, would not be so of deliberation and premeditation, and would not be evidence thereof. You will, upon this question of premeditation and deliberation, consider the evidence offered by the state of threats made by the defendant against the deceased, as testified to by the witnesses A. J. Johnson and Booker Little, and the evidence that the man who shot the deceased was standing close by the side of the wall on one side of the alley, along which the deceased was going, if you shall find that the defendant was the man who was standing by the side of said wall, and was the man who shot the deceased, and that, upon the deceased addressing and saluting him by using the word 'Hello,' he cursed him. But you will not consider upon the question for the state any expressions of the defendant tending to show ill will or bad temper generally. You will consider for the defendant the denial of the defendant that he made the threats testified to by the witnesses, and all the other evidence in the case that may be in his favor.

"(11) If you should find beyond a reasonable doubt that the defendant fired the shot that killed the deceased, but that the killing was not deliberated and premeditated, then you will find the defendant guilty of murder in the second degree; but, if you are not so satisfied, you will find the defendant not guilty. And upon this question you will consider all the evidence to which I have called your attention, and all the other evidence in the case.

"(12) As to the testimony of Will Boggan, the defendant, the court instructs you that it is your duty to weigh and scrutinize his evidence carefully, on account of his interest in the result of the trial, but if, after doing so, you are satisfied he has told the truth, you will allow the same weight to his testimony that you would to any other credible witness."

H. H. McLendon, for appellant. The Attorney General, for the State.

CONNOR, J. The prisoner was convicted of murder in the first degree, and from the judgment of the court appealed. The facts material to the decision of the exceptions set out in the record and case on appeal are as follows: On the night of February 28, 1903, the deceased met Morgan and Starnes near the Klondyke Hotel, in the town of Wadesboro. They went into and down an alley between the hotel and store of one Williams for the horse and buggy of the deceased. There was testimony on the part of the state tending to show that, as the

three persons went down the alley, the prisoner was standing up beside a wall, and deceased spoke to him in a friendly manner; the prisoner responding, "Hello, you damn son of a b——." Deceased said, "I do not like to take that off of no man," and made an attempt to turn around. The other two persons with him prevented him from doing so, and the three started on down the alley. Prisoner followed them. One of the witnesses swore that he saw a pistol in prisoner's hand; that he turned deceased loose, and started around the corner by the store; that he looked back, and saw prisoner with pistol in his hand, arm outstretched, presenting it toward deceased, and he said, "I will break it off in you, you d—— son of a b——;" that he then saw the pistol fire. The prisoner turned and ran up the alleyway. Witness went to deceased and asked him if he was hit, and he said, "That negro has killed me." The witness said: "Boggan followed Sullivan, after using the words, ten or fifteen feet, before he shot. He was about four or five feet from Sullivan when he shot him." The witness Starnes further testified: "I looked back, and saw the negro following. I turned and told him to go back. He said, 'I'll be d—— if I do.' Just about that time Sullivan stepped around me and said, 'I do not like to take that.' The negro said, 'I gave it to you, and I'll be d—— if I take it back. Before I will, I will break it off in you.' Sullivan pulled off his right glove, and went to put it in his pocket, and as he did so the negro shot him." There was other testimony in regard to the identity of the prisoner. The prisoner set up an alibi, and introduced testimony tending to sustain his contention that he was at another place at the time of the homicide. The deceased was shot on Saturday night, and died the following Tuesday. Dr. Bennett and Dr. Ashe saw him on Sunday morning. "He was then rational and very much composed." Doctors told him that the wound would very probably prove fatal. They extended some hope to him by means of an operation that might save him. They told him that they were preparing for a statement he might make to the magistrate. Prisoner objected to this testimony. Objection overruled. No statement by the prisoner was introduced. Julius Sullivan, a brother of the deceased, was introduced, and testified that he saw the deceased about 3:30 o'clock Monday morning. To an inquiry as to his condition, deceased said: "I am in a bad fix." About 9 o'clock that morning deceased sent for witness, and said: "Well, I am about to leave you all. I hate to leave my little children." Witness then asked him if he knew who shot him. He said: "Yes; I know who shot me. Will Boggan shot me. I have been knowing him all my life." Witness duly objected and excepted to the admission of this testimony. Daniel Crawford also testified to similar declara-

tions of deceased made about the middle of Monday afternoon. Before making the statement as to who shot him, deceased said: "I am getting weaker. I believe I am going to die." Witness said he hoped not. Deceased said: "Yes; he thought he was bound to die. 'The doctors thought he could not possibly get well.'" To all of which prisoner duly excepted.

The declarations of the deceased were clearly competent. Every condition upon which dying declarations are made competent were shown to exist. The ruling of his honor is sustained by a long and uniform current of decisions of this court. *State v. Dixon*, 131 N. C. 808, 42 S. E. 944. We have examined the other exceptions to the admission of testimony. We concur with his honor in respect to them.

The prisoner requested his honor to charge the jury "that upon the evidence the jury cannot find a verdict of murder in the first degree." This was declined, and prisoner excepted. His honor could not properly have given the instruction. According to the decisions of this court, there was ample evidence, if believed by the jury, to show premeditation. Similar instructions were asked in regard to verdict of murder in the second degree and manslaughter, and declined. The ruling upon the first prayer disposes of these. His honor might well have given the instruction as to manslaughter, but, of course, the prisoner cannot complain of his failure to do so. In no possible point of view could they find the prisoner guilty of manslaughter. His honor's charge, set out in full, is clear, exhaustive, and absolutely fair to the prisoner. If there was any error, the state alone had a right to complain. The real contest in the case centered upon the question of the identification of the prisoner. If the testimony of the only witnesses to the homicide is true, it was an unprovoked, heartless murder. There is no contradictory evidence in respect to the way in which the deceased was killed.

We have examined the exception to the reply made by his honor to the question propounded by the jury after an hour's deliberation, and find no error therein.

The last exception urged by the prisoner's able and faithful counsel relates to the conduct of the jury. In respect thereto his honor finds the following facts: "The jury, pending the trial, were quartered in the Klondyke Hotel by the officer, and kept together there at night, and when not attending upon the sessions of the court. That the alley in which the shooting occurred was right on one side of the hotel, and was the nearest way from the hotel to the privy, and that on two occasions the jury were carried by the officer through the alley to reach the privy for the calls of nature. The first time was on the night after the jury was impaneled, and before any evidence was introduced. The next time was on yesterday, in the day-

time, pending the argument. The court finds that the jury, nor did any of them, at any other time visit or go through the alley, and that there were not any remarks made by any one of the jury, nor by the officer attending them, as to the condition or appearance of the alley, and that the jury could see and did see the alley from time to time as they passed along by it going to and returning from the sessions of the court, but no remarks were made by them, or any of them, as to the conditions of the alley, or appearances therein. That the jury, from the hotel windows, could see and did see the alley and street along which the accused was alleged to have gone after the shooting. The court further finds that the jury could and did see the electric lights, and could and did see to what extent they lighted up the alley and the streets and points at which it was testified the accused was on the night of the killing, but there was no mention of any of these conditions, nor remarks made by the members of the jury to each other, nor to any one else, nor by the officer, nor any discussion by them of any of these conditions, or the appearance of the place of the shooting, nor any of the environments." The prisoner, upon these findings of fact, moved the court to set aside the verdict. Motion denied. Prisoner excepted. In respect to motions to set aside the verdict of the jury for misconduct, the rule which controls this court is thus stated by Pearson, C. J., in *State v. Tilghman*, 33 N. C. 513 (page 553): "If the circumstances are such as merely to put suspicion on the verdict, by showing, not that there was, but that there might have been, an undue influence brought to bear on the jury, because there was opportunity and a chance for it, it is a matter within the discretion of the presiding judge. But if the fact be that undue influence was brought to bear on the jury, as if they were fed at the charge of the prosecutor or prisoner, or if they be solicited and advised how their verdict should be, or if they have other evidence than that which was offered, in all such cases there has been, in contemplation of law, no trial, and this court, as a matter of law, will direct a trial to be had." This court held in *State v. Crane*, 110 N. C. 530, 15 S. E. 231: "When it appears only that there was an opportunity whereby to influence the jury, but not that the jury was influenced—merely opportunity and chance for it—a new trial is in the discretion of the presiding judge." *State v. Miller*, 18 N. C. 500. In *State v. Gould*, 90 N. C. 658 (a capital felony), Mr. Justice Ashe says: "And even if the circumstances had been such [which was not the case here] as to show that there was an opportunity and chance for exerting an influence upon them, it would have been matter of discretion with the presiding judge whether he would have granted a new trial." In this case his honor, while properly declining to

have an affidavit from one of the jurors for the purpose of impeaching the verdict, states that he examined each of the jurors verbally in the presence of the prisoner and his counsel, and the record shows that the jury was polled. The presumption is, in favor of the integrity of the jury and their verdict, that they tried the case upon the law and evidence. If it is sought to impeach the verdict, the burden is upon the prisoner to show either that they were improperly influenced, or that their conduct was such that, as a matter of law, there had been "no trial." We construe the findings and action of his honor to mean that the jury were not influenced in arriving at their verdict by what they saw in regard to the alley and its surroundings. We do not entertain a doubt but that the learned, just, and fearless judge who heard the case and passed upon the motion would have promptly set the verdict aside, regardless of all other considerations than his sense of duty, if he had even doubted its integrity. We should not hesitate to declare the law as contended by the prisoner, regardless of this consideration, if we so found it to be. Formerly juries were selected from the vicinage, because of their supposed familiarity with the parties, witnesses, and surroundings. It would be impracticable to shut a jury up in a room without light, air, or exercise during a long trial—as in this case, eight days—to prevent the possibility of their seeing, in passing to and from the courthouse or attending a call of nature, something which might affect their minds. Many suggestions readily occur to the mind of conditions and circumstances which might affect the minds of jurors, which it would be impracticable to make the basis for setting their verdicts aside. The law and its administration are for the practical affairs of life. While it seeks to protect the innocent, and surround the accused in the day of his trial with all of the safeguards which experience, humanity, and justice demand, it seeks also to deal with men and things in a practical way.

We have given the prisoner's cause a careful, anxious consideration. A jury of his country has found him guilty of an unprovoked murder of a citizen of the state. We find no error in the action of the court. He has been tried according to the "law of the land." The judgment must be affirmed.

MONTGOMERY, J. (dissenting). I dissent from that part of the opinion of the court in which it is held that his honor committed no error in refusing to grant to the prisoner a new trial on the ground that the jury were on several occasions allowed to visit the locality where the homicide occurred. A most material question of the trial was the identification of the prisoner. Without the aid of the dying declarations of the de-

ceased, the jury would have had difficulty in making that identification. The homicide occurred at night in an alley of the town of Wadesboro. Some of the witnesses testified that the light in the alley from an electric light was insufficient to disclose the identity of the prisoner. Others said that the light was sufficient for that purpose. The jury were allowed, without an order of the court, and without the knowledge of the prisoner, to observe many times the effect of the light upon the point where the homicide occurred. I am not seeking to disturb the rule, so often laid down by this court, that it is not sufficient to set aside a verdict that a juror might have been influenced by separation from the others of the jury, or by communications held with others outside, but that there must be evidence that the juror was influenced in his verdict by such conduct. But I do intend to enter my dissent against the conviction of any person of a capital felony in a case where evidence other than that offered on trial in an open court has been received by the jury, as was done in this case. In *State v. Tilghman*, 38 N. C., at page 553, Pearson, J., said for the court: "We take this plain proposition: If the circumstances are such as merely put suspicion on the verdict by showing, not that there was, but that there might have been, undue influence brought to bear on the jury, because there was opportunity and a chance for it, it is a matter within the discretion of the presiding judge. But if the fact be that undue influence was brought to bear on the jury, as if they were fed at the charge of the prosecutor or the prisoner, or if they be solicited and advised how their verdict should be, *or if they have other evidence than that which was offered on the trial* [italics mine], in all such cases there has, in contemplation of law, been no trial; and this court, as a matter of law, will direct a trial to be had, whether the former proceeding purports to have acquitted or convicted the prisoner." It matters not what you may call the observations of the jurors of the place where the homicide was committed, or for whatever purpose the jury visited that locality; the fact is the effect of those lights upon the points in that alley which were made important by the testimony was evidence, and it was, in the nature of things, bound to have influenced the jury in fixing the identification of the prisoner. No person can say that the lights which the jurors saw on the nights when they were in or near the alley were the same lights which were there the night of the homicide. And it will not do to say that the prisoner could have shown that the lights were not the same. The answer to that is that he did not know the jurors had been there making observations. That information came after the trial was over.

(54 W. Va. 161)

FLESHMAN v. McWHORTER, Judge, et al.
(Supreme Court of Appeals of West Virginia.
Nov. 21, 1903.)

**MANDAMUS TO JUDGE—DISCRETION—CONTROL—
INADEQUATE REMEDY—CONSTITUTIONAL
LAW—RIGHT OF APPEAL.**

1. In awarding or refusing costs under section 6 of chapter 138 of the Code of 1899, the judge of a circuit court acts judicially, and the writ of mandamus does not lie to control his discretion.

2. Failure of the law to give a right of appeal, where a party feels that he has been injured by a decision, affords no ground for an application for the writ of mandamus.

3. There is no absolute right in a suitor to have a decision against him reviewed, which must be respected in making laws; and, in the absence of a constitutional inhibition, it is within the power of the Legislature to prescribe the cases and the courts in which parties shall be entitled to appellate remedies.

4. One trial, without review, fulfills the maxim that there is a remedy for every wrong. Allowing appeals and writs of error in some cases only permits the remedy to be further pursued in them than in those as to which such provisions are not made.

(Syllabus by the Court.)

Petition of B. M. Fleshman for writ of mandamus to J. M. McWhorter, judge of the circuit court of Greenbrier county, and others. Writ refused.

Williams & Dice, for petitioner. Preston & Wallace, for respondents.

POFFENBARGER, J. D. M. Fleshman asks that a peremptory writ of mandamus issue against Hon. J. M. McWhorter, judge of the circuit court of Greenbrier county, requiring him to enter a judgment for costs in favor of petitioner in an action of trespass on the case in which he was plaintiff and D. F. Hedrick was defendant, and in which the plaintiff recovered a judgment for \$1. The action was for breaking, entering, and trespassing upon the plaintiff's close. No other cause of action is set out in the declaration, and the plea was, "Not guilty." But it is claimed by the petitioner that the action was brought for the purpose of determining in this indirect way a controversy between the plaintiff and defendant concerning a right of way over the plaintiff's land. They own adjoining tracts of land, the titles to which were derived from a common source—David Hedrick—who conveyed the land now owned by the plaintiff to S. A. Hedrick in 1875, who in 1896 conveyed to the plaintiff. David Hedrick conveyed to the defendant his land in 1901. An old pathway led across the lands of both parties, and the defendant claimed a right of way through the plaintiff's land along said pathway by prescription or long user thereof; claiming that it had been so used for 60 years or more. Plaintiff had forbidden the defendant to use the pathway, and obstructed it by increasing the height of the fence and in other ways; but after-

wards the defendant had entered and torn away the obstructions, and continued to use it against the will of the plaintiff. These facts appear from an agreed statement of facts incorporated in a bill of exceptions, and exhibited with the petition, together with the pleadings and orders in the case. Upon the trial there was a verdict for the plaintiff, with damages assessed at \$1, for which sum the court entered a judgment, but refused to give judgment for plaintiff's costs, amounting to \$64.30, and also to certify that the object of the action was to try a right other than the mere right to damages for the trespass complained of.

The trial judge and the attorneys for the defendant were of the opinion that judgment for costs in the action is forbidden by section 6 of chapter 138 of the Code of 1899, reading as follows: "In any personal action not on contract, which might be brought and prosecuted to judgment in a justice's court, if a verdict be found for the plaintiff, on an issue or otherwise, for less damages than fifty dollars, he shall not recover, in respect to such verdict, any costs, unless the court enter of record that the object of the action was to try a right besides the mere right to recover damages for the trespass or grievance in respect of which the action was brought, or that the said trespass or grievance was willful or malicious." The attorneys for the plaintiff insist that the action was one which could not have been brought and prosecuted to judgment in a justice's court, as it involved the title to real estate; that there was a plain duty resting upon the judge to enter the certificate, even if the case did fall within that statute; and that the plaintiff has no remedy for his costs, unless it be by mandamus.

The rendition of a judgment of any kind is the exercise of a judicial function and power. Mandamus will not lie to control the exercise of the discretion of any court, board, or officer when the act complained of is either judicial or quasi judicial in its nature. *State v. County Court*, 33 W. Va. 589, 11 S. E. 72. An inferior tribunal may be compelled to act in such cases, if it neglects or refuses to do so, but mandamus is not a remedy by which it can be compelled to enter any particular judgment or to act in any particular manner. By this writ the inferior court, board, or officer can only be compelled to move, but not to move in any particular way. Its discretion cannot be controlled. *Miller v. County Court*, 34 W. Va. 285, 12 S. E. 702; *State v. Herrald*, 36 W. Va. 721, 15 S. E. 974; *Marcum v. Commissioners*, 42 W. Va. 263, 26 S. E. 281, 36 L. R. A. 296. These authorities, as well as many others, further hold that if such court, board, or officer is acting in respect to the matter which is the subject of complaint, or has acted upon it, mandamus does not lie at all. If the court is proceeding to act, and commits an error, or has completed its function,

¶ 4. See Constitutional Law, vol. 10, Cent. Dig. §§ 267, 963.

and erred in doing so, the remedy, if any, is by some form of appellate procedure. Though these general principles are decisive of the case, the following authorities more directly in point are cited: In *Jansen v. Davison*, 2 Johns. Cas. 72, there was a recovery of a sum less than \$25, and the court refused a judgment for costs. Thereupon a mandamus was asked for, and the superior court refused it, saying: "The court below have exercised their judgment on the question of costs. If they were wrong, it was an error of judgment, merely, and the proper remedy is by a writ of error." In *Chase v. Canal Co.*, 10 Pick. 244, costs were refused in a condemnation proceeding, a writ of mandamus was applied for, and the court refused it, without expressing any opinion as to whether the petitioners were entitled to costs, because the commissioners against whom this remedy was sought had acted in a judicial capacity upon a question properly submitted to their judgment. In *State v. Judge*, 3 Wis. 809, the court held that, if the judge or court errs in the taxation or award of costs, a mandamus is not the proper remedy to correct the error. In the opinion, the court said: "To direct in this way the judge to decide the questions involved would be a gross perversion of the proper office of a writ of mandamus." To the same effect is *Ex parte Nelson*, 1 Cow. 417, where a writ of mandamus was applied for to compel the common pleas court to enter a judgment for costs. *Savage*, C. J., said: "A mandamus is proper where a party has a legal right, and there is no other appropriate legal remedy, and where, in justice, there ought to be one; but where a discretion is vested in any inferior jurisdiction, and that jurisdiction has been exercised, a mandamus will not be granted, because this court cannot control and ought not to coerce that discretion." The same principle is applied in *People v. New York C. P.*, 19 Wend. 113. In *Ex parte Many*, 14 How. 24, 14 L. Ed. 311, the Supreme Court of the United States refused a mandamus to compel the circuit court to tax and enter in the blank left in its order the amount of the costs. Chief Justice Taney said: "This court might unquestionably issue a mandamus to the court below to proceed to judgment. But in this case the court has proceeded to judgment upon the question submitted for its decision. And whether that judgment be erroneous or not, this court has no jurisdiction to re-examine it in a proceeding by mandamus." See, also, *Merrill on Mandamus*, §§ 187, 201; *High on Extraordinary Legal Remedies*, §§ 159, 182, 193.

That the function performed by the court in passing upon the question of costs in the case out of which this proceeding has grown is judicial is perfectly clear. The authorities cited show that in awarding costs the court acts judicially. Hence, if the right to costs were clear and indisputable, and the

court had refused a judgment therefor, mandamus would not lie. In this case the court was called upon not only for a judgment for costs, but also for an entry upon the record of a certificate to the effect that a right besides the mere right to recover damages had been involved in the action. The entry of such certificate calls upon the court for the exercise of judgment, and the application of legal principles to the pleadings and evidence in order to determine the nature of the controversy. In some cases the nature of the right involved is apparent, requiring no consideration whatever; and it might be said that in entering the certificate the court acts ministerially, but it does not. Where the action is brought upon a bond, and there is no defense, the duty of the court is plain; but in pronouncing judgment it acts judicially, nevertheless.

Counsel for the petitioner urges in support of this application the want of any other remedy. As applicable to this phase of the case, the following is quoted from *Spelling on Extraordinary Remedies*, at section 1373: "It does not necessarily follow that because the law, by ordinary methods of procedure, does not afford an adequate remedy, relief will be given by mandamus. There are many cases of wrong, and consequent damage to the party, resulting from omitted duty, wherein the law affords no redress in the usual forms, and where yet the courts refuse to grant relief by mandamus. Though a party may fancy himself injured by a decision of an inferior court upon a matter where the law gives no right of appeal, yet this circumstance alone does not entitle him to relief by mandamus. The desirability of having the matter finally settled in the first instance may have been the prevailing motive of the Legislature in withholding the right of appeal." On an application for a writ of prohibition, this court has applied the principle; holding that the writ does not lie for error committed, or about to be committed, by a circuit court, in respect to a matter which is clearly within its jurisdiction, notwithstanding the lack of a remedy by appeal. *Sperry v. Sanders*, 50 W. Va. 70, 74, 40 S. E. 327. Failure to give an appeal or writ of error in every case is not the result of oversight in the people in the adoption of the Constitution, nor of the Legislature in making laws under it. On the contrary, there is a deliberate purpose to set limits upon litigation, after one trial in a court having jurisdiction, and put an end to controversy. Though writs of error came into use, as common-law remedies, more than seven centuries ago, there is no absolute right in a suitor to have a decision reviewed, which must be respected in making laws; and, in the absence of some constitutional inhibition, it is within the power of the Legislature to prescribe the cases in which, and the courts to which, parties shall be entitled to bring a cause for review. 2 Cyc. 507.

While the law is supposed to give a remedy for every wrong, this relates to the wrong constituting the cause of action, not mere errors in procedure. The people, in framing the Constitution, and the Legislature, in passing statutes, have full and complete discretion and power to determine whether a review shall be allowed, and, if none is provided for, the courts have no power to give it. The law gives one trial on every cause of action. As to some, the judgments and decrees of the trial court may be reviewed; as to others, they may not. There is a remedy for every wrong, but in some cases it is more ample, and may be pursued farther, than in others. There is no appeal from the judgment of a justice when the amount in controversy does not exceed \$15, exclusive of interests and costs; nor any appellate jurisdiction in this court, in controversies pecuniary in character, when the amount does not exceed \$100, exclusive of costs. Hardships result in a few instances, but the courts can give no relief. Against these the lawmakers have set the benefits of fixing bounds to litigation, and said that, upon the whole, the public good is subserved, notwithstanding occasional instances of injustice. The courts cannot entertain complaints founded upon a supposed lack of wisdom or propriety in the exercise of the powers vested in lawmaking bodies.

The principles and authorities above referred to forbid the awarding of the peremptory writ. It must be refused, the alternative writ quashed, and the petition dismissed.

(54 W. Va. 169)

MERRINER v. MERRINER et al.

(Supreme Court of Appeals of West Virginia.
Nov. 21, 1903.)

INJUNCTION—SUFFICIENCY OF BILL.

1. A general allegation that the defendant is interfering with the plaintiff "in the matter of farming, cultivating, or tilling a farm on which plaintiff resides" presents no sufficient grounds for an injunction.

(Syllabus by the Court.)

Appeal from Circuit Court, Wetzel County; M. H. Willis, Judge.

Action by David Merriner against Matthew H. Merriner and others. Judgment for defendants, and plaintiff appeals. Affirmed.

T. P. Jacobs and E. B. Snodgrass, for appellant. McIntire & McIntire and M. R. Morris, for appellees.

DENT, J. David Merriner appeals from an order of the circuit court of Wetzel county, entered on the 28th day of March, 1902, dissolving an injunction obtained by him against his father, Matthew H. Merriner. The facts, as shown by the bill and exhibits, are that David Merriner holds in trust for himself and father a certain tract of land,

known as the "Beck Farm." By the deed conveying title to him, a life estate and right of possession are vested in the father. The son says "that, under an agreement between himself and father, he is entitled to possession of the farm for cultivation and tilling"; that his said father "has become disagreeable, and ill-tempered, so that it is impossible to deal with him or to come to any amicable adjustment between themselves; that he continually interferes with your orator in his management of said farm; that, while your orator holds said property in trust for himself and said Matthew H. Merriner, the said Matthew H. Merriner has so continuously interfered with his rights and duties in the performance of his trust that it has become impossible for him longer to discharge his trust, on account of the interference and hostility of the said Matthew H. Merriner." The only trust the plaintiff shows he holds, by his bill, is the legal title to the lands jointly for the benefit of himself and father, while his father, under the deeds, is entitled to a life estate in and the possession of such lands, and the plaintiff occupies them by virtue of an alleged agreement with his father, and therefore as his tenant, and not as his trustee. It is his tenancy that is interfered with, and not his trusteeship. He prays that his father "may be inhibited, restrained, and enjoined from interfering with" him "in the matter of farming, cultivating, or tilling the said farm on which he now resides until" the matter between them may be settled. The circuit court awarded a preliminary injunction, and then dissolved it on motion of the father.

The bill presents no sufficient grounds for injunction. It wholly fails to show or allege any irreparable damage either committed or threatened. *Becker v. McGraw*, 48 W. Va. 539, 37 S. E. 532; *Greathouse v. Greathouse*, 46 W. Va. 21, 32 S. E. 994. If the plaintiff has any sufficient grounds for injunction, he fails to set it out in his bill.

The order of dissolution is affirmed.

(54 W. Va. 146)

FISHER v. FISHER.

(Supreme Court of Appeals of West Virginia.
Nov. 14, 1903.)

DIVORCE—ABANDONMENT—INSANITY OF DEFENDANT.

1. A decree of divorce for willful abandonment and desertion for three years will be granted the plaintiff, where it appears that the defendant was guilty of such desertion and abandonment for three years while he was of sound mind, although subsequently he became insane, and at the time of the commencement of the suit and the granting of the decree he was a lunatic.

(Syllabus by the Court.)

Appeal from Circuit Court, Monongalia County; John W. Mason, Judge.

Suit by Lucy A. Fisher against Joseph William Fisher. Decree for defendant, and plaintiff appeals. Reversed.

Moreland & Glasscock, for appellant.

McWHORTER, P. This is a suit for divorce brought by Lucy A. Fisher against her husband, Joseph William Fisher, in the circuit court of Monongalia county. The plaintiff filed her bill alleging her marriage with the defendant on the 25th of November, 1893; that a son was born to them on the 8th of October, 1894, who was with the plaintiff, and whom she had always maintained and supported; that plaintiff was born in Monongalia county, and had always resided therein, which was also the case as to the defendant, and that they had last cohabited in that county; that plaintiff had always been a faithful and dutiful wife to her said husband, but that he had always been cruel and inhuman in his treatment towards her, and in May, 1898, had wholly and willfully abandoned and deserted her, and had ever since abandoned and deserted her; that within the then last four or five months defendant had been adjudged insane, and committed to the Hospital for the Insane, in Lewis county, where he still was, and would likely remain for and during the remainder of his lifetime; and alleged that such willful abandonment and desertion on his part was committed and was continued for more than three years while he was sane, and long before any signs of insanity; that he had no property, personal or real, so far as she knew; and prayed she might be allowed to file her bill, and that said Joseph W. Fisher be made defendant thereto; that a guardian ad litem be appointed to defend his interests, and that plaintiff be granted a divorce; and that she be given the custody, care, maintenance, and education of her said child; and for general relief. R. H. Brown was duly appointed guardian ad litem of the defendant, and filed his answer to the bill. Plaintiff filed with her bill duly certified copies of the marriage license, and of the minister's return certifying the marriage, from the records of the circuit court of Garrett county, Md., wherein the marriage was consummated, duly authenticated. Depositions were taken upon due notice, and in the presence of the guardian ad litem—the depositions of Lucy A. Fisher, Estella Myers, Marion A. Laughlin, and I. M. McGallagher—which depositions were filed and read in the cause, and sustained the allegations of plaintiff's bill. And on the 14th day of June, 1902, the following decree was rendered: "This cause came on this day to be heard upon the bill of complaint of the plaintiff and the exhibit filed therewith, process duly served upon the defendant, and the answer of R. H. Brown, guardian ad litem for the defendant, the general replication of the plaintiff thereto, and depositions taken on behalf of the plaintiff in the presence of the guardian

ad litem, and was argued by counsel, and it appearing to the court that the plaintiff is not entitled to the relief prayed for, it is adjudged, ordered, and decreed that the bill be dismissed." From this decree the plaintiff appealed, insisting that the court erred in holding and adjudging that plaintiff was not entitled to the relief prayed for and in dismissing her bill, and in not granting her the relief asked.

The only question presented for consideration in this cause is whether the plaintiff can be divorced from her insane husband for an act committed by him before his insanity. The only ground conceivable upon which the court refused relief to the plaintiff is that the suit could not be prosecuted because of the insanity of the defendant, but late authorities seem to unanimously hold that that is no ground for refusing relief. Section 5, c. 64, Code 1899, provides that "where either party willfully abandons or deserts the other for three years a divorce may be decreed to the party abandoned." In 34 L. R. A. 186, in the notes, it is said: "The rule was adopted by some of the early English cases that an action for divorce could not be allowed to proceed against an insane person. See *Bawden v. Bawden*, *Mordaunt v. Mordaunt*, and *King v. King*, supra, 11a. But these cases were either reversed or overruled, and the practice would now seem to be universal to permit the action to proceed under proper restriction, leaving the defense to the guardian, committee, or the next friend of the lunatic respondent. Thus an action for a divorce or separation is a civil action, and not a criminal suit or proceeding which cannot be instituted or carried on while the accused is a lunatic. *Mordaunt v. Moncreiffe*, 43 L. J. Mat. N. S. 49, 30 L. T. N. S. 649, 22 Week. Rep. 12, L. R. 2 H. L. (Sc.) 374." And in *Rathbun v. Rathbun*, 40 How. Prac. 328, it is held: "A decree of divorce for adultery will be granted to the plaintiff where it appears that the defendant committed the act of adultery while he was of sound mind, although subsequently he became insane, and was for several years previous to, and at the time of, the commencement of the action and the granting of the decree, a lunatic." And in *Douglass v. Douglass*, 81 Iowa, 421, it is held: "Where the husband deserted his wife while sane, he could not excuse his subsequent absence for the statutory period by showing that he became insane." And in 5 A. & E. E. L. (1st Ed.) 770: "The fact that a party, after being guilty of conduct entitling the other party to a divorce, becomes insane, should not bar such other party's remedy; and the court which takes care of the public interest will likewise protect the insane defendant from fraud and abuse, but must grant the divorce if the case is clearly made out. The insane defendant may appear and defend by guardian or committee." And cases there cited. See, also, *Cook v. Cook*, 53 Barb. 180.

The evidence in the case at bar clearly establishes the fact of marriage and of desertion and continued desertion for more than three years on the part of the defendant prior to his insanity. The plaintiff was entitled to the relief prayed for. Therefore the decree of the circuit court must be reversed, and, this court proceeding to render such decree as the circuit court should have rendered, it is adjudged, ordered, and decreed that the bonds of matrimony heretofore existing between the plaintiff and the defendant be, and the same are, forever dissolved, and the custody of the child given to plaintiff, as prayed for in her bill, and that the plaintiff recover of the defendant her costs, as well in the circuit court as the costs of the appeal in this court.

(54 W. Va. 301)

MARTIN v. MARTIN.

(Supreme Court of Appeals of West Virginia.
Dec. 5, 1903.)

MARRIAGES—ANNULMENT—PUBLIC POLICY.

1. Under sections 1-4, c. 64, Code 1899, all unlawful marriages are made voidable by decree of a court of chancery.

2. Incestuous marriages will be annulled by such court at the instance of either party although the applicant may have knowingly, willfully, and wickedly entered into the same.

3. The continuance of such marriage is contrary to good morals and public policy.

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County; John Homer Holt, Judge.

Action by S. J. Martin against Sarah Martin. Decree for defendant, and plaintiff appeals. Reversed.

W. B. Maxwell, for appellant. Harding & Harding, for appellee.

DENT, J. S. J. Martin complains of a decree of the circuit court of Randolph county, rendered on the 16th day of October, 1902, in his suit against his wife, Sarah Martin, in these words, "Upon consideration whereof, and without passing upon said demurrer, the court is of the opinion that the plaintiff is not entitled to be heard in a court of chancery, and therefore the relief prayed for in his bill is denied him." Thereupon the court dismissed his bill. He appeals.

It is hardly necessary to notice the question of jurisdiction raised. This was fully settled in the case of Hitchcox v. Hitchcox, 2 W. Va. 435, and the court sees no good reason to depart therefrom. It is a chancery cause, determined by the circuit court, involving the personal rights of the parties.

The bill was filed for the purpose of annulling the marriage between himself and the defendant, consummated in the state of Pennsylvania, because they, being related by blood as nephew and aunt, went to the latter state

to evade the laws of this state, with the intention of returning here to reside. The defendant demurred to the bill, and filed her answer, admitting the marriage and relationship, but denied they went to Pennsylvania for the purpose of evading the laws of this state and returning here to live. She also admitted that they had lived together for 18 years, had a son 10 years old, and had recently mutually agreed to separate. She denied, however, the right of plaintiff to have the marriage annulled. The plaintiff replied generally. On consideration the court reached the above conclusion that a court of equity ought not to entertain a litigant who vaunted his own iniquity, and made that his sole ground of the decree asked from it. In England and many of the United States marriages between relations of the forbidden degrees are void. 19 Am. & En. En. Law, 1175. In this state, by statutory enactment, they are only voidable. Sections 1-4, c. 64, Code 1899; 19 Am. & En. En. Law (2d Ed.) 1210; Stewart v. Vandervort, 84 W. Va. 524, 12 S. E. 736, 12 L. R. A. 50. They remain valid, to some extent at least, until annulled by a decree of court. If the parties could continue the marriage relationship without violating the criminal laws of the state, then the court might be justified in refusing to entertain the plaintiff's bill. But when the law forbids the continuance of their marriage relation, notwithstanding its inception may have been a misdemeanor, it is the duty of both parties to make restitution by having the marriage annulled promptly. Their hands may be unclean, but it is the duty of a court of equity to permit them to clean them when it can do so, and not permit such uncleanness to continue as a stench in the nostrils of the people. 19 Am. & En. En. Law (2d Ed.) 1212; Com. v. Lane, 113 Mass. 458, 18 Am. Rep. 509; State v. Brown, 47 Ohio St. 102, 23 N. E. 747; 21 Am. St. Rep. 790; 16 Am. & En. En. Law (2d Ed.) 134. While the rule is that equity will not entertain persons with unclean hands, yet there are just exceptions thereto, and the statutes of this state on marriage and divorce have mercifully provided that those who unwittingly enter into a marriage that leads to the continual violation of law, notwithstanding their original sin, may have such relation annulled, so that they may go and sin no more. Such transgressors should get from before the public gaze as quickly as possible.

The decree is therefore reversed, and the cause is remanded to the circuit court, with directions to enter a decree annulling the marriage heretofore entered into between the parties, and also determining to whom the custody of the child should be given, and to further proceed therein according to the rules and principles governing courts of equity.

(54 W. Va. 1)

MERCHANTS' COAL CO. v. BILLMEYER et al.

(Supreme Court of Appeals of West Virginia. Nov. 7, 1903.)

SALE OF TIMBER RIGHTS—SUFFICIENCY OF CONTRACT—TRESPASS—INJUNCTION.

1. It is not necessary for the vendees of certain timber rights to sign and acknowledge the contract conveying the same to them, to render them legally bound. Acceptance and operation thereunder binds them to all its conditions and stipulations.

2. On a bill filed to stay irreparable trespass, a court of equity will not on evidence, in the absence of allegations or pleading putting the same in issue, enforce the forfeiture of a contract relied on by the defendants, when such forfeiture is founded on unsettled questions of law and facts, and such contract, together with the plaintiff's evidence, fully negatives the allegations of irreparable damage contained in the bill.

(Syllabus by the Court.)

Appeal from Circuit Court, Preston County; John Homer Holt, Judge.

Bill by the Merchants' Coal Company against Allen E. Billmeyer and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

P. J. Crogan, for appellant. J. A. Brown and R. H. Gordon, for appellees.

DENT, J. The Merchants' Coal Company, plaintiff, appeals from a decree of the circuit court of Preston county rendered on the 3d day of April, 1901, dissolving its injunction and dismissing its bill filed against Allen E. Billmeyer and others. The plaintiff's bill alleges that the defendants, Allen E. Billmeyer, Frank Billmeyer, John D. Billmeyer, and Andrew H. Billmeyer, were engaged in trespassing on a certain large tract of land belonging to plaintiff, and valuable solely for its timber, and were unlawfully cutting and removing such timber, and thereby irreparably damaging the plaintiff. A temporary injunction was awarded against the defendants. They appeared and filed their answer, admitting the principal allegations of the bill, but setting up their right to the timber by virtue of the following contract with the plaintiff, to wit:

"This agreement, made this 27th day of October, in the year one thousand eight hundred and ninety-nine, between the Merchants Coal Company, of Baltimore city, a body corporate, of the first part, and Allen E. Billmeyer, Frank Billmeyer, of Orleans Cross Roads, in the State of West Virginia, and Andrew H. Billmeyer and John D. Billmeyer of Little Orleans, in the State of Maryland, trading as the Billmeyer Lumber Company, of the second part; whereas, the party of the first part has upon the terms and conditions hereinafter set forth agreed to sell to the said parties of the second part, trading as aforesaid, all the sound and merchantable timber contained on a certain tract of land situate along the Baltimore and Ohio Rail-

road, at a point near Tunnelton, in West Virginia (known as the 'Hammond' tract), containing about twelve hundred acres, witnesseth:

"That in consideration of the sum of one dollar and the premises the said party of the first part does sell unto the said parties of the second part, trading as aforesaid, all of said timber, and the said parties of the second part do hereby purchase, at the price and upon the terms and conditions as follows:

"1st. All timber to be cut into saw logs from twelve to sixteen feet long and to square eight inches at the top end or larger, or at the option of the purchaser less than eight inches can be included. All the logs to be scaled by what is known as 'Doyle's Rule,' by a person or persons agreed upon by the respective parties hereto.

"2d. All timber and logs cut and scaled hereunder, in each and every month, shall be paid for on the twentieth day of each and every succeeding month at the rate of five dollars per thousand feet, 'B. M.' for all the white and red oak and poplar, and three dollars and fifty cents per thousand feet, 'B. M.,' for all other merchantable and salable timber, the party of the first part to have the right to cut and pull the bark from all the chestnut oak or rock oak in springs of 1900 and 1901.

"3d. The said parties of the second part are to have free right of way for access to any part of said land and through said land for the purpose of cutting, manufacturing and shipping said lumber, timber or bark.

"4th. It is understood and agreed that if at any time the measurement or scale should be unsatisfactory to either of the respective parties hereto, the said party of the first part shall have the right to appoint a disinterested party or parties to do the work of scaling, provided that said party or parties will work at the mill at anything the said party of the second part may direct. In which case said party or parties are to be paid equally for said scaling by the parties hereto, but the other work so done by said party or parties shall be paid for exclusively by the said parties of the second part.

"5th. It is understood and agreed that the said parties of the second part shall commence operations hereunder on or before November 1st, 1899, and the said parties of the second part do hereby agree and bind themselves to cut and move at least three hundred thousand feet per year, and that said parties of the second part do further bind themselves to cut and remove from said tract of land within four years from November 1st, 1899, all merchantable or salable timber thereon.

"6th. The said parties of the second part to have the right during the continuance of this contract to cut any timber unfit for merchantable lumber for cross-ties, for which they shall pay to the party of the first part

eight cents per tie upon the twentieth day of the month next succeeding that in which the ties are cut.

"7th. It is further understood and agreed that if the said parties of the second part should fail to carry out and comply faithfully with all the terms and conditions of this agreement and should fail for the period of five days to make the payments hereunder, as herein prescribed, then the said party of the first part shall have the right at its option to declare this agreement null and void, and shall be entitled in case it should elect to annul this agreement to receive immediately all money that has accrued for all timber cut hereunder.

"And the said party of the first part does hereby constitute and appoint D. Meredith Reese as its attorney, to acknowledge on its behalf this agreement.

"In testimony whereof, the said party of the first part has caused its president to subscribe his name and affix its seal hereto, and the parties of the second part hereunto have subscribed their names and affixed their seals.

"Thos. T. Boswell, [Seal.]

"President,

"Frank Billmeyer, [Seal.]

"John Billmeyer, [Seal.]

"Andrew H. Billmeyer, [Seal.]

"Allen E. Billmeyer, [Seal.]

"Trading as the Billmeyer Lumber Company.

"Test:

"Wilmer Emory."

"State of Maryland, Baltimore City, to-wit: On the third day of October, 1899, before me, the subscriber, a notary public of the State of Maryland, in and for Baltimore city aforesaid, personally appeared D. Meredith Reese, the attorney named and appointed in the foregoing agreement, to acknowledge said agreement to be the act of the said Merchants Coal Company.

"Witness my hand and notarial seal.

"Wilmer Emory, Notary Public. [L. S.]"

"State of Maryland, Allegheny County, to-wit: On the 27th day of October, in the year 1899, before me, the subscriber, a justice of the peace of the State of Maryland, in and for said county, personally appeared Allen E. Billmeyer, Frank Billmeyer, Andrew H. Billmeyer, and John D. Billmeyer, trading as the Billmeyer Lumber Company, and acknowledged the foregoing agreement to be their respective act.

"P. H. Fletcher, J. P."

To this the plaintiff replied generally, thus putting in issue the validity of the contract alone.

In its proof the plaintiff admits the making of the contract on its part, but insists it was not completed by reason of the failure or refusal of Allen E. Billmeyer, one of the defendants, to sign the same, and that therefore it was never legally binding. To sustain this contention, the plaintiff further introduced in evidence the following option, telegrams, and letters:

"Cumberland, Md., Queen City Hotel, Sept. 28th, 1899.

"I hereby agree to sell to the Billmeyer Lumber Company, of Orleans Cross Roads, W. Va., all the sound merchantable timber contained on a certain tract of land situate on the Baltimore and Ohio R. R., at a point near Tunnelton, W. Va., containing about twelve hundred acres, all the timber to be cut in saw logs, from 12 to 16 feet long, and to be squared eight inches at the top end and larger, or at the option of the purchaser, timber less than eight inches can be included. All logs to be scaled by what is known as 'Doyle's Rule,' by some person or persons who may be agreed upon by both buyer and seller, and to be paid for on the twentieth of each month for all logs cut and scaled during the previous month, at the rate of five dollars per thousand feet, 'B. M.,' for all the white and red oak and poplar, and three dollars and fifty cents per thousand feet, B. M., for all other merchantable or salable lumber, reserving the right to cut down and peel on all the chestnut or rock oak, which would be done in the springs of 1900 and 1901; also give free right of way and access to any part of said land and through said land for the purpose of manufacturing and shipping said lumber or timber. This option or offer to be accepted on or before eight o'clock p. m., on Thursday, September 28th, 1899, by telegram or letter. If at any time the scale or measurement would be unsatisfactory the seller would have the right to appoint some disinterested party to do the work of scaling, provided that same man would work on mill at any thing the buyer may direct, in which case said man is to be paid equally by both buyer and seller. Operations to commence on said timber on or before November 1st, 1899, and to remove at least 300,000 feet per year, and all timber to be removed within four years from November 1st, 1899. Said tract is known as the 'Hammond Tract.' If offer is accepted, contract to be written which would be legally binding between both parties. Any timber considered unfit for merchantable lumber, and that would be fit for cross-ties, the price to be eight cents per tie. This is only binding provided W. H. Watkins, Tunnelton, W. Va., can give a clear title for his interest.

"Merchants Coal Company,

"Thomas T. Boswell, President."

Telegram: "Received at Baltimore, Md., No. 2 Donnell Building, Sept. 28th, 1899. Dated Orleans Road W. Va., 28th. To Thomas T. Boswell, 33 S. Gay St., Balto: We accept all conditions as written in your offer dated twenty-sixth instant and mail check for fifty dollars on agreement. Please wire answer and approval. Billmeyer Lumber Company."

Letter: "Orleans Road, W. Va., Sept. 28th, 1899. Mr. Thomas T. Boswell, President Merchants Coal Company, Baltimore, Md.: Dear Sir—Confirming telegram this p. m., we accept all conditions as written your offer

dated twenty-sixth instant, and mail check for fifty dollars on agreement. Please wire answer and approval. Respectfully yours, Billmeyer Lumber Company, per A. E. B."

"Orleans Road, W. Va., 10-27-1899. Mr. Thomas Boswell, Baltimore, Md.: Dear Sir—We write you to-day in regard to the Tunnelton timber tract. Our Mr. Andrew and John and A. E. Billmeyer were up to see the timber, and just came home to-day. Also signed agreement which we mail to you. Mr. A. E. Billmeyer would not sign the agreement, as he says that he is not connected with the Billmeyer Lumber Company any more but you said when I was down at Baltimore it made no difference; it would be all right with us three. A. E. B., he has been deranged ever since he went to have the agreement written, and unfit to do any business. May be we will have to send him for treatment. We will make agreements to go ahead to manufacture the lumber. We are very sorry this thing has happened. They cut one tree and had it scaled by Mr. Watkins, and it scaled 109 feet. Hoping every thing is satisfactory to you. If you get any letters from A. E. Billmeyer pay no attention to them, as he is most liable to say anything. You know how he was when he was to Baltimore. We remain yours truly, Billmeyer Lumber Co., Frank Billmeyer."

"Oct. 30th, 1899. Mess. Billmeyer Lumber Co., Orleans Cross Roads, W. Va.: Gentlemen—Your favor of the 27th and agreement to hand. On account of the turn things have taken we will have to demand a bond from you for the value of the timber, say \$10,000. Unless this is arranged by the fifth of November (Nov. 5th) we shall have to call the deal off. Yours very truly, T. T. Boswell, (S.)"

"Oct. 26th, 1899. Billmeyer Lumber Co., Orleans Cross Roads, W. Va.—What do you intend to do about the timber? Answer. Merchants Coal Co."

"Orleans Road, W. Va., 11-4-1899. Mr. Thos. Boswell, President Merchants Coal Company, Baltimore, Md.—Your letter of 30th ult. at hand. In reply would say, we expect to cut the timber regardless of the bond which you require. Mr. Gordon, of Cumberland, says if Mr. A. E. Billmeyer is insane, as he is pronounced, would not sign the agreement, would not make any change to the Co. Hoping every thing will be satisfactory to you, we will do as we agreed; you may depend upon that. We are yours truly, Billmeyer Lumber Co., Frank Billmeyer."

"Received at Baltimore, Md. No. 2 Donnell Building, Oct. 9th, 1899. Dated Orleans Road, W. Va., 9. To Thomas T. Boswell, 33 S. Gay St.—A. E. Billmeyer has not come home. Know any thing about where he is? Answer. Frank Billmeyer."

"Oct. 4th, 1899. Billmeyer Lumber Co., Orleans Cross Roads, W. Va.: Gentlemen—We beg to hand you enclosed contract in duplicate and request that you kindly re-

tain the copy on which we have placed our seal and sign the other copy and acknowledge it before a justice of the peace at Cumberland, Md., and mail it to this office. Please be advised that each one of your company should sign and acknowledge this document. Your prompt attention will oblige. Yours very truly, Merchants Coal Co., G. W. —, Treas."

"Nov., 6-9. Billmeyer Lumber Co., Orleans Cross Roads, W. Va.—Do you intend to give bond? Otherwise we will turn the timber over to some one else. Answer quick. T. T. Boswell."

"November 7th-9. Billmeyer Lumber Co., Orleans Road, W. Va.—If you have not complied with agreement or executed contract we regard the deal as off, but if you have — bond we will consider the —. Answer quick. Merchants Coal Company."

"Old date, Nov. 2, 1899. Orleans Road, W. Va., New Century, 12, 1900. Mr. T. T. Boswell, President Merchants Coal Company, 33 S. Gay St., Baltimore, Md.: Sir—In answer to yours of recent date permit me to say that I would not sign the agreement and the other members signed it against my wishes. I am the general manager of the Billmeyer L. Co. and it was me that wrote the conditions of the deal and I will hold you to said conditions exactly as written therein. I will see that our part is fulfilled to the very letter, and will hold your company responsible for your part of it. I will not give any bond as that was not mentioned in the original bargain. We have commenced operations all right and will cut and ship 300,000 feet or more within the next year. Awaiting your reply, I am, Yours truly, Allen E. Billmeyer."

"Nov. 14th, 1899. Mess. Billmeyer Lumber Co., Orleans Cross Roads, W. Va.: Gentlemen—We hand you enclosed our check for forty-five dollars, being in settlement of deposit which you sent us, namely, \$50.00, less \$5.00 advanced to your Mr. A. E. Billmeyer while in this city. On account of your not carrying out your contract we have a right to hold this check but as we wish to treat you fair, we return the same. Yours very truly, Merchants Coal Company. G. W. Atkinson, Tres."

"Orleans Road, W. Va., 11-20-1899. Mr. Thomas Boswell, Baltimore, Md.: Dear Sir—We return the check you sent us. Our firm stands to the contract and expects to carry it out to the letter, and that Robert H. Gordon is the committee in lunacy of Allen H. Billmeyer. He will look after his interests now. Yours truly, Billmeyer Lumber Co., F. B."

"Orleans Cross Roads, W. Va., 2-28-1900. Mr. Thomas T. Boswell, Pres. Merchants Coal Co., 33 S. Gay St., Baltimore, Md.: Dear Sir—We are ready to comply with all conditions of our contract with you, and will proceed to commence operations as soon as the proper arrangements can be made. Our Mr. A. E. Billmeyer will now sign the agree-

ments, being restored to his usual good health. Please return the agreement you hold for his signature at the earliest date possible, and oblige, Yours truly, Billmeyer Lumber Co., A. E. B."

The defendant introduced no evidence.

On the bill, answer, and general replication, the case is plainly for the defendants, as the contract proves itself, the making thereof not being denied by affidavit.

The only question, therefore, is, does the proof sustain the plaintiff's bill? Without any pleading to this effect the plaintiff claims that its contract has been avoided, first, because not signed by one of the defendants, who refused to sign the same, no doubt, because it departed materially from the original accepted proposition of sale, in that it reserved to the plaintiff an almost unlimited right of forfeiture. It was wholly unnecessary for the defendants to sign or acknowledge such contract, unless for the purpose of compelling them to submit to its departure from the original proposition. Nor was it necessary for any of them to sign and acknowledge it for this purpose, but the mere acceptance thereof and acting thereunder would bind them to its provisions. *West Virginia, C. & P. R. R. Co. v. McIntire*, 44 W. Va. 210, 28 S. E. 696. Signature and acknowledgment on the part of the defendants were extralegal requirements, not rendering the contract any more binding than acceptance otherwise. Nor had the plaintiff any right to demand of the defendants a bond, for they are not shown to have been insolvent, and such requirement is not included in the original proposition. All the defendants, including Allen E., accepted the contract in so far as it corresponded with the original proposition, and even he afterwards waived his objections and agreed to it. This they had a right to do, and this substituted the final contract, with its departures therefrom, for the original accepted proposition. The provision in the original proposition, to wit, "If offer accepted contract to be written which would be legally binding between both parties," did not authorize the use therein of the forfeiture clause, nor the requirement of a bond without the consent of the defendants. The conclusion, therefore, must be that the contract relied on by the defendants was a binding contract between the plaintiff and defendants from the beginning, in so far as it adhered to the original proposition.

Second, because of the forfeiture of the contract by reason of the failure of the defendants to begin operation thereunder in time. Under this head plaintiff insists that because the defendants failed to commence operations on or before the 1st of November, 1899, as stipulated, it had the right to and did annul the contract and make a new contract, similar in effect, with Henry J. Wilmoth. As Wilmoth is not a party thereto, his rights are in no manner involved in this suit, nor can they be considered in the determina-

tion hereof. The plaintiff, to sustain its contention under this head, introduces in evidence the following correspondence between it and the defendants, to wit:

"March 1st, 1900. Mess. Billmeyer Lumber Co., Orleans Cross Roads, W. Va.: Gentlemen—Your favor of the 28th to hand and noted. We beg to state that this property has been disposed of to Mr. Wilmoth, of Meyersdale, Pennsylvania, who has made payments and will commence operations about April 1st. This was done as you did not comply with our agreement. Yours very truly, Merchants Coal Company, Boswell."

"Orleans Cross Roads, W. Va., July 21st, 1900. Mr. Thos. T. Boswell, Pres. Merchants Coal Co., Baltimore, Md.: Dear Sir—Mr. A. H. Billmeyer and Frank Billmeyer are now at Tunnelton, W. Va., at work on the Hammond timber tract. They have commenced cutting logs and will be ready for a scaler on Monday, July 30th, at which time we will commence sawing lumber. Please advise us as to who you may want to do the scaling, or if we shall pick a man to be on hand at the time named. We expect to cut from 300 to 400 thousand feet of the chestnut timber at once, and have leased the W. H. Watkins mill to do the sawing. Please advise us promptly as to the scaler, as we do not want to be delayed on that account. Yours truly, Billmeyer Lumber Co."

"July 23d, 1900. Mess. Billmeyer Lumber Co., Orleans Cross Roads, W. Va.: Dear Sirs—Your favor of 21st to hand and noted. You did not carry out your agreement, consequently we have sold the timber to H. J. Wilmoth, Meyersdale, Pa., and do not know you in this matter. I have instructed our superintendent at Tunnelton when your parties commence cutting to have them arrested for trespassing. If they insist on cutting we have them prosecuted to the fullest extent of the law. Yours very truly, Merchants Coal Company, Boswell."

It is not clear from the plaintiff's evidence but that the delay to commence operations was caused, to some extent at least, by the plaintiff's failure to adhere strictly to its original proposition, and in unnecessarily requiring the defendants to sign and acknowledge a contract legally binding on them without such signatures and acknowledgments, and also in demanding a bond of them before they should begin operations or the contract be binding. All these extralegal requirements necessarily tend to produce confusion, uncertainty, and delay. The provision in the original proposition is in these words: "Operations to commence on said timber on or before November 1st, 1899, and to remove at least 300,000 feet per year and all timber to be removed within four years from November 1st, 1899." Under this provision the failure to begin in time would not be sufficient to cause a forfeiture of the contract, although the defendants might be liable for all damages occasioned

thereby. A removal of 300,000 feet within the remainder of the year would no doubt be deemed a full satisfaction thereof and compliance therewith. Substantially, although more at length, the same provision is contained in the final contract, but the plaintiff had inserted a forfeiture clause, to wit: "It is further understood and agreed that if the said parties of the second part should fail to carry out and comply faithfully with all the terms and conditions of this agreement * * * then the said party of the first part shall have the right at its option to declare this agreement null and void." It is under this provision that the plaintiff claims to have the right to declare the contract null and void because the defendants failed to commence operations on or before the 1st day of November, 1899, although the plaintiff was at the time hindering operations under the contract by reason of its extralegal requirements. If the plaintiff had filed a bill to have the contract canceled by reason of its forfeiture as a cloud on its title, the matter might have been properly presented and considered by a court of equity. But on evidence alone, without allegations or pleadings, or an opportunity for defendants to explain their delay, in a matter purely pecuniary and subject to satisfaction in damages, it is asking too much of a court of equity to treat the solemn contract of the parties as a nullity, in short, to enforce the forfeiture thereof against the defendants. If the contract was clearly void, and irreparable damage might be done, equity might possibly interfere. But where it is a matter of the lapse of time, not plainly of the essence of the contract, and the question of irreparable damages or insolvency is not involved, and any damages the plaintiff may have sustained are susceptible of pecuniary adjustment, equity will not interfere in doubtful cases, but will leave the parties to their legal remedies.

On the question of the forfeiture of their contract by reason of unreasonable delay in beginning operations thereunder, without fault of the plaintiff, the defendants have the right to be impleaded and heard either at law or in equity, and such question cannot be justly determined from the evidence on the one side alone, in the absence of proper allegations or pleadings. The bill seeks to enjoin an irreparable trespass. This ground is abandoned. But by the proof the plaintiff attempts to establish a forfeiture of its contract under which the defendants justify, thus raising doubtful questions both of law and fact, and changing the nature of the case to be decided. Plaintiff might have presented this whole matter in its bill, but it did not do so, and it must endure the consequences of such failure. It is well settled that where the plaintiff's rights depend on disputed questions of fact, or on disputed questions of law which have not been adjusted by a court of law, an injunction will

be refused, although a court of equity may be satisfied as to what is the correct conclusion of the law on the facts. 16 Am. & Eng. Enc. Law (2d Ed.) 358, 359, 360; 10 Enc. Pleading & Practice, 1095.

For these reasons, the decree is affirmed.

(54 W. Va. 283)

SPERRY v. SWIGER et al.

(Supreme Court of Appeals of West Virginia.
Nov. 28, 1903.)

DOWER—ACTION TO RECOVER—LIMITATIONS—WIDOW IN POSSESSION.

1. The statutory bar to a widow's remedies for recovery of dower is 10 years from the death of her husband, when her right to sue accrues. But where the widow is in possession, and taking rents and profits in common with the heirs, the statute does not run against her dower right while so in possession.

2. Where a will devises land to the widow of the testator to hold under her control and management until testator's youngest child attains majority, with direction to apply its rents and profits to the support of minor children until of age, and the widow is in possession under such will, the statute of limitations does not run against her dower right while so in possession.

3. To bar a widow's dower right for failure to renounce her husband's will, the will must make a provision for her use and benefit, and must be intended by the testator to be in lieu of dower.

(Syllabus by the Court.)

Appeal from Circuit Court, Harrison County; John W. Mason, Judge.

Bill by M. G. Sperry against Mary O. Swiger and others. Decree for defendant Cunningham, and plaintiff and defendant Swiger appeal. Affirmed.

M. G. Sperry and E. G. Smith, for appellant. T. N. Parks, for appellees.

BRANNON, J. Franklin Cunningham died owning a tract of land, leaving a will containing this provision: "I give, devise and bequeath to my wife, Susan L. Cunningham, all my estate both real and personal or mixed of which I shall die seised and possessed or to which I shall be entitled at my decease, * * * to have and to hold the same to her control and management until my youngest child shall arrive at twenty-one years of age, it is further provided in this my will that the property herein devised and bequeathed my wife, Susan L. Cunningham, shall by the rents and profits of said property be applied as a support and home for my minor children until they arrive at twenty-one years of age." M. G. Sperry brought a suit in equity in Harrison county against Susan L. Cunningham, widow of said decedent, and his heirs, to partition the land; denying in his bill that said widow had any dower right; claiming that, as she had not renounced the will, she was for that reason barred of dower, and that she was also barred of dower for the further reason that more than 10 years had passed since the death of

her husband, and that she was barred by limitation. She had been in possession 11 years after the death of her husband before the suit. The youngest child had attained majority. The court decreed dower to her, and Sperry and Mary C. Swiger, one of the heirs, appeal.

Is Mrs. Cunningham entitled to dower? This depends upon several questions. Does the general statute of limitations, "No person shall make an entry on, or bring an action to recover, any land, but within ten years next after the time at which the right to make such entry or to bring such action shall have first accrued to himself or to some person through whom he claims" (Code 1899, c. 104, § 1), apply to dower right? If we follow the cases of *Morris v. Roseberry*, 46 W. Va. 24, 32 S. E. 1019, and *Smith v. Wehrle*, 41 W. Va. 270, 23 S. E. 712, holding that "the statutory bar to a widow's remedies for the recovery of her dower is the lapse of ten years from the death of her husband, when her right to sue accrues," we must say that a dower right is barred by that statute. But it is said that *Smith v. Wehrle* is too broad in its syllabus; that those cases cannot apply to a contest between a widow and heirs, but only to one claiming by conveyance from the heirs, or sale under a deed of trust given by the husband, or sale under decree where there is adverse possession by color of title. In *Smith v. Wehrle* the case was between the widow and a purchaser at a sale under a deed of trust given by the husband, and it seems plain that the statute would in such case bar dower. In *Morris v. Roseberry*, however, the case was between the widow and one of the heirs who obtained a tax deed. It was held that the dower was barred. We may say this was a hostile claim under a tax deed, but, as this tax deed inured to the benefit of the heirs, we may regard the case as holding that as between the widow and heirs the statute applies. It followed the syllabus in *Smith v. Wehrle*. The argumentation in the latter case goes to apply the statute as well in a contest between the widow and heirs as to one between her and alienees of the heirs. Is the syllabus in those cases too broad? Are they wrong? I assented to them because I thought them sound law. I still think so. The possession of the heirs is not the possession of the widow, like coparceners or tenants in common, nor is there privity between them: "Nor does she, as tenant in dower, hold her estate of the heir or tenant who set it out to her, but of her deceased husband, or, rather, by appointment of law. The law, moreover, does not consider that there is any privity of estate between the dowress and the reversitioner of her lands." 1 Washb. R. Prop. § 486. We will find cases holding that the statute does not bar dower, but it will seem that in most of those such decisions are upon statutes taken from the English Act 21 Jac. 1, which bars only where there is a right of entry, and as a widow, until assignment of

dower, has no estate or right of entry, the statute was held not to apply to her. So some are on statutes taken from 32 Henry VIII, requiring seisin in the person to be barred, and a widow had no seisin. 2 Scrib. on Dower, §§ 12, 17; *Barnard v. Edwards*, 17 Am. Dec. 403; *Moore v. Frost*, 3 N. H. 126; *Parker v. Obear*, 7 Metc. 24. But no seisin or right of entry in case of dower is required by our statute above quoted. Though a widow has no seisin, right of entry, or vested estate before assignment of dower, yet our Code 1899, c. 65, § 10, says that a widow entitled to dower "may recover said dower and damage for its being withheld by such remedy at law as would lie on behalf of a tenant for life having a right of entry or by bill in equity." This gives her right to sue at once upon the husband's death. There may be a few states not having statutes imported from England, but general statutes that hold them not applicable to dower, but the bulk of decisions hold that general statutes of limitations limiting suits generally for recovery of possession of land apply to dower. In *Conover v. Wright*, 47 Am. Dec. 213, the New Jersey court said of an act "that every real, possessory, ancestral or mixed or other action for land * * * shall be brought within 20 years after the right or title thereto shall accrue," that "it, in very terms, applies to all actions for the recovery of land, and it is difficult to see how it can fail to apply to an action for dower. It bars not the right of entry, merely, but any action brought for recovery of land. Land is sought to be recovered in this action, and the widow's title becomes absolute on the death of the husband." In *Procter v. Bigelow*, 38 Mich. 232, the statute was: "No person shall commence an action for the recovery of lands, nor make entry thereon, unless within 20 years after the right to make such entry or bring such action first accrued." The court said: "If Mrs. Bigelow could have brought an action of ejectment in 1851 [it is not pretended that she could not have done so], she comes within the plain terms of the statute. We are not called upon to discuss the propriety of the old decisions, which certainly strained the law very much to favor dower. The forms of remedy under which that overnice casuistry was adopted have been changed into a single and universal remedy, which will not permit any different treatment of suitors. All must be governed by the same regulations." I cite the following further cases to show that the general statutes of limitation for actions for land apply to dower: *Beebe v. Lyle*, 73 Mich. 114, 40 N. W. 944; *Robinson v. Ware*, 94 Mo. 673, 8 S. W. 153; *Beard v. Hale*, 95 Mo. 18, 8 S. W. 156; *Branch v. Cole*, 18 Fla. 363; *Care v. Keller*, 77 Pa. 490; *Durham v. Angier*, 20 Me. 242; *Berrien v. Conover*, 16 N. J. Law, 107; *Larrowe v. Bean*, 10 Ohio, 498; *Phares v. Walters*, 6 Iowa, 106; *Lide v. Reynolds*, 1 Brev. 78; 10 Am. & Eng. Ency. L. 205; *Westbrook v.*

Hawkins, 59 Miss. 498; *Owen v. Peacock*, 38 Ill. 33. In *Jones v. Powell*, 6 Johns. Ch. 194, Chancellor Kent said that, even under a statute like the English act, "no action for the recovery of any land," etc., "shall be maintained," etc., "unless on seisin or possession," etc., "either of the plaintiff or of his ancestor," "the general and sweeping language of this act, no less than the sound policy of it, would dictate the application of it to dower as well as to any real action." He held that limitation would bar the common-law writ of dower unde nihil habet. Many cases in South Carolina so hold. *Ramsay v. Dozier*, 1 Tread. Const. 76, and other cases cited in 2 Scrib. Dower, 576. In 2 Scrib. 578, after stating that there is some conflict, the author says: "The general doctrine in regard to limitation of actions is that the cause of action or suit arises as soon as the party has a right to apply to the proper tribunal for relief. In many states the widow has right by law to proceed for the recovery and assignment of her dower immediately upon the death of her husband. [Such is the West Virginia act.] It is immaterial to her whether the heir or a stranger asserting an adverse title, is in possession. Her right of action is as perfect and complete against the one as the other. In this respect there is an essential difference between the case of a dowress and a party having title to land. Until the possession of the latter is disturbed or invaded, no cause of action arises in his favor, and consequently until that time the statute cannot commence to run against him. But as the widow can assert her claim and bring her action at once, it would seem, upon the principle above laid down, that it should be considered as coming within the operation of the statute." It is not a question of adverse possession—not a question whether the heirs deny or admit the dower right. She can sue regardless of this. If they do not assign dower, which the law says they must do without demand, they unlawfully withhold dower, in the eye of the law. Our Code 1899, c. 65, § 8, says: "Until her dower is assigned the widow shall be entitled to demand of the heirs or devisees one third part of the issues and profits of the other real estate which was devised or descended to them, of which she is dowable, and in the meantime may hold, occupy and enjoy the mansion house and curtilage without charge." Being in possession of the mansion and curtilage, of course, the statute does not run against her as to them. *Westbrook v. Hawkins*, 59 Miss. 499. This implies that the possession is adverse as to other land. But this statute excludes her from possession of the balance of the land until dower is assigned. It is in the possession of the heirs. Of course, she is not co-tenant with them, like a coparcener. All she has is a money demand for a part of the issues of the other land. Where one gets all the profits

or issues of land, he is, in equity, owner; but the dowress is not, under this statute, co-tenant, so as to enable her to say that the heirs must bring home notice of hostile claim, for, to be co-tenant, one must have right to joint possession with another. The cases of *Smith v. Wehrle* and *Morrison v. Roseberry* seem to be well grounded, in their most general sense, on authority. They have stood some years, are a rule of property, and, even if there were some doubt of their correctness, should not be disturbed. I have no doubt as to them. Why should a claim of dower not fall under the statute? Shall mere sympathy exclude it? You bar other claims to land. You bar a married woman as to her separate estate. The heirs do not hold in trust for her. Their rights are hostile, antagonistic. If the widow is in actual possession along with the heirs, taking rents and profits, or sharing them with the heirs, her right is not barred. *Hastings v. Mace*, 157 Mass. 502, 32 N. E. 668, cited in 10 Am. & Eng. Ency. L. 205.

Another question. Mrs. Cunningham was in possession of the whole tract. Does this prevent the bar of the statute? As just stated, if a widow is in possession along with heirs, sharing in the issues and profits of the land, the statute does not run against her dower while so in possession. It is said that this possession by Mrs. Cunningham does not save her from the statute, as she was in possession, not in right of her dower, but as trustee for her children, bound to give them all the issues of the land, and that her possession as trustee was their possession, and that she recognized a trust for them in antagonism to her right; but I think the true theory is this: She was in the mansion by right, and the statute could not bar her as to that. She need not sue for it, as she already had it; and, as to the residue of the land, she could subtract from its rents and profits one-third, notwithstanding the trust, and a court of equity would not charge her as trustee with that third. Thus, while the law is that when there is a right of action the statute runs, yet here she need bring no suit, as she already had what a suit would give—actual possession and rents and profits.

Do the provisions of the will bar Mrs. Cunningham of dower, under section 11, c. 78, Code 1899, she not having renounced the will? By the letter of that statute, to bar dower by reason of acceptance of the provision made in a will for a widow, there must be in the will a provision made for her benefit. Moreover, that provision must appear to have been intended by the testator to be in lieu of dower. *Shuman v. Shuman*, 9 W. Va. 50; *Cunningham v. Cunningham*, 30 W. Va. 599, 604, 5 S. E. 139. This will gives nothing to the widow. It takes all away from her. Surely we cannot say that her husband intended to deprive her of dower.

Therefore we affirm the decree.

(54 W. Va. 137)

RONK v. HIGGINBOTHAM et al.(Supreme Court of Appeals of West Virginia.
Nov. 21, 1903.)**EJECTMENT—EVIDENCE—DEED BY COMMISSIONER.**

1. In an action of ejectment, unless both plaintiff and defendant claim title from a common source, the plaintiff must connect himself by an unbroken chain of title with the state or commonwealth.

2. Point 3 in *Wilson v. Braden et al.*, 36 S. E. 367, 48 W. Va. 196, approved and applied.

3. Points 5 and 6 in *Coal Co. v. Howell*, 15 S. E. 214, 38 W. Va. 490, approved and applied. (Syllabus by the Court.)

Error to Circuit Court, Lincoln County; *El. S. Doolittle*, Judge.

Action by *H. D. Ronk* against *A. E. Higginbotham* and *Newton Carrier*. Judgment for plaintiff, and defendants bring error. Reversed.

D. E. Wilkinson and *W. S. Laidley*, for plaintiffs in error. *A. F. Morris*, for defendant in error.

MILLER, J. On the 28th day of November, 1899, *H. D. Ronk*, the defendant in error, filed his declaration in ejectment, in the circuit court of Lincoln county, against *A. E. Higginbotham* and *Newton Carrier*, defendants below and plaintiffs in error, alleging that plaintiff, on the 15th day of January, 1899, "was possessed of an estate in fee absolute of a certain tract or parcel of land, lying and being in the said county of Lincoln, containing 294 acres, more or less," and bounded as follows: "Situate on Island creek, a tributary of Coal river, beginning at a stake in a line of the John Kidd survey of 63 acres on Board Tree Branch," etc.; to which declaration the defendants entered their plea of not guilty, and issue was thereon joined; and, at the November Term, 1901, a jury being waived by the parties, the court heard the evidence in lieu of a jury, found for the plaintiff, and gave judgment in his favor, against the defendants, for the tract of land as described, with one cent damages for the detention thereof, and his costs in said action expended. Plaintiffs in error excepted to said finding and judgment of the court, and moved the court to set the same aside and to render judgment in their favor in said action, but the court overruled the motion. Whereupon plaintiffs in error tendered their bill of exceptions to the ruling and judgment of the court aforesaid, which bill was signed and sealed by the court, and made part of the record. On the trial of the action, the plaintiff, to maintain the issue on his part, introduced certain evidence, all of which was objected to by defendants; and the defendants, to maintain the issue on their part, also introduced certain other evidence. The whole of said evidence, adduced and considered by the court, is certified in bills of exception, and made parts of the record.

Plaintiff put in evidence a patent from the commonwealth of Virginia to *Webb Tomlinson*, bearing date on the 25th day of September, 1795, reciting "that by virtue of a land office treasury warrant number nine hundred and ten, issued the first day of December, 1794, there is granted by the said commonwealth unto *Webb Tomlinson* a certain tract or parcel of land containing ten thousand acres by survey bearing date the second day of January, 1795, lying and being in the county of Kanawha, on the waters of Davis creek, and bounded as follows, to wit: Beginning at two white oaks, corner to said *Tomlinson's* survey of 10,000 acres, number eight, and running south eighty degrees west 2,000 poles to a white oak, S. 10 E. 800 poles to a black oak, N. 80 E. 2,000 poles to two white oaks, N. 10 west 800 poles to the beginning"; and also introduced a decree of the circuit superior court of law and chancery of Kanawha county, state of Virginia, made on the 24th day of October, 1840, reciting that "*James M. Laidley* and *Thomas L. A. Mathews*, commissioners of delinquent and forfeited lands in and for Kanawha county, this day made report, in pursuance of the several acts of assembly relating to delinquent and forfeited lands, to the circuit superior court of law and chancery for said county, of a tract of 10,000 acres of land lying and being in this county on the waters of Davis creek and Coal river, the lines, boundaries, and abutments of which said tract or parcel of land are fully set out and described in the report of the commissioners, and more particularly shown and illustrated by a plat, accompanying and making a part of said report, made from a recent survey by the commissioners, and which tract or parcel of 10,000 acres of land was granted by the commonwealth of Virginia unto said *Webb Tomlinson* by patent bearing date the 25th day of September, 1795," etc. The decree also directs a sale of said land by said commissioners on terms prescribed therein.

Plaintiff then introduced in evidence another decree of said court, made on the 17th day of May, 1841, in words and purport as follows: "*James M. Laidley* and *Thomas S. A. Mathews*, commissioners of delinquent and forfeited lands in and for the county of Kanawha, this day made report that in pursuance of a decretal order made in relation to the parcel of 10,000 acres of land forfeited in the name of *Webb Tomlinson*, and pronounced at the October term, 1840, they proceeded to make sale of the same, having divided it into two separate lots. * * * That said parcel of land, containing, by recent survey, 10,000 acres, sold in lots or divisions as aforesaid, produced the aggregate sum of \$151.25; * * * and the said report not being excepted to, on examination and consideration thereof, is approved and confirmed. * * * It is further adjudged, ordered, and decreed, on the payment of the purchasers of the deferred installments, that

the commissioners, by apt and proper deed or deeds, convey to him said land purchased by him as aforesaid, in pursuance of the acts of assembly in relation thereto," etc. Next follows a deed made by James M. Laidley and Thomas S. A. Mathews, commissioners of delinquent and forfeited lands, to Joel Shrewsberry, Jr., bearing date on the 5th day of May, 1841, reciting a decree made by said court "at the fall term of said court in 1840," and that they "did offer at public sale at the door of the courthouse aforesaid, on the — day of December, 1840, among others, the tract or parcel of land hereinafter described; and at the public sale the said Joel Shrewsberry, Jr., the party of the second part, being the highest bidder, became the purchaser of lot or tract No. 2, containing four thousand two hundred acres, more or less, being part of a tract or parcel of land of ten thousand acres lying and being in the county of Kanawha, on the waters of Davis creek, granted by the commonwealth letters patent bearing date the 25th of September, 1795, to Webb Tomlinson, and forfeited and sold in same name, as more fully and at large appears by the reports, decretal orders, and other proceedings in relation thereto and now remaining in the said circuit superior court, reference thereunto being had; and which said lot or tract No. 2, part of the said tract of ten thousand acres, is situated on the west side of Coal river, in the county aforesaid, and more fully set out and described as lot No. 2 in the plat and report of the commissioners filed with and made part of the proceeding aforesaid; which said lot No. 2 is bounded as follows: Beginning at a post, corner to No. 1 on the bank of Coal river," etc. Said deed appears to have been acknowledged by said commissioners on the 7th day of May, 1841, and admitted to record the same day. By their deed, bearing date on the 5th day of May, 1841, and acknowledged on the 11th day of May, 1841, said Shrewsberry and his wife conveyed said land, by the description last aforesaid, to Joseph H. Harvey, with covenants of special warranty, for the consideration of \$1. Said Joseph H. Harvey and his wife, by their deed bearing date on the 21st day of November, 1870, conveyed said land to William S. Wilson by the same description, and, as stated in the deed, "being the same tract conveyed by Joel Shrewsberry and wife to Joseph H. Harvey, by deed bearing date on the 5th day of May, 1841." William S. Wilson and his wife, by their deed bearing date on the 5th day of September, 1873, for the consideration of \$1, conveyed said land to Robert T. Harvey and Thomas H. Harvey, by the description aforesaid, but excepting certain portions thereof which had theretofore been sold. Next, in the order as mentioned, come the following deeds, showing that Robert T. Harvey and wife, and Thomas H. Harvey, by deed bearing date on the 6th day of January, 1874, for the consideration of \$1, conveyed to Alfred

Sperry, Ethello W. Hale, and Willard P. Sperry the following described tract of land, lying and being in the county of Lincoln, and bounded as follows: "Beginning at a Sycamore on Coal River, containing about 1,100 acres," etc.; that Ira P. Sperry, S. J. Ritchie, and Willis Sperry, and their wives, by deed bearing date on the 11th day of August, 1888, conveyed to George F. Miller and B. F. Enslow the said tract of 1,100 acres, by the description last aforesaid; and that George F. Miller and B. F. Enslow, and their wives, by deed bearing date on the 9th day of July, 1895, conveyed to the plaintiff, H. D. Ronk, "all their right, title and interest in and to the land, owned by them on the waters of Coal river and Island creek in Lincoln county, West Virginia, consisting of four tracts." All are described by metes and bounds. The first contains 294 acres, and is the land in controversy.

A. C. Hilbert, a surveyor who had surveyed the land in controversy, testified that he had surveyed it at the instance of said H. D. Ronk by the deed to him from Miller and Enslow. He had made a plat of his survey of the land, which covered the said 294 acres. The plat was introduced with the evidence. Thos. J. Mathews, who testified that he had been a surveyor about 48 years, was examined as follows: "Have you surveyed that portion of Webb Tomlinson's survey introduced here in evidence, lying on the west side of Coal river? Ans. Yes, sir. Q. Please state whether the land conveyed in the deed from James M. Laidley and Thomas L. A. Mathews to Joel Shrewsberry, introduced in evidence here, covers the same land as the patent to Webb Tomlinson's land that lies on the west side of Coal river? Ans. I don't know as I ever saw the patent. I have run out the land by the deed. Q. I hand you the patent to Webb Tomlinson for 10,000 acres. Please state whether the land mentioned in that patent covers the land mentioned in the deed to Joel Shrewsberry? Ans. It has the same corners and distances." Witness further stated that he was acquainted with the 4,200-acre tract, a part of the Webb Tomlinson survey that lies on the west side of Coal river; that he had surveyed it; run out of it the prior claims, and divided it into lots for the Harveys, or Enslow and Miller; that he was familiar with a lot of that land purchased by Ronk, the plaintiff; and that the land claimed by plaintiff, and described in his declaration, is part of said 4,200 acres.

H. D. Ronk, the plaintiff, testified that the land in controversy lies in Lincoln county, on the waters of Island creek, on the west side of Coal river, and that defendants were in possession of it at the commencement of this action. Thereupon the plaintiff rested his case.

The defendants then introduced a patent from the commonwealth of Virginia to Daniel Shaver, bearing date on the 27th day of September, 1796, which recites that by virtue

of a land office treasury warrant No. 8,819, issued on the 2d day of April, 1872, there is granted by the said commonwealth unto Daniel Shaver a certain tract of land, containing 256 acres by survey bearing date the 7th day of May, 1791, lying and being in the county of Kanawha, on Island creek, a branch of Coal river. This was followed by various deeds down to defendants (under which they claim the land in controversy), with other evidence tending to prove adversary possession of the land, and payment of the taxes thereon for the required number of years under the statute.

Plaintiffs in error contend that the judgment and rulings of the court below are erroneous, because the plaintiff failed to identify and establish his title to the real estate described in his declaration, and also failed to trace his title either to a common source or to the commonwealth, and because the court refused to set aside its said judgment and render judgment in favor of the defendants. In an action of ejectment the general rule is that a plaintiff must recover upon the strength of his own title, and not upon the weakness of defendants' title, and that before the plaintiff can recover he must identify the land claimed, so far as the exterior boundaries are concerned. *Coal Co. v. Howell*, 88 W. Va. 490, 15 S. E. 214; *Witten v. St. Clair*, 27 W. Va. 763. Plaintiff introduced no survey of the 10,000 acres of which said 294 acres is claimed to be a part. We are not informed by any evidence where the exterior boundaries of the 10,000 acres are. It is not shown that the land in controversy was ever included in the county of Kanawha. The deed of said commissioners, purporting to convey said 4,200 acres to Shrewsberry, is not accompanied by any of the reports, decretal orders, or other proceedings, or with the plat and report stated to have been filed with, and made part of, said proceeding, which are referred to in said deed, except the decretal order of October 24, 1840, hereinbefore mentioned. It will be observed that the decree of the 17th day of May, 1841, confirming the sale of 10,000 acres sold by said commissioners, was made and entered 12 days after said deed was made to Shrewsberry. This deed having been acknowledged by said commissioners on the 7th day of May, 1841, and admitted to record the same day, as the certificate of the clerk of the county court of said county, appended thereto, shows, could not have been and was not authorized by said decretal order of May 17, 1841, which order does not mention Shrewsberry or any other person by name as purchaser of said 4,200 acres. There is no other decree in the record conferring authority to execute said deed. In the case of *Walton v. Hale*, 9 Grat. 197, 198, the court says: "But in this case it seems to me the caveator has utterly failed in connecting himself with the Ruston and Blanchard title. The commissioner to make sales under the delinquent land laws, under

which these proceedings were had, has no interest in the subject of sale. He acts like a commissioner to make sales under a decree of the chancery court, and is clothed with a mere naked authority. Having no interest in the land conveyed, the deed of the commissioner could avail nothing where his authority to make it did not appear, unless there had been such a long acquiescence and possession under the deed as to justify a presumption in favor of the deed, as was the case in *Robnett v. Preston's Heirs*, 4 Grat. 141. In this case no such presumption can be raised. The caveator has rested his right upon the deed and the proceedings which led to it. In such a case, and as against a stranger setting up an adverse claim to the title asserted, the recitals in the deed are no evidence. *Carver v. Jackson*, 4 Pet. 1, 83 [7 L. Ed. 761]; *Wiley v. Givens*, 6 Grat. 277. In the case of *Masters v. Varner's Ex'rs*, 5 Grat. 168 [50 Am. Dec. 114], a decree of the chancery court and the marshal's deed were offered in evidence. The decree did not describe the specific land directed to be conveyed, but it was described with sufficient certainty in the deed. The court held that the recitals in the marshal's deed were no evidence, as against a third person asserting an adverse claim, of the authority of the marshal to convey the specific tract, and that, as the decree left it uncertain, it was necessary to produce the whole record, or so much thereof as would show that the land conveyed was the land embraced in the suit, before the deed could be used as evidence. In the case under consideration, the report of sales set out that Raper, Graham, and Allison were the purchasers. By the eighth section of the act of March 30, 1837, it was the duty of the court to direct the commissioner to convey to the purchasers upon the payment of the purchase money; and the ninth section of the act of 15th March, 1838, declares that the purchaser shall, on application to the commissioner, be entitled to his deed upon the payment of the purchase money. By each act the authority of the commissioner is limited to a conveyance to the purchasers. The deed in this case is to a stranger, if regard be had to the record of the proceedings which are relied on as authorizing the commissioner to convey. The name of Walton nowhere appears as purchaser, or as having any interest in the subject." In *Wilson v. Braden*, 48 W. Va. 196, 200, 36 S. E. 368, this court said: "In this record is a deed made by Camp, as commissioner under a decree of a Virginia court, conveying land to Donaldson as trustee. If Donaldson had any title, he got it by this deed; but not a letter of authority in Camp to make this deed is shown. The decree giving Camp power to convey does not appear; not an item of the Virginia record was produced. This was essential to give any effect whatever to that deed. You must give in evidence, as a general rule, in such case, the whole record; but surely enough

to show that the party holding the title to the land and the land were before the court; that that land was decreed to be sold, and was sold, and the sale confirmed and authority given by decree to the commissioner to convey. That commissioner does not own the land. He has a mere naked authority, uncoupled with any personal interest. His authority to make the very deed for the very land he conveys must appear by the record. This has been so often held. *Waggoner v. Wolf*, 28 W. Va. 820. The recital in that deed of Camp's authority under decree is no evidence against third parties claiming adversely to it, and denying his authority to convey. *Walton v. Hale*, 9 Grat. 198. Yet this deed went in evidence for Braden to show title, to connect Braden with the old patent, and was used by the jury as such in connection with said instruction. That deed did not show title. It did not connect Braden with the patent of 1784." See, also, *Watson v. Smith*, 13 Johns. 426. For the same reasons, we say that the deed of Laidley and Mathews, as commissioners, to Shrewsberry, does not connect the plaintiff with the patent issued to Tomlinson by the commonwealth of Virginia for the 10,000 acres.

It will be further observed that Alfred Sperry, Ethello W. Hale, and Willard P. Sperry, the grantees of Robert T. Harvey and Thomas H. Harvey of the 1,100 acres, have not, so far as the record discloses, conveyed said land to any person. The description of the 1,100 acres of land contained in the said deed from S. J. Ritchie, Willis Sperry, and J. P. Sperry, and their wives, to Miller and Enslow, is similar to the description of the 1,100 acres in the deed of the Harveys to their grantees above mentioned, but there is no evidence in the case to explain how the grantors of Miller and Enslow derived their title. So far as it appears, the title to the said 1,100 acres conveyed by the Harveys is outstanding in Alfred Sperry, Ethello W. Hale, and Willard P. Sperry. This is fatal to plaintiff's case. In *Coal Co. v. Howell*, 38 W. Va. 506, 15 S. E. 221, the court says: "And the reason for it is that the defendant in possession, and the prima facie owner, is not required to give up the possession until the true owner demands it. And the doctrine of setting up a subsisting outstanding title in a stranger rests upon the same foundation." "Where a plaintiff relies on documentary proof of title, a complete title must be shown; and, if a material link be wanting, his documentary proof should be excluded from the jury." *Jenkins v. Noel*, 3 Stew. 60. In this case there are two material links lacking. Besides, the plaintiff has not sufficiently identified the 10,000-acre tract of land, of which said 294 acres in controversy is claimed to be a part. Neither has he shown an unbroken chain of title thereto from the commonwealth of Virginia to himself. But, on the contrary, so far as the record discloses, the title to said 294 acres was, at the commencement of plaintiff's action,

and still is, in the grantees of Robert T. and Thomas H. Harvey.

For the reasons stated, the judgment of the circuit court aforesaid is erroneous, and must be reversed and set aside, and a judgment rendered by this court for the defendants.

(54 W. Va. 502)

ARMSTRONG v. TAYLOR COUNTY COURT.

(Supreme Court of Appeals of West Virginia.
Dec. 16, 1908.)

COUNTY ROAD—DISCONTINUANCE.

1. Under section 30, c. 43, Code 1899, the county court may discontinue the portion of a county road made highly dangerous to the traveling public by the legal occupancy and use thereof by a railroad, and their discretion in so doing cannot be controlled by prohibition.

(Syllabus by the Court.)

Petition by A. Armstrong for writ of prohibition to the county court of Taylor county and others. Writ denied.

W. Gordon Mathews, for petitioner. Walter Penderleton, B. F. Bailey, and Reece Blizard, for respondents.

McWHORTER, P. Under section 50, c. 54, Code 1899, and the sixth clause thereof, the Buchanan & Northern Railroad Company applied to the county court of Taylor county for permission to use certain portions of the public road on the west side of the Tygarts Valley river between the west end of Fetterman's Bridge and Short creek, being two certain pieces of said road described in the proceedings, which permission was granted by order of the court. The pieces of road so to be used are on narrow strips of ground lying between perpendicular bluffs and the Tygarts Valley river. The double occupancy of the same as public road and for the railroad will render them highly inconvenient and dangerous both to the public and the railroad, and, as the railroad would have the paramount right of user, the public, in the ordinary means or mode of travel, would be almost entirely excluded therefrom, except at the great risk of life and limb. Many of the citizens of the vicinity, appreciating the great danger from such use of the road, and deeming it wise to have the same discontinued as public roads, petitioned the county court, "because of the extreme danger to the traveling public," to discontinue as public roads the two pieces mentioned. In response to the said petition the county court proceeded, under section 30, c. 43, Code 1899, after giving the notice required by said section, on the 22d of September, to appoint from its own body the three members of the court a committee to view such roads, "and report in writing whether in their opinion any, and, if any, what, inconvenience would result from discontinuing the same." Which committee reported to the regular term of the said county court held on the 10th of October, 1903, recommending

the discontinuance of the roads from the mouth of Short creek to the west end of the Fetterman Bridge across the Tygarts Valley river, and that a road in lieu thereof be constructed from the Northwest Turnpike across to said Short Creek road at the earliest convenience, and further reported that they had viewed the road from near the residence of C. N. Mason, the point designated in the petition, down the Tygarts Valley river to the point designated as a station, and had ascertained that said road was a post road and a route for the carrying of United States mails; recommended its discontinuance, but to be kept open for the uses and purposes of carrying the mails until another road in lieu thereof should be constructed, and reported that in their opinion travel on the two sections of road along the site of the Buchanan & Northern Railroad there would be extremely hazardous to the traveling public, and would menace the lives of those who saw fit to travel said road, and that the interests of the citizens and taxpayers of the districts in which said roads were respectively located, and the general safety of the public, would be subserved by the discontinuance of the same, and that, when the proposed roads in lieu of said discontinued sections should be established, it would not inconvenience the traveling public, but it would be a great benefit to the same, and the Buchanan & Northern Railroad Company offered to the said court the sum of \$3,000 for the exclusive use and occupation of said two parts and parcels of said road for the purpose of constructing the line of said railroad; and it further appeared to the court that it was desirable and necessary to alter and change the present location of said roads in order to place the same on better ground, and better and more convenient location for the public, and that there would be no inconvenience to the public resulting from the discontinuance of the said two parts, and that the \$3,000 so offered by the Buchanan & Northern Railroad Company would build and construct a county road on better ground and more desirable location for the public, and thereupon said parts of said roads were discontinued, but the said post road to be kept open for post road purposes until another road should be established by said court in lieu thereof.

Adolphus Armstrong tendered his petition, praying to be made a party defendant in opposition to the discontinuance of said roads, which was refused to be filed. Under section 30, c. 43, Code 1899, a county court is given authority to discontinue a county road, or portion thereof, whenever the interests of the public demand such discontinuance. It cannot discontinue such road for private benefit of a person or corporation, unless the uses to which such discontinued road should be put is a public use, under the sanction of the Legislature. *Pence v. Bryant* (decided at the present term) 46 S. E. 275. And the

Buchanan & Northern Railroad Company is authorized by law to occupy the portions of the roads discontinued, having first obtained the consent of the lawful authority having control and jurisdiction thereof, under said section 50, c. 54, Code 1899. In *State v. County Court*, 33 W. Va. 589, 11 S. E. 72, where it is said, "Prohibition is simply the converse of mandamus, and governed by the same principles," point 4 of the syllabus holds that "mandamus cannot be permitted to usurp the place of a writ of error nor appeal, nor will it lie when there is any other adequate and complete remedy"; and point 5, "Mandamus will not lie to compel the county court, under the provisions of section 23, c. 89, Code 1899, to rebuild a county bridge which had been destroyed, when it appears that said court has, under the provisions of chapter 43, Code 1899, decided to build a bridge across the same river 110 yards from the site of the former bridge, and thereby, in effect, deciding to change the location of the former bridge." At page 595, 33 W. Va., page 74, 11 S. E., Judge Snyder, in delivering the opinion of the court, says: "It is a well-established rule, both in mandamus and prohibition, that neither will lie where another specific and adequate remedy exists, nor to correct the errors of inferior courts in matters properly within their jurisdiction. It is a fundamental principle that neither of these writs can be allowed to usurp the functions of a writ of error or certiorari, and can never be employed as a process for the correction of errors of inferior tribunals;" and cites *High on Ex. L. Rem.* §§ 156, 243; *State v. McAuliffe*, 48 Mo. 112; *McConiha v. Guthrie*, 21 W. Va. 134. *Buskirk v. Judge of the Circuit Court*, 7 W. Va. 91 (Syl., point 3): "Prohibition can only be interposed in a clear case of excess of jurisdiction on the part of some inferior judicial tribunal. Where the matter is clearly within the jurisdiction of the inferior court, a mere error in the proceedings may be ground of appeal or review, but not of prohibition." In *Haldeman v. Davis*, 28 W. Va. 324 (Syl., point 1), it is held: "Prohibition does not lie to restrain an inferior tribunal after its judgment has been given and fully executed." The county court, in case at bar, had completed the discontinuance of the said parcels of road. The only inconvenience that will result to the public is that it will cause those using the ordinary means of traveling on these discontinued roads to travel a longer distance to their places of destination, while they will avoid the danger of traveling along or immediately upon the railroad. These things the county court had the right to take into consideration in determining whether the portions of the public road should be discontinued or not. The discontinuance is a question of sound discretion with the county court, and cannot be controlled by prohibition. The fact that the railroad company is willing to

pay the county court \$3,000 to enable it to provide a more convenient way for the public, causing less damages, does not affect the court's discretion as to such discontinuance, but only emphasizes the fact that the railroad company is anxious to get rid of the two extremely dangerous places along the line of its road, where probably it would be otherwise necessary to keep watchmen continually to protect itself and the traveling public from otherwise unavoidable or negligent accidents, greatly endangering life and entailing great loss and expense. The apparently exclusive grant of the use and occupancy of said road can amount to nothing more than the discontinuance of the road for such use, with full notice to the public of complete abandonment. It matters not what language is used, the county court can grant to the company no right in the roads, for it possesses none. All it does or can do is to relieve the land occupied from use as public roads. This is what it is clothed with the power to do when the public necessities require its action. In so doing, it does not act in excess of its jurisdiction, and its action cannot be controlled by prohibition.

POFFENBARGER, J. (concurring). I concur in the decision in so far as it denies and refuses the writ of prohibition, but I think the proposition stated in the syllabus and announced in the opinion goes too far, and admits authority and power in the county court, in respect to the discontinuance of roads, which the statutes do not confer. The county court, under section 30 of chapter 43 of the Code of 1899, has an undoubted right to discontinue a road in the manner therein provided, but those provisions show clearly that it is a discretionary right, and one that ought to be exercised in the interest of the public. Viewers must be appointed to go upon the ground and ascertain the conditions, and then report upon the advisability of discontinuing the road. This section, impliedly at least, says a public road shall not be discontinued if inconvenience will result therefrom, for the viewers are required to report what inconvenience will so result. The Legislature rightly assumed that no county court would discontinue a road under such conditions as to prejudice the public or to put the people to inconvenience. This is a general provision, applying to ordinary cases of applications for discontinuances of public roads. There is a special provision of the statute prescribing the duties of county courts and of railroad companies when it becomes necessary or desirable for a railroad company to occupy a public road, and these provisions, having been made to govern a special case, ought to be understood and construed as the only law applicable to that case. What are those provisions?

Clause 6 of section 50 of chapter 54 of the Code of 1899 gives to a railroad company the right to construct its railroad across,

along, or upon any stream of water, water course, street, highway, road, turnpike, or canal which the route of such railroad shall intersect or touch; but such corporation shall restore the stream, water course, street, highway, road, turnpike, or canal thus intersected or touched to its former state, or to such state as not unnecessarily to have impaired its usefulness, and to keep such crossing in repair. But a limitation upon this right of railroad companies is expressed in the same clause. It says that, in case of the construction of such railroad along highways, roads, turnpikes, or canals, they shall either first obtain the consent of the lawful authorities having control of the same, or condemn the same under the provisions of section 43 of said chapter. Nothing in these provisions gives to a railroad company, or authorizes the county court to give to a railroad company, under the guise of a discontinuance or otherwise, the exclusive use of any public road. They only authorize an occupation of the road consistent with the ordinary use of such roads, giving to the railroad company and the people the common use of the same road. The usefulness of the road to the public may be impaired by the operation of the road therein, but it cannot be unnecessarily impaired, nor does the statute authorize the destruction of the road as a public highway.

It is to be observed that clause 6 of section 50 of chapter 54 gives no right to a railroad company to occupy a street or road, in the construction of its railroad, without restoring the same to its former state, or to such state as not unnecessarily to have impaired its usefulness. Does a railroad company obtain any greater right by the condemnation of the use of the public highway? If it cannot agree with the county court or the municipal authorities, and is compelled to condemn the use of the public highway, then what right does it acquire? Can it deprive the people of the use of the highway? If it becomes necessary to do that, the railroad company must itself provide them with another road. This shows clearly that the county court has no right to discontinue a public road merely to allow its use by a railroad company. Section 43 of chapter 50 says any such corporation may take and hold, under any grant or ordinance made by a municipal corporation, any interest or right such municipal corporation may have in any street, alley, or public ground, and may, in exchange therefor, in whole or in part, dedicate or otherwise secure to public use another street, alley, or public ground out of real estate owned by such railroad corporation, whether acquired by purchase or condemnation; or, under an agreement with such municipal corporation, may condemn land for use as such new street, alley, or public ground in the same manner as it may condemn land for its own use. This plainly shows that, unless a public highway can be

dispensed with consistently with law and the public convenience, a railroad company taking possession of it, by consent of the public authorities, or by the exercise of the power of eminent domain, must put the road in such condition as to enable the public to use it in common with the railroad company, or provide another road in lieu thereof. In taking possession of public roads, railroad companies are exercising a power conferred upon them by statute. It is not a right existing independently of the statute. Therefore they have only such rights in that respect as the statutes confer. By its terms, this section limits the right to the taking of streets, alleys, or public grounds of a municipal corporation. If a county road may be condemned to such use, express authority for such condemnation must be found elsewhere in the statute. Such authority is found in the sixth clause of section 50 of chapter 54, and says that the condemnation shall be as provided in section 48. This makes section 48 applicable to county roads as well as to streets, and therefore, when railroad companies exclude the public from the use of roads, they must provide others. The use of the word "may" in section 48, instead of "shall," signifies nothing. The legislative intent is plain. They may take roads by consent of the authorities or by condemnation, and may provide others. The two propositions are bound together and must be construed together, and they mean the same as if the Legislature had said a railroad company may take the use of a public road, but, if so, it shall provide another.

This construction of the statute imposes a duty upon any railroad company so taking to itself the exclusive use of a public highway, and the law has provided a way for compelling performance of that duty. If the railroad company neglects or fails in this respect, mandamus lies to compel it to perform its duty. *Town of Mason v. Railroad Co.*, 51 W. Va. 183, 41 S. E. 418. So the county court has ample power in the premises. If the county court fails to perform its duty, a citizen injured by its failure has a remedy by which he may compel the county court to perform its duty. Section 45 of chapter 39 of the Code gives the writ of mandamus to enforce the performance of any legal duty resting upon a county court. Whether the county court is, in this particular case, amenable to that writ, it is not proper now to inquire.

While the county court has an undoubted right to consent to the occupation of the county roads by the railroad company, for which reason prohibition does not lie, we are not prepared to say the railroad company can exclude the public from the use of the road, even under the order of discontinuance made by the county court.

Judge MILLER has aided in the preparation of this opinion, and concurs in the views herein expressed.

(54 W. Va. 187)

BOARD OF EDUCATION OF DAVIS DIST. v. HOLT et al.

(Supreme Court of Appeals of West Virginia.
Nov. 21, 1908.)

WRIT OF PROHIBITION—WHEN AWARDED—MOTION TO DISCHARGE.

1. The writ of prohibition only properly issues to prevent unlawful judicial action by inferior tribunals exercising or assuming to exercise judicial functions. It never issues against administrative boards exercising purely administrative functions.

2. The writ of prohibition is never proper to try title to office and oust de facto officers and replace them by others claiming to be de jure officers.

3. When a circuit judge has issued a rule in prohibition directly contrary to the principles settled by this court in a former case to which he was a party, this court will not require the party making complaint to first make a motion to discharge such rule before applying to this court for relief against the same.

(Syllabus by the Court.)

Application by the Board of Education of Davis District for a writ of prohibition against John H. Holt and others. Writ awarded.

Cunningham & Stallings, for petitioner. O. O. Strleby and Conley & Smith, for respondents.

DENT, J. The Board of Education of Davis District, Tucker county, asks for a writ of prohibition against John Homer Holt, judge of the circuit court of said county. This is a controversy between two sets of men claiming to be the legal board of education of Davis District in the county of Tucker. The contestants, George H. Howard and Joseph Kline, claiming to be the de jure board of education, obtained a writ of prohibition from Judge Holt against said E. K. Hovermale and R. C. McKelvey acting as the de facto board, inhibiting them from acting as such board, and said Hovermale especially from acting as president, and directing him to turn over to the alleged de jure board all the property belonging properly to the board of education of such district. In short, the prohibition awarded was a writ of ouster, turning out the de facto board and installing the alleged de jure board until the title to the office could be inquired into and determined. This is the case of *Hassinger v. Holt, Judge*, etc., 47 W. Va. 348, 34 S. E. 728, repeated, and a reference to the decision in that is sufficient to settle this case. This court has so often held that the writ of prohibition only lies against judicial action of an inferior tribunal exercising judicial functions. Here it is used by the circuit court to prevent a de facto board of education from exercising purely administrative functions until the official titles of the members thereof can be inquired into. Not only is it used for this purpose, but it is used to put the incumbents out and put the contestants in until the title to

the office can be determined; thus making a writ of prohibition a revolutionary writ for the purpose of changing the administrative officers of the government until the title to the office can be settled. If one of the sets of claimants is entitled to the writ under the circumstances, why should not the others have it, and thus stop the functions of the office until the title thereto is settled? The wheels of the government could thereby be stopped for the want of administrative officers, and the courts would be compelled to appoint curators for or receivers of such officers, with power to discharge the duties thereof until the right of office could be finally determined. Thus the court would have to assume the administrative functions of the government. Such use of prohibition is plain usurpation of and abuse of judicial functions. Prohibition never issues to test the title to an office. Quo warranto is the proper remedy for this purpose. A de facto officer claiming to be de jure has the right to hold the office and discharge the functions thereof until his title or right thereto is determined against him by proper judicial authority. 2 Bailey on Jurisdiction, § 479; 16 En. Plead. & Prac. 1106. It is insisted that no motion was made in the circuit court to discharge the rule before application to this court for relief. This is not always necessary. Board v. Holt, 51 W. Va. 435, 41 S. E. 337. It is only required as a matter of respect and courtesy to the circuit judge. When he is acting in total disregard of the principles settled by this court in prior cases to which he was a party, such motion will be deemed unnecessary, as the circuit judge will be deemed to have acted advisedly when he issued the rule, and that a motion to discharge the same would be unavailing, and an idle requirement.

The writ of prohibition is therefore awarded.

(54 W. Va. 324)

FRYE v. MILEY et al.

(Supreme Court of Appeals of West Virginia.
Dec. 5, 1903.)

FRAUDULENT CONVEYANCE—SUIT TO SET ASIDE—DISMISSAL—APPEAL—COSTS.

1. A suit to set aside a fraudulent conveyance under section 2 of chapter 133 of the Code of 1899, instituted for a legal demand by a creditor at large before the debt on which it is predicated becomes due and payable, cannot be sustained. Inadvertent rulings to the contrary in *Christlip v. Teter*, 27 S. E. 288, 43 W. Va. 356, and *Bank v. Prager*, 41 S. E. 363, 50 W. Va. 680, are disapproved.

2. In such case, though the bill may be sufficient under section 1 of chapter 106 of the Code of 1899, it is proper to dismiss it on demurrer if an attachment has not been sued out under it before such dismissal.

3. But it is error to so dismiss such a bill without inserting in the decree a clause saving to the plaintiff the right to prosecute any other proper suit in respect to the matters complained of in the bill, or showing that the cause

had not been decided on its merits, as such decree, without such clause, would be a bar to a subsequent suit predicated upon the same facts.

4. Where a party brings a suit in equity which cannot be entertained for want of jurisdiction, and permits such a decree to be entered, without objection, as would bar another suit for the same matter, he is not entitled to costs in the appellate court upon a reversal of the decree. In such case he is not the party substantially prevailing in the true sense of the terms.

Miller and Brannon, JJ., dissenting in part.
(Syllabus by the Court.)

Appeal from Circuit Court, Hardy County;
R. W. Dailey, Jr., Judge.

Bill by William H. Frye against John R. Miley and others. Decree for defendants, and plaintiff appeals. Modified.

W. M. Gamble, for appellant. Benjamin Dailey and H. B. Gilkeson, for appellees.

POFFENBARGER, J. William H. Frye complains of the dissolution of an injunction and dismissal of his bill by a decree of the circuit court of Hardy county. It appears from the bill that on the 18th day of February, 1902, John R. Miley executed his negotiable note for the sum of \$1,517.75, payable to the order of Annie L. Miley nine months after date, with interest from date, at the Shenandoah Valley Bank of Winchester, Va., and indorsed by the said Annie L. Miley, G. W. Miley, and P. J. J. Walker, and then delivered to said Frye. The note was given for the purchase money of property purchased by said John R. Miley at a sale made by Frye. On the 22d day of September, 1902, about seven months after the date of the note, two months before its maturity Frye instituted this suit, and, at October rules following, filed his bill, setting forth in detail conveyances by John R. Miley, Annie L. Miley, George W. Miley, and P. J. J. Walker of all the real estate, and practically all the personal property, owned by each and every one of them, made between the 17th day of July, 1902, and the date of the institution of the suit; alleging all of said conveyances to have been made for the purpose of hindering, delaying, and defrauding the plaintiff in the collection of his said debt, and praying that each and all of them be set aside, and the real estate subjected to the payment of the debt, and that Annie L. Miley, George W. Miley, and P. J. J. Walker be restrained by injunction from transferring or assigning certain purchase-money notes given in consideration of the conveyances, and Fannie V. Pease, J. W. Miley, and William M. Snyder from paying certain notes to the parties alleged to be holders of them. The injunction was awarded on the 11th day of September, 1902, and on the 29th day of May, 1903, the bill was held insufficient on demurrer, the injunction dissolved, and the bill dismissed.

This decree is based upon the theory that a suit to set aside conveyances on the ground of fraud cannot be instituted by a creditor whose debt is not due, and on the further

¶ 1. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 640.

ground that if an attachment would in such case be maintainable, and give equity jurisdiction to charge the land with a lien in favor of the creditor, the bill does not pray an attachment, and the record does not show any affidavit therefor, nor any application to the court for an order of attachment.

Prior to the enactment in 1849 of what is now section 2 of chapter 133 of the Code of 1899 of this state, a creditor could not resort to a court of equity to impeach a conveyance for fraud without having first reduced his demand to judgment. This made it a lien upon the debtor's real estate, and, the fraudulent conveyance being an obstruction to the enforcement of the lien, equity interposed for the removal of the obstruction. When the property fraudulently conveyed and sought to be subjected was personal property, the creditor was required not only to obtain a judgment, but also to take out execution, and have it levied or returned, so as to show that he had exhausted all legal remedies. *Chamberlayne v. Temple*, 2 Rand. 384, 14 Am. Dec. 786; *Tate v. Liggit*, 2 Leigh, 84; *Kelso v. Blackburn*, 3 Leigh, 300; *Rhodes v. Cousins*, 6 Rand. 189, 18 Am. Dec. 715; *Wallace's Adm'r v. Treacle*, 27 Grat. 479. In the absence of statutes conferring jurisdiction in equity at the instance of creditors at large, the general rule is that there is no such jurisdiction. There are exceptions to the rule, it is true, but this case does not fall within any of them. "Occasional exceptions may be found in some states to the rule that equity will not interfere at the instance of a simple-contract creditor. But the exceptions prove the force of the rule." *Wait, Fraud. Conv.* § 53. This author, in the same section, analyzes the cases which are supposed to establish these exceptions, and substantially denies their soundness. He concludes by saying, "Creditors will, as a rule, find these exceptional cases not easy to support." To the same effect, see *Bump on Fraud. Conv.* § 535, where it is said: "Equity has jurisdiction of fraud, but it does not collect debts. A creditor must establish his demand at law, and obtain a lien upon the property, before the transfer interferes with his rights, or he has any title to claim relief in equity. No creditor can be said to be delayed, hindered, or defrauded by any conveyance until some property out of which he has a specific right to be satisfied is withdrawn from his reach by a fraudulent conveyance." *Adler v. Fenton*, 24 How. (U. S.) 407, 16 L. Ed. 696; *Williams v. Tipton*, 5 Humph. (Tenn.) 66, 42 Am. Dec. 420; 5 Enc. Pl. & Pr. 468. The reasons assigned for this rule are that a court of law is the proper forum in which to establish debts; that the aid of a court of equity is given for the enforcement of a lien and the removal of obstructions in the way of execution at law; that equity will not aid any person until it is made certain that he has a claim upon the debtor; and that a creditor at large has no right to interfere

with the debtor in the disposition of his property. 5 Enc. Pl. & Pr. pp. 470-473.

Section 2 of chapter 133 of the Code of 1899 does away with this rule by providing that a creditor, before obtaining a judgment or decree for his claim, may institute a suit in equity to set aside a fraudulent conveyance, and in such suit have all the relief which he would be entitled to after obtaining a judgment or decree for his claim. This statute gives such creditor a lien upon the property fraudulently conveyed from the time of the commencement of the suit in equity. *Wallace's Adm'r v. Treacle*, 27 Grat. 479; *Clarke v. Figgins*, 27 W. Va. 663; *Foley v. Ruley*, 50 W. Va. 158, 40 S. E. 382, 55 L. R. A. 916; *Sweeney v. Sugar Co.*, 30 W. Va. 443, 4 S. E. 431, 8 Am. St. Rep. 88; *Gelser Mfg. Co. v. Chewning*, 52 W. Va. 523, 44 S. E. 193. But for this statute, it is plain that no such suit could be brought. It is an enabling statute, doing away with the rule which prevented relief under certain conditions. It does away with that rule only to the extent of the right given by the statute, namely, to sue in equity to annul a fraudulent conveyance before reducing the claim to judgment. Whether such suit can be brought before the debt is due is an entirely different matter. This last question came before the Virginia Court of Appeals in *Devries v. Johnston*, 27 Grat. 805, and the court divided evenly upon it; Judges Moncure and Anderson standing for the affirmative of the proposition, and Christian and Staples for the negative. It is therefore no precedent, and Judge Anderson, who wrote the only opinion filed, cites no authority whatever for his position. A later Virginia case (*Simon v. Ellison*, 22 S. E. 860) holds that "suit attacking a conveyance as in fraud of creditors cannot be maintained by creditors whose claims are not due." It is said that this court, in *Chrislip v. Teter*, 43 W. Va. 356, 27 S. E. 288, has held that such suit may be maintained for a debt not due. It appears from the statement of the case that the debt was not due, and that the suit was maintained; but the point cannot be regarded as having been adjudicated in that case, for it seems never to have been brought to the attention of the court. Not a word of comment on that phase of the case is found in the opinion, and there is nothing in it to suggest that counsel relied upon it or brought it to the attention of the court. Even if it be considered as an adjudication, it is clearly the result of inadvertence, rather than consideration. *Miller v. Zeigler*, 44 W. Va. 484, 29 S. E. 981, 67 Am. St. Rep. 777, and *Bank v. Prager & Son*, 50 W. Va. 660, 41 S. E. 363, are urged and relied upon as supporting the position taken by counsel for the appellant. What has been said of the case of *Chrislip v. Teter* applies to that of *Bank v. Prager & Son*. Neither in the opinion nor in the briefs, so far as a hasty examination of the latter reveals, is there any mention of the fact that the debt of the plaintiff was not due, as a

material point in the case. It cannot be regarded as a sedate and considerate decision on that point. In the other case (*Miller v. Zeigler*) the proceeding was by attachment, and the attachment was held good. Therefore the jurisdiction which was taken and maintained stood upon an entirely different ground from that urged in this case, and the decision and views expressed in the opinion afford no support to the position taken by the appellant here. Judge Brannon says in the opinion in that case; "But the bill, while setting up a fraudulent transfer, does so only as evidence to sustain the attachment, and does not go for the property transferred. Hence the bill could not be sustained, independently of the attachment, on that ground."

In Alabama there is a statute similar to ours, providing that a creditor who has not acquired a lien for his debt may sue in equity to set aside a fraudulent conveyance. The Supreme Court of that state, although most liberally expounding the statute against fraudulent conveyances, holds that such suit cannot be predicated upon a debt not yet due. *Jones v. Massey*, 79 Ala. 370; *Freider v. Lienkauff*, 92 Ala. 469, 8 South. 758; *McGhee v. Bank*, 93 Ala. 192, 9 South. 734; *Gibson v. Furniture Co.*, 93 Ala. 579, 9 South. 370. The court said in *Jones v. Massey*: "The purpose and operation of the statute are to dispense with the necessity of obtaining a judgment at law, thereby establishing the justness of the demand, and to confer on a creditor without a lien the rights of a judgment creditor, so far as a judgment was essential to the jurisdiction of the court. The statute does not exempt such suit from the general rule, which prevails in equity as well as at law, that no suit can be maintained before a cause of action has accrued, and does not confer on a creditor the right to bring a bill to subject property to the payment of his debt before its maturity, and before he is authorized to maintain an action at law on the demand." In *Freider v. Lienkauff* the court said: "Confessedly, no suit, at law or in equity, can be maintained upon the debt which has not matured." This seems to be the construction put upon such statutes in most, if not all, the states where they exist. Thus in Maryland it is held that the jurisdiction of equity is not thereby so extended as to warrant the appointment of a receiver to take charge of the property, or an injunction to restrain the debtor from disposing of his property. *Uhl v. Dillon*, 10 Md. 500, 69 Am. Dec. 172; *Hubbard v. Hubbard*, 14 Md. 356; *Balls v. Balls*, 69 Md. 388, 16 Atl. 18. Of such statutes, 5 Enc. Pl. & Pr., at page 477, says: "But they do not authorize the filing of a bill before the maturity of the debt, nor do they, unless it is expressly so provided, authorize a bill to enjoin a contemplated disposition by the debtor of his property." Mr. Hogg, in his valuable work entitled "Equity Principles," at section 183, says: "But no

suit can be maintained to set aside a conveyance as fraudulent unless the debt upon which the plaintiff's suit is predicated is due and payable at the time the suit is brought."

A very substantial reason suggests itself at this point for so limiting the effect of the statute. The commencement of suit under it gives a lien and priority of lien over the claims of all creditors at large subsequently suing. To hold that one whose debt is not due may acquire it confers upon him a great advantage not expressly given by the statute. It also overturns the general rule upheld by both courts of law and equity, that no suit can be maintained until a right of action accrues. Such right does not accrue until the maturity of the debt. The Legislature has seen fit to give a right of action for a debt not due, as well as a lien, under another statute (section 1 of chapter 106 of the Code of 1899), saying, "And such attachment may be sued out in a court of equity for a debt or claim, legal or equitable, whether the same be due or not." The Legislature having so far authorized a suit for a debt not due, and failed to provide for it, except by attachment, there is no ground for the presumption of an intention that such right should be further extended. In so far as the cases of *Chrislip v. Tetter*, 43 W. Va. 356, 27 S. E. 288, and *Bank v. Prager & Son*, 50 W. Va. 660, 41 S. E. 363, hold that a suit under section 2 of chapter 133 of the Code of 1899 may be maintained for a debt not due, they must be disapproved and overruled.

Much is said in the brief of counsel for the appellant on the subject of the odium of fraud in the eye of a court of equity, and the extent to which it vitiates transactions into which it enters. All this is granted, but it does not rise to the question presented here. The inquiry now is, not the extent to which equity may go in relief against fraud when the court has acquired jurisdiction, but when and how the jurisdiction may be invoked. It is a question of time, when the remedy sought may be had.

As already indicated, a creditor has a remedy against his fraudulent debtor by attachment in a suit in equity before the debt is due; and counsel for appellant here insists that the bill ought not to have been dismissed, because it shows sufficient ground for an attachment. But no attachment was ever taken out or applied for. Whether, in order to give jurisdiction in such case, the attachment must be sued out at the institution of the suit, and the bill show by proper allegations that it is a suit by attachment, it is unnecessary to say. It is certain that, in order to confer such jurisdiction, an attachment must be taken out or asked for at some stage of the proceeding. Nor is it necessary to say whether, in addition to the allegations of the bill sworn to, there must be an affidavit setting forth the grounds of the attachment. It seems, however, that there should be. *Taylor's Ex'rs v. Cox*, 32 W. Va. 148, 9 S. E. 70;

Cirode v. Buchanan, 22 Grat. 205. Hogg's *Equity Principles*, at section 37, says: It would seem, on principle, that, in all those instances wherein suit is brought to enforce a purely legal demand in equity, the bill should aver such facts as to show on its face that the law of attachment has been invoked in aid of the court's jurisdiction." But the author admits that decisions hold that the rule is not quite so strict.

There is a very short paragraph in the bill charging that all the conveyances were made for the purpose of giving preferences among the creditors of the parties to the note. In addition to this, there is an averment of the insolvency of said parties. But the bill does not indicate the existence of antecedent debts, to secure which the conveyances were made. One deed of trust is alleged to have been made to secure what may have been an antecedent debt, but it is not averred to have been antecedent, but the property thereby conveyed was 12 head of cattle, and plaintiff says in his bill he is informed that they have been driven to market and disposed of. One or two other deeds of trust are set out, reciting that the debts thereby secured were for money loaned at the time of the execution of the instruments. Most of the conveyances are, on their faces, absolute, not purporting to have been given to secure debts. It is deemed unnecessary to go through and analyze in this opinion all these conveyances, for the purpose of showing that the bill is insufficient under the preference statute. In this respect there is an absolute want of that certainty and definiteness required in such bill.

The decree complained of sustains the demurrer to the bill, dissolves the injunction, dismisses the bill, and gives the defendants their costs, without putting in any clause saving to the plaintiff the right to prosecute any other proper suit for relief in the premises. Obviously, he is entitled to relief after the maturity of the debt by just such a suit as he has brought, if the allegations of his bill be true. Moreover, if he had sued out an attachment in this suit at its inception, or at any time before it was dismissed, upon a sufficient affidavit, or possibly upon the facts set forth in his bill, verified by affidavit as it is, he might have had relief without waiting for the maturity of his debt. Then ought the court to have put into the decree a saving clause? This depends upon whether the decree would bar another suit for relief in respect to the same matters. It is a decree upon a demurrer sustained. By demurring, the defendants admitted the facts alleged in the bill. In any subsequent suit they would be estopped to deny those facts, if this decree remains unreversed. The facts are admitted in favor of the plaintiff, and do not estop him, but, upon those facts, there has been an adjudication against him; and by that adjudication, unless reversed, he is forever barred from prosecuting a suit for the

same cause of action upon the same facts. *Res judicata* ties the hands of both parties. *Buford v. Adair*, 43 W. Va. 211, 27 S. E. 260, 64 Am. St. Rep. 854; *Stockton v. Copeland*, 30 W. Va. 674, 5 S. E. 143. In *Gould v. Railroad Co.*, 91 U. S. 526, 533, 23 L. Ed. 416, Mr. Justice Clifford, after reviewing many authorities, lays down the following rules as deducible from them: "(1) That a judgment rendered upon demurrer to the declaration or to a material pleading, setting forth the facts, is equally conclusive of the matters confessed by the demurrer as a verdict finding the same facts would be, since the matters in controversy are established in the former case, as well as in the latter, by matter of record; and the rule is that facts thus established can never be contested between the same parties, or those in privity with them. (2) That if judgment is rendered for the defendant on demurrer to the declaration, or to a material pleading in chief, the plaintiff can never after maintain against the same defendant, or his privies, any similar or concurrent action for the same cause upon the same grounds as were disclosed in the first declaration, for the reason that the judgment upon such a demurrer determines the merits of the cause, and a final judgment deciding the right must put an end to the dispute, else the litigation would be endless. (3) But it is equally well settled that if the plaintiff fails on demurrer in his first action, from the omission of an essential allegation in his declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right, for the reason that the merits of the cause, as disclosed in the second declaration, were not heard and decided in the first action." The syllabus of this case reads as follows: "If judgment is rendered for the defendant on demurrer to the declaration, or to a material pleading in chief, the plaintiff can never after maintain against the same defendant or his privies any similar or concurrent action for the same cause upon the same grounds as were disclosed in the first declaration; but if the plaintiff fails on demurrer in his first action, from the omission of an essential allegation in his declaration which is supplied in the second suit, the judgment in the first suit is not a bar to the second." As to when a judgment upon a demurrer is a bar to a subsequent suit, see *Bissell v. Spring Valley Township*, 124 U. S. 225, 8 Sup. Ct. 495, 31 L. Ed. 411; *McLaughlin v. Doane*, 40 Kan. 392, 19 Pac. 853, 10 Am. St. Rep. 210; *Insurance Co. v. Smith*, 117 Mo. 261, 297, 22 S. W. 623; *Keater & Skinner v. Hock, Musser & Co.*, 16 Iowa, 23; *Terry and others v. Hammonds et al.*, 47 Cal. 32; *Robinson v. Howard*, 5 Cal. 428; *Estep v. Larsh*, 21 Ind. 190; *Wilson v. Ray*, 24 Ind. 156; *Campbell v. Hunt*, 104 Ind. 210, 2 N. E. 363, 3 N. E. 879; *Los Angeles v. Mellus*, 58 Cal. 16; *Gray et al. v. Gray et al.*, 34 Ga.

499; *Carlin v. Brackett*, 38 Minn. 307, 37 N. W. 342; *Johnson v. Pate*, 90 N. C. 334; *Felt v. Turnure*, 48 Iowa, 397; *Bouchaud v. Dias*, 3 Denio, 238; *Aurora City v. West*, 7 Wall. 82, 19 L. Ed. 42; *Gilman v. Rives*, 10 Pet. 298, 9 L. Ed. 432. "A decision upon a demurrer which has, however, clearly gone to the merits of the case, by being based distinctly upon a specific allegation of the facts touching the substance of the action or the defence, is an effectual bar to further litigation, and, upon the facts admitted, it is held to be as conclusive as a verdict; and this will be true in regard to such facts, though the second litigation, being between the same parties, is not upon the same cause of action." Big. on Est. 56.

The conclusion resulting from an examination of the record in the light of these principles is that another suit by attachment, based upon the same facts as it, would have been, and will still be, barred by the decree in this cause. Whether a second suit, under section 2 of chapter 133 of the Code of 1899, brought after the maturity of the debt, would be barred, is not so clear. A new essential fact, namely, the maturity of the debt, would appear in the case, and it would not be the same matter as that determined in the present suit. This, however, we do not decide, as it is unnecessary; but, as it would clearly bar a proceeding by attachment upon the same facts—a remedy to which the plaintiff was entitled, as clearly appears from the allegations of the bill—the court ought not to have pronounced such a decree, but should have dismissed the bill without prejudice. In failing to do this, the court erred, and for this reason the decree must be modified. *Carberry v. Railroad Co.*, 44 W. Va. 260, 28 S. E. 694; *Van Dorn v. County Court*, 38 W. Va. 267, 18 S. E. 579; *Christian v. Vance*, 41 W. Va. 754, 24 S. E. 596.

Ought the appellant to have costs in this court? In *Van Dorn v. County Court* and *Christian v. Vance*, costs were given to the appellees, as the parties substantially prevailing; but in those cases nothing was said in the court below against the failure to put in the clause "without prejudice." In *Carberry v. Railroad Co.*, costs in this court were awarded the appellant, but objection to the decree for want of saving clause was made in the court below. In this case no such objection appears, and the appellant stands as did the appellants in the two cases above mentioned, in which costs were awarded the appellees. There are two reasons in those cases, and in this one, for refusing costs to the appellant: He brought his suit in a court which could not entertain it, and thereby superinduced the error of which he has the right to complain. He is also in fault in having remained silent when the decree was entered. Had he objected to it, and asked that it be made to show that the dismissal was for want of jurisdiction, or that it was to be without prejudice, his situation would

be far better, and like that of the appellant in *Carberry v. Railroad Co.*, and there would probably have been no necessity for his coming here at all. On the ground of their having been in fault, the appellants, in *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164, were refused costs. In doing so, this court followed the Supreme Court of the United States in *Railroad Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462, in the opinion in which the question is fully discussed. The reasoning of that opinion, as quoted in *Freer v. Davis*, 52 W. Va. 16, 43 S. E. 164, clearly applies here.

For the reasons above given, the decree complained of is to be amended so as to save to the appellant the right to prosecute any other proper suit in respect to the matters complained in his bill, and then affirmed as amended; and costs in this court are to be adjudged to the appellees, as the parties substantially prevailing.

MILLER, J. (dissenting). I do not agree to the fourth point in the syllabus. It is the duty of the trial court to pronounce, and have entered on its record, proper decrees and judgments in cases before it. Parties to the action or suit have no legal control of this duty, and should not be held responsible for a failure therein. If such an error be committed in this respect, that it can be corrected only by this court on appeal or writ of error, the party injured, who is compelled to apply for such correction, should be allowed his costs occasioned thereby. This should be the rule in such case, because the erroneous decree or judgment is entered, presumably, at the instance of the party who recovers costs, and who would be benefited by such erroneous decree or judgment, should the same be permitted to stand.

BRANNON, J. I concur with Judge MILLER in the above note.

(54 W. Va. 78)

GORRELL & SMITH v. WILLIS, Judge,
et al.

(Supreme Court of Appeals of West Virginia.
Nov. 14, 1903.)

ACTION—DISMISSAL—REINSTATEMENT.

1. G. & S., partners, recovered a judgment for \$28.52, with interest thereon and costs, against A., before a justice. A. gave bond, with approved security, and was granted an appeal from the judgment by the justice. Afterwards the plaintiffs and defendant appeared in the circuit court, and thereupon the appellees moved the court to dismiss the appeal for the reason that the transcript filed did not show that any appeal had been granted by the justice to the appellant. The court sustained the motion, and dismissed the appeal, and gave judgment against the appellant for costs. At its next term the court, on motion of the appellant, set aside its former order of dismissal, and reinstated the appeal on the docket for trial.

Held, that the first order is not a final and conclusive judgment, and that the second order

is authorized by section 11 of chapter 127 of the Code of 1899.

(Syllabus by the Court.)

Petition of Gorrell & Smith for a writ of prohibition to M. H. Willis, judge of the circuit court of Tyler county, and others. Writ denied.

I. M. Underwood, for petitioner. J. H. Strickling, for respondents.

MILLER, J. On the 22d day of May, 1900, before G. W. Robinson, one of the justices of the peace of Tyler county, W. Va., Moses Gorrell and W. A. F. Smith, partners under the firm name of Gorrell & Smith, recovered a judgment against Emanuel Alkire for \$28.52, with interest thereon and costs of the action. On the 30th day of May, 1900, Alkire executed and filed with the justice an appeal bond, with approved security, and was granted an appeal from the judgment aforesaid to the circuit court. On the 11th day of June, 1900, a transcript from the docket of the justice of the proceedings had before him in the action, together with the appeal bond, the pleadings, and all of the original papers in the cause, were transmitted to the clerk of the circuit court of said county, which transcript and papers were filed by said clerk, and the appeal docketed, and set for trial at the August term, 1900, of said court. On the 21st day of August, 1900, petitioners moved the court to dismiss the appeal, and thereupon the court made and entered an order in the words following: "This day came the parties plaintiff and defendant, by their attorneys, and thereupon the appellees moved the court to dismiss this appeal for the reason that the transcript filed shows that no appeal was granted by the justice to the appellant, Man Alkire. The court doth therefore sustain said motion, and this appeal is dismissed for the reason aforesaid; and it is further considered by the court that the appellees, Gorrell & Smith, do recover their costs in this court against said appellant, Man Alkire." At its December term, 1900, the court made and entered another order in the action, in the words and figures following: "This day came the defendant, by his attorneys, and moved the court to set aside the order of dismissal in this cause entered at the August term, 1900, of this court; to reinstate upon the trial docket of this court the above case, because the same was improvidently dismissed and dropped from the docket. The court doth consider the motion well taken, and doth order the said order of dismissal set aside, and the said case reinstated upon the trial docket of this court, and doth require notice to be served upon the plaintiffs as required by law. Thereupon the defendant suggested diminution of the record sent up by the justice, and the court doth order the justice to send up a full and complete transcript of the record of all the proceedings had before him in said case. A copy of this order shall be served

upon the justice rendering the judgment." Upon petition of Gorrell & Smith, a rule was awarded by this court, directed to the circuit court of Tyler county, M. H. Willis, judge thereof, and said Emanuel Alkire, to show cause, if any, they or either of them can, why a writ of prohibition shall not be issued, prohibiting the said circuit court and said Willis, judge thereof, from proceeding further in said cause. To this rule, Alkire has filed his demurrer and answer, and contends that the circuit court had no legal power or jurisdiction to dismiss said appeal, and that its order of dismissal is no more, in effect, than a refusal to take or entertain jurisdiction of the appeal then properly before it. On the other hand, petitioners claim that the said order of dismissal at the August term, 1900, was and is a final judgment, whether erroneous or not, and could not be set aside by the court at a subsequent term. From the language of the said order of dismissal, we may conclude that the court dismissed the appeal because the transcript from the justice's docket did not, in terms, state that the appeal had been granted. However, in obedience to the last order of the circuit court, the justice, on the 2d day of January, 1901, transmitted what he certifies to be "a true copy as appears on his docket," and by which it is shown that the defendant on the 30th day of May, 1900, applied for an appeal, executed his appeal bond, with approved security, and was granted an appeal.

It thus appears that the appeal was properly allowed and perfected, so far as the defendant was concerned. *Holmes v. Yoke*, 48 W. Va. 267, 37 S. E. 545. It was docketed in the circuit court, and at its August term, 1900, the court had jurisdiction both of the parties and the subject-matter, because, as the record shows, the defendant had brought the case into that court by his appeal; and the petitioners appeared thereto, and moved the court to dismiss the same, which was done. The case was in the circuit court, to be tried and determined de novo. Section 169, c. 50, Code 1899. "In such case, where the effect of the appeal is to transfer the action to an appellate court, in which the cause is to be tried de novo, and the controversy is to be settled by a judgment in such court, regardless of the judgment appealed from, the appeal operates not only to suspend the judgment of the justice or inferior tribunal, but vacates it and sets it aside, so that it cannot be used as evidence or as the foundation of an action in any court." *Watson v. Hurry*, 47 W. Va. 810, 35 S. E. 830; *Evans v. Taylor*, 28 W. Va. 188. If the transcript from the justice's docket, when filed in the circuit court, was incomplete, the court should have then ordered the omitted parts to be supplied, as was afterwards done. Code 1899, c. 50, § 173. The dismissal of the appeal was, in effect, nothing more than a refusal of the court to try the controversy between the parties, upon the erroneous assumption that it did

not have jurisdiction, and was not a judgment final and conclusive upon the parties. In *Wheeling, B. & T. Ry. Co. v. Paull*, 89 W. Va. 148, 19 S. E. 553, the court says: "The appeal was not tried on its merits, but was dismissed for want of jurisdiction. The jurisdiction being unquestionable, the order of dismissal amounts to nothing more than a refusal to hear or entertain the appeal, and is equivalent to the refusal of the court to proceed with any case properly pending therein." At its December term, 1890, the court, finding the case in that condition, set aside its former order and reinstated the appeal, under section 11, c. 127, Code 1890, which provides that "any circuit court may on motion, re-instate on the trial docket of the court, any case dismissed, and set aside any non-suit that may be entered by reason of the non-appearance of the plaintiff, within three terms after the order of dismissal may have been made, or order of non-suit entered." This language is broad and comprehensive, and certainly embraces the dismissal in this case. The court, in reinstating the appeal, did no more than it could have been compelled to do by mandamus—take jurisdiction of the action. *Wheeling, B. & T. Ry. Co. v. Paull*, supra. In *Alderson's Heirs v. Henderson*, reported in 5 W. Va. 187, the circuit court, at its own instance, dismissed the bill at the costs of the plaintiff, and at the next term reinstated the cause. At the time of the dismissal the process had been duly served on the adult defendants, some of whom had filed their answers, and the answers of the infant defendants, by their guardian ad litem, had also been filed. *Berkshire, J.*, who delivered the opinion, says: "I think there was no sufficient ground for dismissing the bill and amended bill, and that the court did not err in reinstating the cause, which it was clearly authorized to do under the first section of chapter 132, p. 115, of the act of March, 1868 [now section 11, c. 127, of the Code of 1890]." To the same effect is the case of *M. & F. Bank v. Mathews*, 8 W. Va. 26.

To uphold the contention of petitioners would be to forever deprive them of the right to collect their said demand from respondent *Alkire* by legal process. They have no judgment now, and could recover none hereafter.

For the reasons stated, the said demurrer is sustained, the rule quashed, and the writ of prohibition refused.

(54 W. Va. 414)

TIMMS v. TIMMS et al.

(Supreme Court of Appeals of West Virginia.
Dec. 12, 1903.)

FRAUDULENT CONVEYANCE—KNOWLEDGE OF GRANTEE—EVIDENCE.

1. Where the grantee in a deed made to defraud the creditors of the grantor knows of the fraudulent intent of the grantor, or has notice of facts sufficient to excite the suspicions of a

prudent man and put him on inquiry, he makes himself a party to the fraud.

2. T. and his wife conveyed to U., the brother of the wife of T., a house and lot in the city of Parkersburg, being all the estate owned by T., in consideration of \$1,900, assumed to be paid on the indebtedness of T. by U., the grantee, \$665 of which was the balance due on a trust debt on the property conveyed, and the residue of the consideration was made up of negotiable paper of T., mostly indorsed by U., a part indorsed by the brother of U., and most of it long past due and under protest. No lien was retained on the property conveyed to secure the payment of the notes so assumed by U., and U. made no inquiry as to any other indebtedness of T., and left T. in possession of the property free of rent, with authority to sell the same; and the excess over \$1,900 for which it might be sold by T. was to go to the wife of T., the sister of U.

Held, such conveyance is made in fraud of the creditors of T., and is void as to creditors.

S. Livesay's Ex'r v. Beard, 22 W. Va. 585 (Syl., points 8, 12), reaffirmed.

(Syllabus by the Court.)

Appeal from Circuit Court, Wood County; L. N. Tavenner, Judge.

Bill by J. Ross Timms, Jr., against John D. Timms and others. Decree for plaintiff, and defendant Monroe Uhl appeals. Affirmed.

McCluer & McCluer, for appellant. Hunter H. Moss, Jr., for appellees.

McWHORTER, P. John D. Timms and J. Ross Timms, Jr., his brother, were partners, under the firm name of John D. Timms & Bro., in the insurance business at Parkersburg, for some two years or more. On the 1st day of January, 1901, they dissolved their partnership. By the terms of the dissolution, J. D. Timms assumed all the obligations of the firm, and gave his note to J. Ross Timms, Jr., for \$200, payable in one year, and also assumed to pay a note for \$620 given by said J. Ross Timms, Jr., to J. D. Timms, and which had been discounted by J. D. Timms in the Citizens' National Bank at Parkersburg, and all accounts due the firm were to be collected by J. D. Timms. J. D. Timms was the owner of a lot, 40x100, fronting on Spring street, in the city of Parkersburg, upon which there was a house, which premises were occupied by himself and family as a residence. On the 18th day of June, 1901, John D. Timms and Emma M. Timms, his wife, conveyed said property to Monroe Uhl, the brother of said Emma M. Timms, in consideration of \$1,900, to be paid as follows: The grantee assumed the payment of a balance of \$665.70 due from the said John D. Timms on a deed of trust made by said Timms and his wife to secure a loan to the Citizens' Building Association, dated the 30th of April, 1898; also a promissory negotiable note for the sum of \$175, dated January 24, 1901, payable 90 days after its date, to the order of said Uhl, at the Citizens' National Bank of Parkersburg; also a negotiable note dated February 18, 1901, for \$400, payable 60 days after its date at the same bank, to the order of said Uhl; another negotiable note, payable at the same bank, for

¶ 1. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. §§ 466, 495, 504, 505.

\$200, to the order of C. M. Uhl, 90 days after its date; also another negotiable note, dated April 25, 1901, for \$225, payable to the order of M. Uhl, at the same bank, 60 days after its date; also another note, dated the 13th day of May, 1901, for the sum of \$200, payable 90 days after its date to the order of C. M. Uhl, at the same bank; and the further sum of \$34.30, as near as the same could be estimated, for protests and overdue interest upon said notes. On the 27th day of August, 1901, J. Ross Timms, Jr., sued out of the clerk's office of the circuit court of Wood county his subpoena in chancery, and at the November rules of said court, 1901, filed his bill against John D. Timms et al. for the purpose of setting aside said conveyance made by J. D. Timms and his wife to M. Uhl, dated June 18, 1901, as fraudulent and void, as being executed with the fraudulent design of delaying, hindering, and defrauding the creditors of the said John D. Timms, other than the said M. Uhl, and giving said Uhl a preference over the other creditors of said Timms, and praying that the said deed be declared to be fraudulent, and be set aside and held for naught, and the property be sold, and the proceeds distributed pro rata among all the creditors of said J. D. Timms whose claims existed at the time of said conveyance, and who should come in and unite in said suit, and agree to contribute to the cost and expenses of it, and for general relief.

Hermann O. Smith, trustee of the estate of John D. Timms in bankruptcy, filed his petition in said cause, showing that on the 22d day of November, 1901, the said John D. Timms was adjudged a bankrupt upon his own petition in voluntary bankruptcy, and praying to be made a party plaintiff in said suit, and joining plaintiff in the allegations and prayer of said bill. The defendant M. Uhl filed his answer denying all the allegations of fraud against himself, and all knowledge of fraud or fraudulent intent on the part of said John D. Timms in the execution of said conveyance to him, and denied all knowledge of any indebtedness on the part of said John D. Timms at the time of the execution of said conveyance, except that assumed by him as set out in the deed, to be paid as the consideration for such conveyance. Depositions were taken and filed by the plaintiff, and also by the defendants. The cause was heard on the 28th of March, 1903, and the court ascertained the indebtedness of John D. Timms to the plaintiff, J. Ross Timms, Jr., to be \$2,088.06, and decreed the recovery thereof, and further decreed the deed from John D. Timms and his wife to M. Uhl, dated the 18th of June, 1901, to be fraudulent and voluntary as to said claim of plaintiff, and set the same aside, as to said claim, as fraudulent and void; that there were no liens on said property, by judgment or otherwise, except the deed of trust to the Citizens' Building Association of Parkersburg; and that the

plaintiff, J. Ross Timms, Jr., by the filing of his bill attacking the validity of said deed, acquired a lien upon said real estate mentioned and described in the deed for the amount of his claim aforesaid, which lien was second in priority to that of the said building association; and decreed a sale of the said property by a special commissioner to satisfy the said two liens. From which decree the defendant M. Uhl appealed, and says that the court erred in decreeing that said deed from Timms and wife to Uhl was fraudulent and voluntary, and in setting aside and nullifying and declaring the said deed void, and that there was any fraud on the part of M. Uhl, connected with the making of the said deed, and in decreeing that the amounts due from John D. Timms to J. Ross Timms, Jr., constituted a lien upon the said house and lot, and in decreeing that the said conveyance was voluntary, "as the records show that the sum of \$1,900 was paid for this property, and the evidence is conclusive that that sum was a fair valuation for the property."

It is contended by appellees that the conveyance from Timms to Uhl was fraudulent, in law and in fact. In *Wait on Fraudulent Conveyances*, § 225, it is said: "Badges of fraud are suspicious circumstances that overhang a transaction, or appear on the face of the papers. The possible indicia of fraud are so numerous that no court could pretend to anticipate and catalogue them. A single one may stamp the transaction as fraudulent, and, when several are found in combination, strong and clear evidence on the part of the upholder of the transaction will be required to repel the conclusion of fraud." It will be observed on examination of the deed, which is one of general warranty, conveying the house and lot of John D. Timms to M. Uhl, there was no money consideration passed directly from Uhl to Timms, but simply the assumption by Uhl to pay off the lien due to the building association, amounting to \$665, and the payment of certain notes owing by said Timms, and described in the deed, the greater amount of which Uhl was already liable for as indorser for Timms, and the most of which were past due, lying in the bank under protest, and no provision was made, either by vendor's lien retained in the deed or otherwise, to secure the payment of said notes; no part of the consideration being secured, except the lien due to the building association, which was secured by virtue of the deed of trust which secured the original loan of \$1,100, which had been reduced by payments to \$665. This transaction, on the face of the deed, placed the property in position to have been conveyed by Uhl to an innocent purchaser without notice, beyond the reach of any of the unsecured creditors of said Timms. The purchaser, Uhl, must have known that his grantor was in failing circumstances. Although, in his answer, as well as his testimony, he claims to have had

no information of his insolvency, and made no inquiry whatever as to his indebtedness or financial condition, yet he states that always theretofore the said John D. Timms had taken up his paper promptly by payment or renewal, and further admits that several of the notes had been protested, and were long past due, and the bank had given him notice that the said notes must be taken care of. When he called the attention of Timms to the fact that the notes were pressing him, Timms proposed to sell him the property, and asked him \$2,400 or \$2,500 for it, but sold it to him at \$1,900, the price stated in the deed. Uhl says he made no inquiry as to any other indebtedness of the said Timms, but only purchased the property for the purpose of saving himself and his brother, who was indorser on a part of the paper assumed by him. In *Bartles v. Gibson* (C. C.) 17 Fed. 293 (Syl., point 2), it is held: "Where the grantee in a deed made to defraud the creditors of the grantor knows of the fraudulent intent of the grantor, or has notice of facts sufficient to excite the suspicions of a prudent man and put him on inquiry, he makes himself a party to the fraud." The fraudulent intent of John D. Timms is not seriously denied, and, indeed, the evidence, taken as a whole, clearly shows that his purpose in making the conveyance was to hinder, delay, and defraud his creditors, or some of them. In his testimony he says that Uhl might have known of other indebtedness of his than that mentioned in the deed, and assumed by Uhl. It seems almost incredible that a man of Uhl's evident intelligence and prudence would not have inquired of his brother-in-law, who had so far failed as to be unable to take care of his commercial paper, either by payment or renewal, as to his other indebtedness, and the cause of his failing condition. Surely his condition was sufficient to put Uhl upon inquiry. It is said in *Wait on Fraudulent Conveyances*, § 239: "Indebtedness or hopeless insolvency is, however, an important element of proof in marshaling badges of fraud to overturn a covinous transaction. * * * The conveyance, to be fraudulent, should bear such a ratio to the indebtedness as to tend directly to defeat the claims of creditors. It is not necessary that the conveyance should leave the grantor entirely without property, but the amount transferred and the part retained are all circumstances to be weighed. A heavy indebtedness of the grantor, together with a sale to a relative, of necessity form strong badges or indications of collusion and fraud, but are not in themselves, unsupported by other material facts, deemed conclusive proof of fraud." In the case at bar it is conceded that Timms conveyed all the estate he had to Uhl. As held in *Reilly v. Barr*, 34 W. Va. 95, 11 S. E. 750: "Where a conveyance has been made to a relative, and such conveyance is impeached by the creditors of the vendor as having been made with intent to

hinder, delay, and defraud them in the collection of their debts, the vendee relative will be held to stricter proof of the bona fides of the transaction than a stranger would be." See *Hutchinson's Ex'r v. Boltz*, 35 W. Va. 754, 14 S. E. 267 (Syl., point 4).

Another very suspicious circumstance connected with the transaction is the fact that the vendor was permitted to continue to occupy the premises in sole possession, and without payment of rent, and was authorized by Uhl to sell the same; and his wife, who was the sister of the vendee, was to have all the proceeds of such sale above the amount promised to be paid by the vendee—the \$1,900. Timms tried to sell the property, representing it as his own, and made a contract of sale, in writing, signed by himself, to one Leslie M. Sorrell. Although the contract had been mislaid or destroyed, it was well established that it was executed. Sorrell testified that Timms asked \$2,700 in the first place, and came down to \$2,500 or \$2,550—he was not sure which, but it was \$2,500 or over. This contract, he thinks, was made about the 15th of August, 1901. While the deed was put on record on the day it was executed, yet Timms and his wife, on the next day after the execution of the deed, in an interview with the plaintiff, gave him no intimation that they had conveyed the property, but he says they told him they intended to sell it in the future, leaving him to infer that they still owned it. He further states that on that day (the 19th of June), when he had the conversation, "they were trying to figure out how much John D. Timms was in debt, and how much he had paid out, and what he had paid it with; and he put the price on his property—he said he could get \$3,000 for it." Mrs. Timms denies having such conversation, but John D. Timms, in his testimony, makes no reference to it, by denial or otherwise. In *Livesay's Ex'r v. Beard*, 22 W. Va. 585 (Syl., points 8, 12), it is held: "(8) Where, after an absolute conveyance of real estate by a debtor in failing circumstances, he remains in possession of the land without contract, and without accounting for the use of the land, these facts are evidence of fraudulent intent in such conveyance." "(12) A deed fraudulent in fact is void in toto, and cannot stand as security for grantees who have notice of the fraud." See, also, *Curd v. Miller's Ex'rs*, 7 Grat. 185; *Peck v. Land*, 2 Ga. 1, 46 Am. Dec. 368; *Perkins v. Patten*, 10 Ga. 241; *Davis v. Turner*, 4 Grat. 422; *King v. Moon*, 42 Mo. 551. In *Sibley v. Stacey* (W. Va.) 44 S. E. 420, it is held: "Where the evidence relating to fraud is conflicting and tends to support the decree of the circuit court, such decree will not be disturbed, unless plainly wrong."

As to the evidence touching the inadequacy of the price mentioned in the deed to Uhl—\$1,900 for the property—it is somewhat conflicting, and, as to the estimate or price put upon it by the witnesses, the evidence

that \$1,000 was an adequate price preponderates to some extent; yet it would seem that the amount for which it was actually sold or contracted in good faith—and there seems to be no question about the contract to Sorrell by Timms for the property at the price of \$2,500 or \$2,600 being made in good faith, and such sale or contract actually made—would outweigh all expert testimony as to the value of the property given as the opinion of the witnesses, and this sale was made within two months after the date of the deed from Timms to Uhl, and there is nothing in the record to show that there was any material advance in real estate in that time.

There is no error in the decree, and the same must be affirmed.

(54 W. Va. 387)

DEEPWATER RY. CO. v. LAMBERT et al.
(Supreme Court of Appeals of West Virginia.
Dec. 12, 1908.)

RAILROADS—ORGANIZATION—EMINENT DOMAIN—PETITION—DESIGNATION OF TERMINI.

1. The terms of statutes providing for the organization of railroad companies, and the extension of lines of existing companies, requiring designation in the articles of incorporation and certificates for extensions of the termini of railroads and extensions thereof to be constructed by companies organizing and existing under them, are liberally construed in favor of the companies, and substantial compliance therewith is sufficient.

2. A railroad company duly organized under the general laws of this state, desiring to extend its line, as it may do, under section 53 of chapter 54 of the Code of 1899, after filing in the office of the Secretary of State a certificate stating "the point at or near which such extension in this state shall commence and terminate," passed at a meeting of its stockholders, and certified and filed as aforesaid, the following resolution: "Resolved, that the road be extended from its present terminus named in articles of incorporation and charter, at or near the village of Glen Jean, and near the junction of White Oak Fork of Dun Loup creek, with said Dun Loup creek in the county of Fayette, state of West Virginia. Said extension hereby authorized passes through the counties of Fayette, Raleigh, Wyoming, Mercer, Summers and Monroe, West Virginia, to a point on the state line on the line of Craig, Alleghany or Giles counties, Virginia, said extension to be located on the most practicable route from the present terminus at or near Glen Jean, in the county of Fayette, West Virginia, up the valley of Dun Loup creek, and its tributaries into the county of Raleigh, thence through Raleigh county by the most practicable route to the county of Wyoming, thence through Wyoming county by the most practicable route to the county of Mercer, thence through the county of Mercer to the Bluestone river, thence down the same by the most practicable route to New river, in the county of Summers, thence with New river and its tributaries by the most practicable route through the county of Summers to the county of Monroe, to a point on the state line and on the line of Craig, Alleghany or Giles counties, Virginia, said extension to be located on the most practicable route as shown on the maps and profiles filed as required by law; and that the foregoing resolution shall be filed with the Secretary of State of West Virginia as the certificate of extension as required under chapter 54 of the Code of

West Virginia." *Held*, that said resolution designates with sufficient certainty the termini of the proposed extension.

(Syllabus by the Court.)

Error to Circuit Court, Mercer County; J. M. Sanders, Judge.

Proceedings by the Deepwater Railway Company against S. P. Lambert and others to condemn land. From the judgment, plaintiff brings error. Reversed.

A. N. Campbell, R. C. & B. McClaugherty, and Brown, Jackson & Knight, for plaintiff in error. A. W. Reynolds, for defendants in error.

POFFENBARGER, J. The Deepwater Railway Company commenced a proceeding in the circuit court of Mercer county in August, 1903, to condemn rights of way over numerous tracts of land, among which were certain lands owned by the Pocahontas Coal & Coke Company and the Norfolk & Western Railway Company. On the return day of the notice the Norfolk & Western Railway Company appeared and filed an answer setting up certain rights under unrecorded contracts, to which the petitioner replied generally and specially, and moved for a continuance until September 1, 1903, and the motion was sustained over the objection of the petitioner. On said last-mentioned day the parties again appeared, as did also the said Pocahontas Coal & Coke Company, and pleas were filed denying petitioner's right to condemn. On said pleas issue was made, and the petitioner introduced its articles of incorporation, authorizing it to construct and operate a railroad from a point near Deepwater, in Fayette county, to a point at or near Glen Jean, in said county. Then it offered a resolution, adopted by the stockholders of the company, and filed in the office of the Secretary of State, providing for an extension of the road from Glen Jean to the state line, to the introduction of which the court sustained an objection interposed by the defendants, and refused to allow it and the proof of the filing thereof with the Secretary of State to go in as evidence. The court refused, upon the like objection, to allow the introduction of maps of locations of the proposed extension, resolutions respecting the same, and the surveys, and other evidence. To all these rulings the petitioner excepted, and, the defendants having offered no evidence, the court, trying the case in lieu of a jury, found for the defendants and dismissed the petition.

The court based its action upon the uncertainty of the extension resolution, holding that it does not state with sufficient certainty the point at or near which one of the termini of the extension will be located, and is for that reason void. The statute authorizing extensions of their lines by railroad corporations contains the following clause: "Provided, that such corporation, before commencing any such extension in this state, shall file in the office of the Secretary of State a certi-

cate stating the point at or near which such extension in this state shall commence and terminate." Section 53, c. 54, Code 1899. By way of compliance with this requirement, a copy of the resolution in question was certified by the chairman and secretary of the stockholders' meeting, and filed in the office of the Secretary of State, and reads as follows: "Resolved, that the road be extended from its present terminus named in articles of incorporation and charter, at or near the village of Glen Jean, and near the junction of White Oak Fork of Dun Loup creek with said Dun Loup creek in the county of Fayette, state of West Virginia. Said extension hereby authorized passes through the counties of Fayette, Raleigh, Wyoming, Mercer, Summers and Monroe, West Virginia, to a point on the state line on the line of Craig, Alleghany or Giles counties, Virginia, said extension to be located on the most practicable route from the present terminus at or near Glen Jean, in the county of Fayette, West Virginia, up the valley of the Dun Loup creek and its tributaries into the county of Raleigh, thence through Raleigh county by the most practicable route to the county of Wyoming, thence through Wyoming county by the most practicable route to the county of Mercer, thence through the county of Mercer to the Bluestone river, thence down the same by the most practicable route to New river, in the county of Summers, thence with New river and its tributaries by the most practicable route through the county of Summers to the county of Monroe, to a point on the state line and on the line of Craig, Alleghany or Giles counties, Virginia, said extension to be located on the most practicable route as shown on the maps and profiles as required by law, and that the foregoing resolution shall be filed with the Secretary of State of West Virginia, as the certificate of extension as required under chapter 54 of the Code of West Virginia." It will be observed that the beginning point of this extension is definitely fixed by the first clause of the resolution. The next clause gives a general indication of the route of this extension without fixing the terminus at any certain point. It says the extension shall go "to a point on the said line of Craig, Alleghany or Giles Counties, Virginia." The court judicially knows that these three counties of Virginia border on the West Virginia line for a long distance, and counsel for the defendants, in his brief, states that distance to be one hundred and thirteen miles. But this clause is followed by another, giving a more particular description of the route, commencing at Glen Jean and giving every county consecutively through which it is proposed to extend the road, and concluding with the following language: "Thence with New river and its tributaries by the most practicable route through the county of Summers to the county of Monroe, to a point on the state line and on the line of Craig, Alleghany or Giles counties, Virginia." Fol-

lowing this particular description, the point at which the extension will strike the Virginia line will necessarily be a point on that line where the three counties of Monroe, Summers, and Mercer corner on the line of Craig county, as will appear by reference to a map of the state showing the counties. This describes both the route and the terminus, definitely fixing the latter for all practical purposes. No citation of authority is needed to show that courts take judicial notice of the geography of the state, its lines and subdivisions. Reading this particular description of the route and terminus of this extension with the map before us, it is found impossible, without doing violence to the language of the resolution, to reach the point on the Virginia line elsewhere than at or near this common corner of the three counties. Following the course of the New river upward from the mouth of the Bluestone river, one strikes that corner, and it is impossible to strike the state line elsewhere without going through Monroe county, instead of to Monroe county, or through Mercer county a second time, instead of one time, as prescribed by the resolution. Here, however, it is suggested that the words "and its tributaries," in referring to the New river, make the point uncertain. But the tributaries cannot be followed to any other point on the Virginia line without going either into Monroe county or into Mercer county, and to do either of these things would be inconsistent with the clear language of the resolution respecting the objective point of the road. It may be possible that in following the general course of the New river it will be practicable and advantageous to depart from it at some point, and follow a tributary for some distance, and then go back to the river. For this reason it does not appear that the words "and its tributaries" will be without meaning or force under this interpretation of the meaning of the resolution, and the rule of construction requiring the giving of effect to every word, when possible, is not violated.

This construction is in harmony with that other rule, applicable alike to statutes, contracts, deeds, and other instruments, which makes words and clauses general in their nature yield to those which are more particular, when both the general and the particular clauses refer to the same matter. *Suth. Stat. Cons.* §§ 158, 159, 216. The first clause is general, but its generality is restrained and limited by what follows. Both it and that which follows it relate to the same thing, the terminus of the road. As independent clauses, they would be inconsistent. As clauses standing together, they must be read and considered together, and the instrument interpreted as a whole. In doing this, the rule of construction is to be applied, and its application makes the terminus sufficiently certain to comply substantially, at least, with the requirements of the statute, and nothing more is necessary. As a rule, the courts

give to statutes authorizing the formation of railroad companies a liberal construction in respect to the requirements thereof concerning the designation of the termini of the road for the construction of which the company is formed. Redf. on Railways, vol. 1, pp. 412, 413. One of the earliest cases bearing on this question is *Railroad Co. v. Sullivan*, 5 Ohio St. 278. The certificate of the organization of the corporation in that case was held insufficient, but it lacked certainty in almost every particular. The statute required a statement, not only of the termini of the road, but also of the names of the counties through which it should pass. One terminus was described as "a point on the Ohio and Pennsylvania state line in the county of Trumbull"; and the other as "a point on the Ohio river in same state, in the county of Brown or Adams." The route was described as running through "Trumbull, Mahoning, Portage, Stark, via the town of Massillon, Wayne, it may be Holmes, Knox, Licking, Franklin, via the city of Columbus, or near thereto, Pickaway, or it may be Fayette and Madison, or one of them, Ross or Highland, and it may be through each of them, Pike, it may be Brown or Adams." Here was uncertainty both as to the counties through which the road would pass and as to the termini. In *Callender v. Railroad Co.*, 11 Ohio St. 516, a very liberal construction was given to the statute, and the certificate was held good. It read in part as follows: "To commence at some point to be hereinafter designated in the township of Hudson, in the county of Summit, passing through the county of Portage or Cuyahoga." This was not a condemnation proceeding, and the company denied it had any corporate existence, and upon two well-settled principles a decision of the question of the sufficiency of the description might have been avoided. In all ordinary actions *ex contractu* or *ex delicto* it is enough to show corporate existence *de facto*, and a corporation is generally precluded by estoppel from denying its own existence. But the court did pass upon the sufficiency of the articles of incorporation, and asserted most unequivocally and emphatically the rule of liberal construction in favor of the company, saying, among other things: "But, the object being of public interest, and the construction of such roads by private enterprise equally subservient of the convenience of the public as if constructed by the state at public expense, such enterprises undertaken by private associations have always been favored by the state, and the object of the Legislature has been, as evinced by past legislation, to invest such companies with all that right of eminent domain which the state herself might reasonably exercise in the location, construction, and maintenance of such public improvement. The termini and line of this road would, without doubt, have been regarded sufficiently certain if expressed in the same language used in this certificate in a special act or charter under our former

Constitution; and I am unable to perceive, either in reason or law, any ground for an exception to its validity for want of certainty, under this general act, which could not have been urged against the incorporation of the company if so claimed under a special act or charter."

Eakright v. Railroad Co., 13 Ind. 404, was a suit to recover upon a subscription to the original stock of the railroad company, and the court, properly or improperly, proceeded upon the theory that, in order to recover, it was necessary that the company prove its existence *de jure*. The organization was effected under a special act of the Legislature, requiring a designation of "the name of the place from which and the place to which the proposed road is to be constructed." It required this designation to be made in articles of association to be subscribed by the stockholders, and the description, as given in that instrument, described the termini as follows: "The railroad shall commence at the west, or such point on the west line of De Kalb county, with a view of connecting with the present Auburn and Eel River Valley Railroad, at such point as may be agreed on by the companies so connecting; thence running down Eel river valley to Logansport." In passing upon the sufficiency of its designation, the court said: "The statute simply requires the name of such place to be set forth. This must be done with a reasonable degree of certainty. In our opinion, the articles on their face show that this requirement of the statute has been properly complied with." The court could not have deemed it a strict compliance, as the beginning point was not stated, but was left to be fixed by agreement. Hence they must have considered a substantial compliance sufficient, and, in doing so, the construction was certainly a very liberal one in favor of the company.

In *State v. Bailey*, 19 Ind. 452, and *Heaston v. Railroad Co.*, 18 Ind. 275, 79 Am. Dec. 430, the court expressed doubt as to whether the following description of termini in articles of association was sufficient: "Said road shall commence at Fort Wayne, in the county of Allen, and shall be constructed to the eastern line of the county of Wayne, pointing in the direction of Cincinnati." But the court said: "If it had been that that terminus was to be the east line of Wayne county at the point where it would meet a road in Ohio, extending from Cincinnati, with which it was to form a continuous line between Fort Wayne and Cincinnati, we think it would clearly have been sufficient. Inferentially, perhaps, it is thus stated now." That would have been a very indefinite and uncertain designation, as compared with that found in the resolution of extension now under consideration. The Ohio statute requires the designation of the names of the places of the termini of railroads, and not the names of the places "at or near" which the termini will be, as ours does; but it was held in *Warner v. Callender*, 20 Ohio St. 190, that

It was sufficient to say "in or near the town of Lima." Again, in *Railroad Co. v. Hatch*, 20 N. Y. 157, a statute requiring the articles of association to state the length of the proposed road "as near as may be" was held to have been sufficiently complied with by the statement that the road was to be "about seventy-five miles long." The statute further required an affidavit showing that \$1,000 per mile had been in good faith subscribed, and 10 per cent. on the subscription paid, and it was held that the statement in the affidavit that \$84,100 had been subscribed was a sufficient compliance with this requirement. The court decided that the omission, from the affidavit required, of the words "in good faith," in stating that 10 per cent. had been paid in cash on the subscription, was immaterial.

These authorities abundantly establish the rule of liberality in the construction of statutes authorizing the formation of railroad companies. The courts everywhere justly hold that the organization of these corporations is favored and encouraged by the Legislature as necessary agencies of internal improvement, promotive of the convenience of the public, and necessary to the development of the material wealth of the state, as well as the furtherance of its commercial interest and general welfare. In no state or country is there greater necessity or reason for railroad building and extension than in the state of West Virginia, and its legislation has been at all times such as to encourage their construction and operation. Under nothing but the strictest rule of interpretation could it be held that this resolution falls short of a compliance with the statute. A careful examination of the authorities fails to reveal any such rule as obtaining anywhere.

Whether, in a condemnation proceeding, a railroad company must prove its existence *de jure*, when the plea of *nul tiel* corporation is interposed, has been extensively and ably discussed in the briefs filed, as well as in the oral argument; but the decision of that question is wholly unnecessary, as the certificate and resolution under which the proceeding has been instituted are clearly valid.

From this conclusion it results that the court below erred in refusing to admit the evidence offered by the applicant, and also in its finding and judgment. Therefore the judgment will be reversed, and the cause remanded for further proceedings, in accordance with the principles here decided, and, further, according to law.

(54 W. Va. 373)

REGER v. GALL.

(Supreme Court of Appeals of West Virginia.
Dec. 12, 1903.)

DECREE—REVERSAL—NECESSARY PARTIES.

1. If, in any way, it be shown by the record that the final decree was rendered in the ab-

sence of necessary parties, such decree will be reversed, and the cause remanded, in order that proper parties may be made.

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County; John Homer Holt, Judge.

Bill by John T. Reger against David W. Gall. Decree for plaintiff, and defendant appeals. Reversed.

Fred O. Blue, for appellant. J. Hop Woods, for appellee.

MILLER, J. It appears from the record in this cause that on the 1st day of March, 1898, the appellant, D. W. Gall, sold to appellee, John T. Reger, the Plaindealer, a newspaper plant in the town of Philippi, Barbour county, W. Va., for \$1,000. Reger executed to Gall his seven several promissory notes for said sum—one for \$50, payable October 30, 1898; five for \$150 each, payable October 30, 1899, 1900, 1901, 1902, and 1903, respectively; and one for \$200, payable October 30, 1904—all bearing date on the day and year first aforesaid, and each bearing interest from its date. To secure to said Gall and his assigns the payment of the aforesaid notes, also another note of said Reger to Gall for \$248.83, bearing date on the 9th day of November, 1896, and whatever sum might be due said Gall from Reger on a settlement of their partnership accounts, said Reger, by deed of trust of the even date of said first-mentioned notes, conveyed to F. O. Blue, as trustee, the entire Plaindealer plant, and all the stock and fixtures of the office, in which deed it was provided that, should the said John T. Reger pay off and cancel the several evidences of debt to said Gall or his assigns, the deed was to be void, but, in the event of his failure so to do, it should be the duty of said trustee to sell said property at public auction, when requested by said Gall. It further appears that appellant and appellee had been partners in the Plaindealer plant; that the said \$248.83 note represented a settlement of their accounts up to the 9th day of November, 1896, the date of said note; but that the other partnership accounts and transactions pertaining to said newspaper business from the date last mentioned to the date of the deed of trust had not been settled, and have not been settled since that time. Some time in June, 1899, said Blue, trustee, as aforesaid, being required by appellant so to do, advertised for sale, under the trust deed, the Plaindealer plant and property conveyed to him as aforesaid. Thereupon the said Reger, on the 7th day of July, 1899, presented to the judge of the circuit court of Barbour county his bill, verified by affidavit, against said Gall and Blue, trustee, praying an injunction to enjoin and restrain the trustee from advertising a sale under said trust, and from the execution thereof, until the matters alleged in the bill could be inquired into.

The bill sets out the sale of the newspaper plant; the execution of the notes by plaintiff

to Gall therefor; also the said note for \$248.83, and the agreement to pay to Gall whatever might be due from plaintiff to him upon a settlement of partnership matters theretofore existing between them. It then, in substance, alleges that a part of the time from the 20th day of June, 1893, until the 1st day of March, 1898, plaintiff was a partner of Gall in the said newspaper; that very little, if anything, is due to Gall, according to his own pretensions, upon a settlement of their partnership accounts mentioned in the trust deed; that at the time of said purchase Gall agreed with plaintiff not to collect, or endeavor to collect, said \$248.83 from plaintiff until he had paid said annual installments; that without such agreement plaintiff would not have purchased said newspaper, or have executed said trust thereon, for the reason that he wanted sufficient time within which to pay for the same, to all of which said Gall agreed; that the first one, and only one, of said deferred annual installments which has become due, plaintiff has paid with the exception of a very few dollars, which he has arranged for in a satisfactory manner with the person to whom said Gall has assigned the same; that nothing further is now due and payable thereon until the 1st day of October, 1899; that, as plaintiff is informed, said Gall has assigned, or pretended to assign, either in payment of his own debts or as collateral security for the same, the residue of said notes, so that nothing is due him thereon, but as to whom said Gall has assigned said notes plaintiff is not fully advised. It further alleges that Gall is not living in this state, and is insolvent; that defendant has demanded of plaintiff said \$248.83, which plaintiff has refused to pay, not only because of said agreement, but because he does not owe the same; or, if owing the same, he has lawful set-offs against it to the full amount thereof, of all of which said Gall is fully advised.

Plaintiff then avers that Gall is indebted to him the amount of a negotiable note for \$118.29, dated April 9, 1891, executed by Gall to him, and by him indorsed for Gall's accommodation, and by Gall indorsed to J. N. B. Crim, payable at Tygarts Valley Bank, whereof protest was waived, and, in default of payment thereof by Gall, paid by plaintiff to Crim, who assigned the same without recourse to plaintiff; and, further, that on the 18th day of February, 1895, said Crim recovered a judgment in the name of James Nutter against said Gall, and previously against G. B. Harvey for \$633.94, with interest and costs in the circuit court of said county, which, plaintiff says, said Gall is liable for, and which remains unpaid, of which \$200, part thereof, has been assigned by said Crim for a valuable consideration to plaintiff, which last-mentioned sum also remains unpaid; that the said \$200 and the said note constitute proper legal set-offs against said \$248.83 due from plaintiff to Gall, which plaintiff offers to set off against the same.

Copies of the said judgment and assignment of part thereof are made parts of the bill. The prayer is that the plaintiff may have a decree setting off his said demands against said \$248.83; for a settlement of the partnership accounts between plaintiff and said Gall; that, if anything be found due plaintiff, it may be decreed to him; and that the trustee be enjoined from advertising or selling the property under the trust deed until said matters be inquired into.

The record shows that on the 10th day of November, 1899, the defendant, D. W. Gall, tendered in court his answer to the plaintiff's bill, to which answer the plaintiff replied generally. The answer referred to is, in fact, a demurrer and answer together. Respondent demurs to the plaintiff's bill, because said James Nutter and G. B. Harvey are not made parties thereto. The answer states the terms of the said sale, the execution by Reger of the notes and deed of trust, and then alleges that on the 9th day of November, 1896, respondent induced plaintiff to make at least a partial settlement with him, upon which partial settlement there was found due from plaintiff to respondent the sum of \$248.83 for which said note of that amount was given by Reger; and that there is due from plaintiff upon a proper settlement at least \$300 more. Respondent denies any agreement with plaintiff for an extension of the time of payment of said \$248.83 note. Respondent says that on the 16th day of January, 1899, for value, he assigned \$100 of the last above mentioned note to R. E. Miles, of Washington, D. C., and that on the 12th day of June, 1899, he assigned \$85 thereof to S. M. Yeatman, of the said city, of which assignments the plaintiff had notice before the institution of his suit, and before the assignments by Crim to plaintiff of said alleged set-offs; that said alleged set-offs were obtained by the plaintiff after respondent had directed the trustee to sell the property under the trust, and after the trustee had notified plaintiff that he was required to enforce the deed of trust. Respondent further says that plaintiff owes him \$280 in rents; that the said judgment of Nutter against Harvey and himself was, in fact, paid to Crim before said assignment of part thereof to plaintiff; that the said \$118.29 is more than offset by said rents due from plaintiff to respondent; and that the books showing the accounts between plaintiff and respondent are all in the possession of plaintiff, and that he declines to surrender them to respondent, or to make any settlement of the matter between them. Respondent prays, among other things, for a settlement of the said partnership accounts.

The affidavit of said Crim is filed. Affiant says that on the 29th day of June, 1899, he assigned and transferred to John T. Reger, by a paper writing of that date, a copy of which is filed with plaintiff's bill, \$200 out of a certain judgment of \$633.94, with interest thereon from the 12th day of February, 1895, and \$32.10 costs, recovered in the circuit court

of Barbour county by one James Nutter against said D. W. Gall and G. B. Harvey; that said assignment was for full value; that no part of said judgment had, at the time of said assignment, or has since, been paid to him by either Gall v. Harvey; that said assignment was made to Reger to enable him to set the same off, together with a claim of \$118.29, against said \$248.83, and that said judgment, although in the name of James Nutter, belongs to affiant.

Depositions were taken and filed in the cause on behalf of plaintiff and defendant. The plaintiff testifies that defendant is insolvent; that when his bill was filed he owed Gall the \$248.83, and interest thereon, and that Gall owed him said \$118.29, and \$200 assigned to him by Crim, with their interest; that he believed upon a settlement of their partnership account Gall would owe him thereon; and that it was expressly understood between Gall and himself at the time the \$248.83 note was given it was not to be paid, and that deponent was not to be called on to pay it until after the office (or newspaper) notes proper were all paid. It will be observed that the former note bears date November 9, 1896, and the latter notes March 1, 1898. Plaintiff admitted that the notice of sale by the trustee had been inserted in his newspaper before the date of the assignment to him of said \$200, part of said judgment. It is further proved that I. E. Robinson is the owner, by assignment, of said five notes for \$150 each and said \$50 note, upon which notes \$200 has been paid to him. J. N. B. Crim states that the Nutter judgment belonged to him, and that he assigned \$200, part thereof, to Reger. Appellant testifies that Reger owes him at least \$350 on their unsettled partnership account; that Reger had notice, before bringing his suit, of the said assignments by appellant to Miles and Yeatman of parts of said \$248.83; that when he required the trustee to advertise the trust property for sale under the deed of trust he was acting for himself and for Miles and Yeatman under an agreement with them to see that the said note should be paid; and that the books and papers relating to the said partnership accounts are in the possession of Reger, who refuses to turn them over to appellant. R. E. Miles testifies that Gall assigned to him for a valuable consideration \$100 of the \$248.83 note prior to June 29, 1899. Yeatman also testifies to the assignment of \$85 of said note to him on the 12th day of June, 1899, for value. Both of said sums of \$185 are shown to be unpaid, and that Gall had agreed at the time of the assignments to see to the collection of the same for the assignees thereof. The said judgment of which the \$200 assignment purports to be a part is in the name of James Nutter. It was rendered previously against G. B. Harvey, and on the 18th day of February, 1895, against said D. W. Gall. There is nothing in the record showing or

attempting to show that, as between themselves, Gall and Harvey are not equally liable for the amount of said judgment. Crim is not a party to the record of said judgment. No assignment thereof by Nutter to Crim is filed or proved.

Upon the record thus made up the cause came on to be heard by the court, and thereupon the defendant moved the court to dissolve said injunction, which the court refused to do, but adjudged, ordered, and decreed that said injunction should be perpetuated, and that the plaintiff should recover from the defendant his costs. From this decree, appellant was allowed an appeal.

It is difficult to understand how the circuit court arrived at the conclusion that the injunction should be perpetuated, at least, without some reservation or saving as to the matters set up in the pleadings other than said \$248.83 note. That note is shown to be a valid contract, and unpaid at the time of the commencement of plaintiff's suit. While it does not expressly appear that it was then due according to its terms, that fact is nowhere disputed or denied. No valid or binding agreement between the parties thereto for an extension of the time of its payment has been proved. Large parts of the debt therein specified were assigned to third parties for value, of which the plaintiff had notice before he commenced his suit. The assignees are not made parties. If the court applied the said \$200, part of said Nutter judgment, assigned to the plaintiff as aforesaid, to said \$248.83 as a set-off, such application (if proper under any circumstances) is without proof that Gall was or is the principal debtor in the said Nutter judgment. One of the objects of an adjudication is to end litigation between the parties as to the matter in controversy. The allowance of this \$200 as a set-off, in the absence of Nutter and Harvey as parties, would afford cause for other controversies. There would be nothing to prevent the issuance of an execution against Gall and Harvey for the full amount of said judgment, notwithstanding said assignment and application of part thereof as aforesaid. An execution, being founded on a legal judgment, must follow the judgment, and be warranted by it, and this depends on its nature and form, and must conform to it in every respect as to the amount of the judgment and character of the parties, or it is void. Herman on Ex. § 55.

Reger says in the deed of trust, signed, sealed, acknowledged, and delivered by him, that it is to secure "whatsoever may be due the said D. W. Gall from the said John T. Reger on a settlement of their partnership account," as well as the notes specified therein. In addition to this admission, we have the evidence of Gall that there is at least \$300 due him on a settlement of the partnership accounts, disputed only by the statement of Reger that he does not owe Gall

anything. Any amount found due to Gall on such settlement is a lien on the newspaper property conveyed by the trust. Such settlement should be made before any sale of the property can take place with safety to the persons already interested as lienholders, or to a purchaser thereof. Besides, it appears that I. E. Robinson is the owner and holder, and was such before the institution of the suit, of the largest part of the said trust debt. It is important and necessary that all parties who hold any of the said indebtedness of Reger to Gall secured by said deed of trust should be before the court, that their rights and equities may be ascertained, before a sale of the property shall be made. "When a court of equity takes jurisdiction of a cause for one purpose, it will go on and dispose of the questions involved to avoid a multiplicity of suits." *Chrislip et al. v. Teter et al.*, 43 W. Va. 365, 27 S. E. 292. It clearly appears that persons interested in the subject-matter of the suit have not been made parties, and were not before the court, although that fact was brought to the attention of the court by the pleadings and proof. The court should have caused all proper parties to be made to the bill. Code 1899, c. 125, § 58. It is immaterial in what manner it is brought to the attention of this court that the decree complained of was rendered. In the absence of proper parties, the decree will be reversed, and the cause remanded, in order that proper parties may be made. *Gallatin L. C. & O. Co. v. Davis et al.*, 44 W. Va. 109, 28 S. E. 747.

For the reasons stated, there is error in the decree of May 26, 1900. It must therefore be reversed, and held for naught, the said demurrer to the bill sustained, and the cause remanded to the circuit court of Barbour county, with leave to the plaintiff to make any necessary additional parties thereto, and to have such other proceedings therein as the principles of equity may warrant.

(54 W. Va. 681)

SCHAEFFER'S ADM'R v. SCHAEFFER'S ADM'R.

(Supreme Court of Appeals of West Virginia.
Dec. 16, 1903.)

WILL—CONSTRUCTION—SURVIVORSHIP—NATURE OF ESTATE.

1. Does survivorship in a will relate to the death of a testator, or to the death of the tenant for life, or other point of time?

2. A will gives testator's widow a life estate, with power to sell some realty and consume its proceeds, and then says, "At the death of my wife what real estate and personal property may be left shall be sold, and divided equally among my children, or their children, or their representatives."

Testator's children took no absolute or vested estate during the life tenancy, and such estate could vest only in those living at its close, and a deed of trust for debt given by a child dying before the life tenant has no effect upon testator's property against children of such child.

(Syllabus by the Court.)

Appeal from Circuit Court, Jefferson County; E. Boyd Faulkner, Judge.

Bill by William Schaeffer's administrator against Emanuel Schaeffer's administrator. Decree for plaintiff, and defendant appeals. Reversed.

D. B. Lucas and J. M. Mason, Jr., for appellant. D. C. Westenbaver, Joseph Trappnell, and Forrest W. Brown, for appellee.

BRANNON, J. William Schaeffer made a will by which he gave to his wife for life all his real and personal property, with power to sell some and use its proceeds, and then provided that "at the death of my wife what real and personal property may be left shall be sold and divided equally among my children, or their children, or their representatives." The testator died leaving his widow. Two of his sons, John W. and Emanuel, gave deeds of trust to secure debts on their interest in their father's estate, and then died during the lifetime of said widow. One of the said sons left a daughter, Deborah Merchant, and the other left children, one named Cora Merrit. The administrator with the will annexed of the testator, having sold the land, filed a bill to construe the will and give him directions how to dispose of the fund, there being conflicting claimants, the creditors of the dead sons claiming, under said deeds of trust, payment of their debts out of the fund, on the theory that the sons who made said trust deeds had vested estate in the land, while their children denied that their fathers had any estate for the deeds of trust to operate upon. A decree was pronounced holding that the sons took a vested estate at their father's death, and that the deeds of trust were effective, and directing their satisfaction out of the fund.

Had the two sons a vested property in the estate of their father, so that the deeds of trust given by them would be good against their children? Did the will vest those sons with an estate at their father's death, or had they only a contingent remainder after their mother's life estate, to become vested only in case they should survive her? Counsel for the trust creditors say that the words "or their children" are words of survivorship, and that they show that the testator had in contemplation that some of his children might die, and that the question is the time of such death; in other words, did he think of such death occurring before his own death or afterwards? They say that he contemplated it as occurring before his own death, and that he used those words to prevent a lapse of the legacies by their death in his lifetime. Viewing it as a question of survivorship, they make the burden of their argument and seek to control the case by the principle found in *Martin v. Kirby*, 11 Grat. 67, that "in a devise or bequest over to survivors at the death of a devisee or legatee for life, in the absence of the expression of

a particular intent on the part of the testator, the survivorship has relation to the death of the testator." Counsel say that estate absolute vested in the sons at the testator's death. It is not demanded in this case that we say whether or not that principle is sound; for, if we treat the case as one of survivorship, even under that rule we can say that the survivorship does not relate to the death of the testator, but to that of the life tenant, because that rule says its application depends upon whether the will manifests another intent, as the will in hand does.

However, speaking for myself, I am at present ready to say that the rule is not sound. Once it was, but not now. Numerous English decisions once upheld it. Jarman on Wills, p. *1538 (6th Ed. 667), after giving numerous cases stating that rule, says, "The sequel will serve to show that no rule of construction, however sanctioned by repeated adoption, is secure of permanence unless founded in principle," and states that the rule is not based on reason, and that "the reader, on a perusal of later cases, will find himself probably impelled to the conclusion that where there is a gift of personal estate to a person for life or any unlimited interest, and after the determination of such interest to certain persons nominatim, or to a class of persons as tenants in common, and the survivors of them, these words are construed as intended to carry the subject of gift to the objects who are living at the period of distribution." On star page 1547, Jarman says, after a review of many cases: "In this state of the authorities one need scarcely hesitate to affirm that the rule that reads a gift to survivors simply as applying to objects living at the death of the testator is confined to those cases in which there is no other period to which survivorship can be referred, and that, where such gift is preceded by a life or other prior interest, it takes effect in favor of those who survive the period of distribution, and of those only." American cases recognize this change. *Branson v. Hill*, 31 Md. 181, 1 Am. Rep. 40; *Wren v. Hynes' Adm'r*, 2 Metc. (Ky.) 129. Several Virginia decisions support Martin v. Kirby. *Stone v. Lewis*, 84 Va. 474, 5 S. E. 282; *Gish v. Moomaw*, 89 Va. 345, 15 S. E. 868; *Chapman v. Chapman*, 90 Va. 409, 18 S. E. 913; *Crews' Adm'r v. Hatcher*, 91 Va. 378, 21 S. E. 811. But the latest, *Cheatham v. Gower*, 94 Va. 833, 28 S. E. 853, does not. In it a will gave "my nephew, T. M. C., during life, my mansion house * * * and at his death to his surviving children." Held, that the remainder after the life estate passed to the children of T. M. C. living at his death, whether living at testator's death or not. Likely, *Jameson v. Jameson's Adm'r*, 86 Va. 51, 9 S. E. 480, 3 L. R. A. 773, is against it. More does the rule apply as to personality, to be realized by a sale of land, as in this case, after the testator's death, and then divided. "Here the property to be distribut-

ed is not in a condition to be divided as directed by the testator until the death of a life tenant, and hence only those who survive him can take." 1 Underhill on Wills, § 350.

But be the case of a plain case of survivorship as it may, I think this a case of substitution, not survivorship. We have not the case of a survivor of several persons alike in interest, but a case where some persons are substituted in default or place of others. Take the will. What was the testator's intent? That at the death of the widow life tenant the property should go to the testator's children, if then living, and, if not, then to their children. If he intended to give unconditionally and at once to his children a vested estate, why not simply give to them? He did not do so. He used more words than those necessary to do this. He says "my children, or their children." He meant something by these additional words. What did he mean by these added words "or their children"? He did not mean "and" their children. We cannot change "or" into "and," for this is only done to execute plain intent; but in this case that is obviously not the case. We must give "or" its natural, usual, grammatical effect—a disjunctive effect. The testator did not mean to give his executor arbitrary power to choose either his own children or their children. He plainly meant to give to his own children, if living at date of distribution after death of his widow, and, if not, then to their children. Do we risk anything in saying that such was the purpose? Let us see if authority will not so interpret that little word "or." "The term [substitution] is generally applied to limitation intended to provide for the death of prior devisees or legatees before the period of distribution. Thus, a direct gift to A. or his children goes to A. if he survive the testator, and to his children if he does not. If the gift be preceded by a life estate, the substitutional gift takes effect whether A. dies in the lifetime of the testator or the tenant for life." 29 Am. & Eng. Ency. L. (1st Ed.) 404. A will gave a wife a life estate, and directed a sale after her death, and gave fixed legacies to two grandchildren, and the balance to go to his six children "or their heirs." It was held that the word "or" interposed between the first legatee and the heirs was a word of substitution, and that the only persons entitled to share were those children living at the distribution and the children of dead ones. The word "or" was held to be equivalent to "in case of the death of." It is stated there that where a legacy is not payable at once on the death of the testator, but an intermediate life estate is given, and the testator provides that, in case of a death of a legatee, it is to be given to some one else, then the words "in case of the death of" mean "in the lifetime of the tenant for life—that is, before the money becomes payable." It was said to create an

alternative devise. The court said: "The vesting of the estate in interest, as well as in possession, in the children of the testator, depended on their surviving the day of distribution." As a daughter died before the end of the life estate, her conveyance was held to pass nothing. *Ebey v. Adams*, 135 Ill. 80, 25 N. E. 1013, 10 L. R. A. 162. In *Robb v. Belt*, 12 B. Mon. 643, a devise was to a widow during widowhood, and on her marriage or death the estate to be divided among "my eight children or their heirs." It was contended that on the death of the testator the eight children took a vested interest in remainder, the possession only being postponed until the marriage or death of the widow. It was held that a proper construction of the will required the division to be made between the testator's children living at the marriage or death of the widow, and the heirs of those dead; that it was an alternative or substitutional devise; that the words "or their heirs" must be taken as a designation of persons to take, or words of purchase, and were equivalent to "or such descendants of any that may be dead or may be their heirs," referring to the time of division. It was said, as I have above said: "But as the testator does not say 'among my living children,' but 'among my eight children,' 'or' is proper to show, and does show, as to some there is an alternative devise in case of death before the time referred to, and in that event the heirs of the deceased take in place of the deceased." It was held that "no absolute and indefeasible interest vested in any of the children until the death or marriage of the widow." In *Wren v. Hynes' Adm'r*, 2 Metc. (Ky.) 129, was a devise that when the testator's youngest child should come of age a fund should be "divided among all my surviving children or their heirs," and it was held that survivorship referred to the date of distribution, not to testator's death, and the words "or their heirs" were words of purchase, and not limitation. "A daughter of the testator, who survived him, having died without issue prior to the period of distribution, her husband is not entitled to an interest in the estate." This was because she had no vested estate. 1 *Redfield on Wills*, 486, states the same meaning for the word "or" so used. *Jarman on Wills*, p. *482, cites *Girdlestone v. Doe*, 2 Sim. 225, as English authority to show that where a legacy was given to A. for life, then to B. "or his heirs," "B. did not take the absolute interest, but that the latter words created a substitutional gift for his next of kin in the event of B. dying in the lifetime of A." "Where, however, the word 'or' is applied to a bequest which may not take effect in possession on the testator's death, another point presents itself, to wit, whether the word 'or' (construing it to be introductory to a substituted gift) is meant to provide against the contingency of the first-named legatee dying in the testator's

lifetime, or the contingency of his dying in the interval between the death of the testator and the vesting in possession." "And here it may be stated that those cases in which the word 'or' has been construed as introductory to a substitutional bequest (in which sense it seems tantamount to the words 'in case of death') present a distinction between immediate and future gifts similar to that which has been just pointed out. Thus, a legacy to A. or his children, or to A. or his heirs, is construed as letting in the children or next of kin in event of A. dying in the lifetime of the testator; while, on the other hand, a bequest to A. for life, and after his decease to B. or his children, is held to create a substitutional gift in favor of the children of B. in the event of B. dying in the lifetime of A." *Jarman on Wills*, pp. *482, *1570. Legacy to T. "or his heirs." Held, that "the legacy to T. was not an absolute one, but that in the event which had happened—T.'s death before the tenant for life—his heirs took directly under the will as substitutes for him." *Heyward v. Heyward's Ex'rs*, 7 Rich. Eq. (S. C.) 289. Note that the children of the two dead sons of Schaeffer took, not by descent from their father, but from their grandfather as purchasers under his will. 1 *Underhill on Wills*, § 353. Having given authorities from abroad—and many more could be given—I now refer to *Toothman v. Barrett*, 14 W. Va. 301, as decisive. A will gave a daughter a life estate in land, and gave all his land after her death to "J. B. or his heirs," and in case of his death then the land to be sold, and proceeds divided as in the will stated. The court held that the force of the word "or" was to give their father but a contingent remainder. See *Ewing v. Winters*, 34 W. Va. 23, 11 S. E. 718.

I will add that even under the rule put in *Martin v. Kirby*, 11 Grat. 67, the dead sons took only a contingent remainder, they dying before the life tenant, because that case applies survivorship to the date of testator's death, "in the absence of the expression of a particular intent on the part of the testator," and in this case the words "or their children" show an intent to vest estate in the sons, if living at the death of the life tenant. I think I have cited enough law to show that the force of "or their children" is equivalent to "in case of their death"; that they provide those who take in place of the first legatee; that they make a condition on which the vesting of any estate depends; that they have the effect to give only a contingent remainder to Schaeffer's children, preventing any estate vesting in them at the testator's death.

I consider it a case of contingent remainder, but others might say that it is a case of an estate vesting in right, but not in possession, at the testator's death, defeasible by the death of any of his children during the life tenancy. It seems immaterial, except in

technical law, as the same result is reached. In *Reiff v. Strite*, 54 Md. 298, it was considered in this light. Land was directed to be sold, and the money given as by the will, and it was held that, as to that part given to S. S. immediately, he took an indefeasible right at testator's death, but, as to that part bequeathed to him subject to the widow's life estate, an estate vested in him conditionally only, and upon his death in the lifetime of the widow it became divested and went over to those embraced by the description of "or his heirs," and consequently assignees claiming under a deed of trust made by S. S. had no claim to the fund. See, also, *Brent v. Washington's Adm'r*, 18 Grat. 528, on this view.

It cannot be said that the words "or their children" were used to prevent lapse from death of a child in the testator's life, because likely those very words by their own force would prevent a lapse, and also because section 12, c. 77, Code 1899, would prevent it. He meant something else. "But although, in the case of an immediate gift, it is generally true that a bequest over in the event of the death of a preceding legatee refers to death in the life of the testator, yet this construction is only made from the necessity of the thing, and consequently, where there is another point of time to which such dying may be referred (as in the case where the bequest is to take effect in possession at a period subsequent to the testator's death), the words are considered as applying to the event of the legatee's dying in the interval between the testator's death and the period of vesting in possession." *Jarman*, p. *1568. I repeat that I consider this a case of contingent remainder. In a note by the able author *Freeman* (10 Am. St. Rep. 477) it is stated that while the courts lean towards treating legacies as vested, yet "when there is no other legatory expression or intention than that implied in a direction to pay or distribute at a future time, or on a contingent event, the bequest, nothing else appearing, should be considered as contingent." Here, what else does appear fortifies this construction. He further says that when legacies are payable at 21, if, or when, in case, or provided the legatee attains 21, "or any other future definite period, these expressions annex the time to the substance of the legacy, and make the legatee's right depend upon his being alive at the time fixed for payment." If he dies before, his representative gets nothing. This will say the legacies are payable "at" the widow's death. Our conclusion is to reverse the decree dated 2d December, 1901, entered on 19th November, 1902, as a *nunc pro tunc* decree, so far as it decrees that by the will of William Schaeffer each of his children living at his death took a vested remainder in fee in his estate, and that the deeds of trust from Emanuel Schaeffer and wife to Cleon Moore, trustee, dated 11th November, 1892, and the deed of trust made by John W.

Schaeffer to E. S. Troxell and Joseph Trapnell, trustees, of date 21st February, 1880, conveyed the interests severally of said grantors in said deeds, and that the interest of said grantors in said estate are liable for the debts in said deeds secured; and we reverse the decree made the 6th December, 1901, so far as it directs the payment out of the fund belonging to the estate of William Schaeffer in the hands of Daniel Heffebower, administrator, to Daniel Heffebower, of \$1,744.69, and to the Geiser Manufacturing Company of \$822.10, and to Frick & Company of \$722.09, and we deny payment out of said fund of the debts secured by said deeds of trust. The cause is remanded for any order that may be deemed proper not inconsistent with this decision.

(54 W. Va. 14)

SCHAFFER v. McJUNKIN et al.

(Supreme Court of Appeals of West Virginia.
Nov. 7, 1903.)

CERTIORARI TO JUSTICE—FORM OF PROCEDURE—APPEAL.

1. A case in a circuit court on a writ of certiorari to a judgment of a justice of the peace, awarded before the decision of the case of *Richmond v. Henderson*, 37 S. E. 653, 48 W. Va. 389, and within 10 days from the date of the judgment, will, upon the request of the plaintiff in error, be treated as being in said court on an appeal allowed by the court or judge thereof, although the requirements of the statute as to the form of the petition and bond in such an appeal have not been complied with.

(Syllabus by the Court.)

Error to Circuit Court, Tyler County; M. H. Willis, Judge.

Action by H. M. Schaffer against Frank Thompson and E. J. McJunkin, before a justice. Judgment for defendants, and plaintiff brings certiorari to the circuit court. From an order reversing the judgment, a writ of error was awarded. Affirmed.

F. D. Young and McCoy & Hanes, for plaintiffs in error. R. L. Moore and G. E. Kesterson, for defendant in error.

POFFENBARGER, J. On September 6, 1899, H. M. Schaffer instituted a civil action against Frank Thompson and E. J. McJunkin, partners as Thompson & McJunkin, before H. B. Hissam, a justice of the peace of Tyler county, for the recovery of the possession of certain personal property, in which, on the 16th day of September, 1899, on the demand of the plaintiff, a jury was impaneled, a trial had, and a verdict rendered for the plaintiff, in the absence of the defendants, they having failed to appear. Two days later, on the motion of the defendants, the plaintiff being represented by his attorney, the judgment and verdict were set aside, and a new trial granted, to be had on September 25, 1899, which, being had on said day, resulted in a verdict and judgment for the defendants. On the 3d day of October, 1899, upon the petition of the plain-

tiff, a writ of certiorari was awarded, by the judge of the circuit court of Tyler county, requiring bond to be given in the penalty of \$100, with security to be approved by the clerk of the court. The bond was given on the 19th day of October, 1899, but there is no indorsement on it showing the approval of the clerk. On the 24th day of December, 1899, on motion of the defendants, the bond was held insufficient, and a new one in the penalty of \$75 was ordered, which was given. The next order was made on April 14, 1900, when a motion to quash the writ and dismiss the petition was made, accompanied by an affidavit of the justice purporting to show that his certificate of the evidence had been altered since made by him. Counter affidavits were filed later by the defendants, and on April 21, 1900, upon hearing, the court overruled the motion, and entered an order reversing the judgment and setting aside the verdict, and ordering that the case be retained upon the docket for trial in the circuit court, and to that order a writ of error and supersedeas was awarded by a judge of this court upon the petition of the defendants.

The principles announced in *Harbert v. Railroad Co.*, 50 W. Va. 253, 40 S. E. 377, and *Falconer v. Simmons*, 51 W. Va. 172, 41 S. E. 193, govern the case. Disregarding all technicalities and informalities, the court decides in those two cases that, although a writ of certiorari does not lie from the circuit court to the judgment of a justice rendered upon the verdict of a jury, and is null and void as a writ of certiorari, yet, as it is a protest against the judgment, and as the decisions were, until that of the case of *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. 653, was rendered, a petition for a writ of certiorari was the only form in which such protest could be made, the writ awarded upon such petition should be treated as an order granting an appeal, under section 17 of chapter 50 of the Code of 1899, although made within 10 days from the judgment, contrary to the express letter of the statute, and without any showing of excuse for not having taken the appeal in the justice's court, as required by the statute, thereby proceeding upon the theory that the court must take judicial notice of the existence of a sufficient excuse in the fact that the decisions, as they then stood, did not permit an appeal to be taken in such cases. Against this liberality in procedure it was vainly urged also that the bond given was not in the penalty nor in the form of an appeal bond. The objections urged against treating those cases as being in the circuit court on appeal were of the same character and equally as strong as those stated in the present case, and the relaxation of merely formal requirements which rendered them unavailing must be permitted to sustain the position of the defendant in error in this case.

As the judgment of the justice has al-

ready been reversed and the verdict of the jury set aside, which would have been the effect of an appeal had it been granted, and the result of proper proceedings in the circuit court upon the request that the certiorari be treated as an appeal, had such request been made and proceeded upon, the action of the court, in reversing the judgment and setting aside the verdict and retaining the action for a new trial, is affirmed, and the case is remanded for further proceedings, if desired by the defendant in error.

(54 W. Va. 311)

SUMMERFIELD v. WHITE et al.

(Supreme Court of Appeals of West Virginia.
Dec. 5, 1908.)

BOUNDARIES—ACQUESCENCE—ESTOPPEL—DESCRIPTION IN DEED—EVIDENCE—INSTRUCTIONS—EJECTMENT—ADVERSE POSSESSION.

1. Where a husband owns, in its entirety, one of two adjoining tracts of land, and his wife an undivided one-eighth of the other, which she conveys to one of her co-tenants by a deed without warranty, in which her husband joins, reciting a description of the division line and one of its termini, different from that given in the deeds by which the husband obtained his lands, and referring to said terminus as an agreed corner, and, afterwards, by partition, another of her co-tenants obtains that portion of the land in which the wife owned a part, lying adjacent to said boundary line, and sues the husband and wife in ejectment for a small triangular piece of land, the title of which depends upon the location of the division line, in the absence of title by adverse possession—the husband having conveyed his land to his wife in the meantime—the defendants are estopped by the recitals in their deed from relying upon the description of the division line contained in the deeds under which they claim, and cannot use said deeds as evidence of the location of the disputed line, if objected to by the plaintiff.

2. The description of the corner in controversy contained in the deed executed by the defendants reads as follows: "Beginning opposite Uriah White's house in the middle of Dry Fork at an agreed corner between Thomas S. White, decd. and Uriah White." Held, that as the description calls for no monument which can be ascertained by mere inspection, and without measurement or calculation, and, opposite Uriah White's house, Dry Fork is claimed to have two channels, over 13 poles distant from each other, in either of which the point may be, as determined by the evidence, the description does not import such certainty of location as to estop the defendants from introducing evidence tending to show that the corner in question is not a certain rock in one channel of Dry Fork, as claimed by the plaintiff, and the court properly overruled plaintiff's motion to strike out such evidence.

3. As the defendants had, by their deed, recognized and admitted the title of the plaintiff, it was error to instruct the jury, on the trial of the issue above stated, that the plaintiff must show title derived from the commonwealth of Virginia or this state, or make out a title by adverse possession under color or claim of title.

4. When the defendant in an action of ejectment sustains such relation to the plaintiff as estops him from denying the title of the latter, the general rule that the plaintiff must recover on the strength of his own title, and make out a chain of title from the state, is inapplicable.

5. Actual, open, continuous, exclusive, and hostile possession of land for a period of 10

years under color or claim of title confers a perfect title, upon which an action may be either defended or prosecuted, and which is not destroyed by mere abandonment of possession after such holding for such period of 10 years, unless some other person has obtained title to the land, while such abandonment continued, by like possession for a like period.

6. Where the plaintiff relies upon such title, it is error to instruct the jury that such adverse possession must continue, without interruption, to the time of the institution of the action, if the evidence tends to show the completion of the required period of adverse possession long before the action was commenced.

7. A deed without a covenant of warranty estops the grantor from asserting against the grantee any title to the land he had or claimed at the time of its execution.

8. A deed with covenant of general warranty estops the grantor from asserting against the grantee any title to the land he had or claimed at the time of its execution, and also passes to the grantee any title to the land that the grantor may acquire afterwards.

(Syllabus by the Court.)

Error to Circuit Court, Randolph County; John Homer Holt, Judge.

Action by Lucy J. Summerfield against Uriah White and others. Judgment for defendants, and plaintiff brings error. Reversed.

W. B. Maxwell and Harding & Harding, for plaintiff in error. McGraw & Post, Molohan, McClintic & Mathews, and Brown & Talbott, for defendants in error.

POFFENBARGER, J. Lucy J. Summerfield complains of a judgment of the circuit court of Randolph county, rendered against her as plaintiff in an action of ejectment, involving only the question of the location of a boundary line between her lands and those of the defendant Hannah V. White, upon which depends the validity of her claim to the small triangular tract of land in controversy, containing about four acres. This disputed line was once a division line between two tracts of land, one of which was owned in its entirety by Thomas S. White, and the other by said Thomas S. White and Allen J. Currence as tenants in common. By the death of said Thomas S. White, and subsequent conveyances by his heirs, in some of which said Hannah V. White and Uriah H. White, her husband, joined—the former being an heir of said decedent—that portion of said first-mentioned tract lying next to the disputed line became the property of the plaintiff. Briefly stated, the history of her title is as follows: Many years ago Thomas S. White placed his son Harvey White upon the tract of which the land now owned by the plaintiff was a part, with the intention, it is said, of giving it to him, but never made any conveyance. The son died first, leaving eight children, of whom the plaintiff was one, and the defendant Hannah V. White another. Prior to March 6, 1884, the father died; and his heirs conveyed the tract on which the son had resided, containing about 123

acres, to said eight children and their mother. By this conveyance the plaintiff obtained one share in the tract. She then purchased the share of Madison White, her brother, and one-half of the share of Joseph, another brother. S. Lee White, having obtained one share by the original conveyance, bought the shares of Phoebe Ketterman and the defendant Hannah V. White, his sisters, and one-half of the share of Joseph White. Martha Jordan and Mary Pennington sold their shares to C. S. Armentrout. By partition, after these conveyances, the plaintiff became the owner of the land next to the disputed line, in its entirety. On the tract so partitioned, Harvey White had resided for a long time prior to his death, and thereafter his heirs resided upon it until the date of the deed conveying the same to them, March 6, 1884; and immediately after the partition, which the evidence shows took place probably 13 or 14 years ago, the plaintiff took possession of the part allotted to her. Some of the deeds by which said land passed as aforesaid are somewhat awkwardly drawn. The one by which Madison G. White conveyed his interest to the plaintiff bears date December 24, 1884, and the defendant Hannah V. White and her husband and the other brothers and sisters of the plaintiff joined in it; and in the deed by which Hannah V. White conveyed her interest to S. Lee White all the other brothers and sisters of S. Lee White joined. Each of these deeds conveyed an undivided one-eighth interest in the whole tract. As above stated, the land on the opposite side of the line was originally owned by Thomas S. White and Allen J. Currence in equal undivided shares, and they conveyed it by separate deeds dated, respectively, November 2 and 20, 1880, to said Uriah White, who subsequently conveyed it to his wife, the defendant Hannah V. White, by deed dated January 17, 1895. The land in dispute has not been inclosed by either of the parties, and the question of its actual occupation is one concerning which there is some conflict in the testimony. The southern terminus of the disputed line is not contested. At that point a sugar and elm are called for. The location of the other end of the line is in dispute. In the deeds from Thomas S. White and Allen J. Currence to Uriah White, the corner at the northern end of the line is described as "a beech and sugar on the west bank of Dry Fork," and is said to run thence south, 20 deg. west, 125 poles. These deeds are dated in November, 1880. In the deed from the heirs of Thomas S. White to the heirs of Harvey White, dated March 6, 1884, and the deeds dated December 10 and December 24, 1884, made by the heirs of Harvey White, including the defendant Hannah V. White, as above stated, the disputed corner is described as follows: "Beginning opposite Uriah White's house in the middle of Dry Fork at an agreed corner between Thomas S. White, decd. and Uriah White."

And the line running from the sugar and elm to said point is described in these deeds as running north, $8\frac{1}{2}$ deg. east, 104 poles. The beech and sugar called for in the deeds to Uriah White are not found, and it is contended by the defendants that the agreed corner called for by the other deeds is something over 13 poles east of the point contended for by the plaintiff, and yet in the middle of Dry Fork. At this point in its course, Dry Fork river seems to have changed its channel. At least, that is the contention of the defendants. And the point they claim as the agreed corner is in what they call the "Old Channel," on the west bank of which they claim the beech and sugar stood.

Upon the theory that the defendants are estopped by their deeds of December 10, 1884, and December 24, 1884, from denying that the rock in Dry Fork river at the point claimed as the corner by the plaintiffs, in what is called by the defendants the "New Channel," plaintiffs moved the court to strike out all the evidence introduced by the defendants tending to show a different location of that corner. This motion the court overruled, and upon its action in so doing the first assignment of error is predicated. As no rock is called for in the deed, and the location of the agreed corner therein mentioned can only be ascertained by resorting to extrinsic evidence, the estoppel, if any, created by the deed, cannot go to the extent claimed by counsel for the plaintiff in error. One of the essentials of a recital creating an estoppel is certainty, and where that element is wanting there can be no estoppel. *Bigelow on Estoppel*, 377, where Lord Tenterden is represented to have said it was a rule that an estoppel should be certain to every intent. The construction of the deed is for the court, but the location of the monuments and lines upon the ground is for the jury. Looking at the deed alone, it is impossible to say where a particular line or corner called for in the deed will be found upon the land. The calls contained in the deed must be applied to the subject-matter, and that goes beyond the mere matter of construction, and requires the aid of a jury and the introduction of extrinsic evidence. If a monument called for by the deed is established by uncontradicted evidence, it becomes binding upon the parties. But where such certainty of location cannot be made, the evidence of both parties must go to the jury, and a motion to strike out the evidence offered by the one or the other could not properly be sustained unless the evidence so stricken out were so slight as to be wholly insufficient to sustain a verdict based upon it. If the corner called for in the deeds relied upon by the plaintiff was so clearly described as to leave no doubt about the particular point in the river, the interpretation of the deed by the court would necessarily involve the consideration of the latent ambiguity arising from the fact that there are two Dry Fork rivers, or, rather, two

distinct and separate channels of the Dry Fork river. At least, the claim of two such channels set up by the defendants, and the evidence introduced in support thereof, could not be ignored. For these reasons, the ruling of the court on the motion to exclude was proper. That there is evidence tending to show the existence of the old channel, and that the corner in dispute is located in or near it, is undeniable.

Though the defendants are not estopped to deny that the agreed corner is located in the so-called new channel, the deeds of December, 1884, limit and narrow the scope of their resistance to that proposition. This phase of the case is not presented here upon any proper exception, but as, upon other grounds hereinafter to be noted, the judgment must be reversed and the cause remanded for a new trial, the proper conduct of that trial and the ends of justice require that the effect of the deeds in the determination of the controversy should be indicated. The description of the line in the deeds under which the defendants claim, bearing date in November, 1880, differs from the description given in the deeds in which they joined, conveying interests to the plaintiff and her cotenant, S. Lee White, and bearing date in December, 1884. The former described the line as being 123 poles long, and running to the sugar and elm on a course south, 20 west, while the other deeds described it as being 104 poles long, and running from the sugar and elm on a course north, $8\frac{1}{2}$ ——. In the deed executed by the heirs of Thomas S. White to the heirs of Harvey White, the description of which is followed in subsequent deeds, the course is stated to be north, $8\frac{1}{2}$ deg. east. As the monument is not so described that it can be found with absolute certainty, the courses and distances mentioned in the deeds control, if they can be reconciled; and, if not, either course or distance may be preferred, as shall best comport with the manifest intention of the parties and with the circumstances of the case. *Ruffner v. Hill*, 31 W. Va. 428, 7 S. E. 13. In thus seeking the true location of the corner, ought all these deeds, with their irreconcilably inconsistent descriptions or calls, to be given to the jury? That depends upon whether the defendants are estopped by the execution of the deeds of December, 1884, from relying upon the description contained in their own deeds of an earlier date. If so, the description of the disputed line and corner contained in the deeds of November, 1880, ought not to go to the jury. It is true that each of the deeds of December, 1884, only conveyed an undivided one-eighth of the tract of land. Neither of them purported to convey more than the one-eighth. But Mrs. White, the defendant, was a tenant in common with the plaintiff, holding under the same title. Their title and boundary lines were of the same character and coextensive. Admitting the location of that boundary line

at a particular place for her own purposes, namely, as defining the territorial extent of her undivided one-eighth, she fixed the same limit for the other seven-eighths. Her husband, though having no title in himself, other than his contingent estate by the curtesy, joined in the deed. As to the one-eighth, they are both estopped to claim against those deeds. *Herman on Est.* §§ 573, 605. A married woman's conveyance estops her as to the estate thereby granted. *Herman on Est.* 716; *Schaffner v. Grutzmacher*, 6 Iowa, 187. It is true that the recitals in the deed of a married woman are limited to the estate which she has at the time, and do not estop her from showing that they are false. *Herman on Est.* 716; *Griffin v. Sheffield*, 38 Miss. 359, 77 Am. Dec. 646; *Banks v. Banks*, 101 U. S. 240, 25 L. Ed. 850. But Mrs. White, at the time the deeds of December, 1884, were made, neither had nor claimed any estate in either of the two tracts of land, except the one-eighth which she conveyed. Having conveyed all of her interest by that deed, and now not setting up any after-acquired title, she could not be permitted to make a defense, except by allowing her to deny the plain terms of her deed. Having parted with all her title in the land claimed by the plaintiff, and taken her husband's land by conveyance from him, she can assert no greater right under the title conferred by his deed than he could. By the deeds of December, 1884, he purports to convey the land according to the calls of those deeds. He could not now go beyond the limits fixed by those deeds without contradicting the terms thereof. As she stands now in his shoes in respect to the same land, holding exactly the title that he held, her claim can go no further than his could have gone. "Any person claiming under one who is bound by an estoppel is himself bound by the same estoppel." *Herman on Est.* 720. "Privies, or those who derive title from or through the parties, ordinarily stand in the same position as the parties, and are bound by every estoppel that would have been binding on the parties." *Id.* The application of the principle of estoppel is resisted by counsel for the defendants on the ground that there is no warranty in the deeds of December, 1884. But there may be an estoppel without warranty. The distinction between a mere estoppel by deed and title by estoppel must be kept in mind. A conveyance without warranty by mere estoppel cuts off the assertion of any title or claim which the grantor had at the time of the conveyance, but it will not operate to pass to the grantee any title afterwards acquired by the grantor. If, however, there is a warranty in the deed, it not only cuts off the existing title of the grantor, but precludes him from setting up any after-acquired title. It does more. Such after-acquired title inures to the benefit of the grantee and passes to him. "The old rule of law was: Where one, by a deed of bargain and sale, or

lease and release, conveyed that to which he had no title, he was estopped by his deed from claiming an after-acquired title in it. But this rule has been repeatedly set aside, and the law at the present time is that where one conveys land to which he has no title, by deed of bargain and sale, without a covenant of warranty, a subsequently acquired title will not inure to the benefit of the bargainee, even as against the bargainor and his heirs." *Herman on Est.* § 653. "A warranty creates an estoppel which not only binds the grantor, but takes effect upon every subsequent interest which he acquires, and transfers it immediately to the grantee." *Herman on Est.* § 654. Here no after-acquired title, the passing of which by estoppel is dependent upon the presence of a covenant of warranty in the deed, is involved; and the question is whether, when there is no warranty, the grantor can assert, contrary to his conveyance and its recitals, any title which he had or claimed to have at the time of the conveyance; and it falls under an entirely different principle of law, resting upon the general doctrine that a man shall not defeat his own act, or deny its validity, to the prejudice of another. In *Taylor v. Shufford*, 15 Am. Dec. 512, 514, *Henderson, J.*, said: "I think the counsel is wrong in attributing the estoppel to the warranty. The estoppel arises entirely out of the affirmation of matters of fact made in the deed. He has confounded estoppels and rebutters—things essentially different in their nature, although frequently producing the same results. A rebutter operates on the right of action to the estate. It operates as to strangers as well as between parties and privies, which is a consequence flowing from its operation on the right to the estate. An estoppel operates entirely as to facts. Its effect is to conclude the parties from making, and, of course, proving the facts to be otherwise than they are stated or acknowledged to be in a deed or other transaction out of which the estoppel arises." A party who has admitted a fact in his deed is estopped not only from disputing the deed, but every fact which it recites, and so are all persons claiming under and through him. *Stow v. Wyse*, 7 Conn. 214, 18 Am. Dec. 99. As the case stands, Mrs. White asserts no title in the land owned by the plaintiff. Her defense is that the boundary line of her own land, derived from her husband by conveyance, is at a place different from where it was claimed to be by the plaintiff. The husband, before conveying the land to her, by his deed, said that the line should run from the sugar and elm on a course north, $8\frac{1}{2}$ deg. east, to an agreed corner in the middle of Dry Fork river. By this he bound himself to the ascertainment of the corner and the line by that description. She takes the land subject to the same limitation as to boundary. By the aid of this description and any extrinsic evidence which may be introduced tending to show the location of the agreed corner, it is

to be found; but the deeds of November, 1880, if objected to, giving different courses and descriptions, cannot be permitted to go to the jury as evidence of the location of the boundary line.

At the instance of the defendants, the court gave the following instructions over the objection of the plaintiff:

"(1) The court instructs the jury that the plaintiff must recover on the strength of her own title, and not on the weakness of the title of the defendant; and, unless she shows title derived from the commonwealth of Virginia or this state, then she can only recover by actual, continuous, adverse, open, and exclusive possession under color or claim of title to the land in controversy for ten successive years next before the bringing of this suit.

"(2) The court further instructs the jury that unless they believe from the evidence that the plaintiff, or those under whom she claims title, have had actual, visible, adverse, exclusive, and continuous possession of the lands in controversy, under color or claim of title, for ten successive years next before the bringing of this suit, then they shall find for the defendant.

"(3) The court further instructs the jury that if they believe from the evidence that the defendants, or either of them, have had actual, continuous, visible, adverse, and exclusive possession of the lands in controversy, or any part thereof, under claim or color of title, within ten years next preceding the bringing of this suit, then they shall find for the defendant, unless they should further believe that the plaintiffs have had actual, continuous, adverse, visible, and exclusive possession of some part of said lands, when they shall find for the plaintiff only such part of said lands in controversy as she has had in possession as aforesaid."

"(5) The court instructs the jury that if they believe from the evidence that the defendants, or any person claiming under them, or either of them, have had actual, continuous, adverse, open, and exclusive possession of the lands in controversy, or any part thereof, under color or claim of title, within ten years next preceding the bringing of this suit, then it makes no difference what agreement the defendant Uriah White had with Thomas S. White, or any other person, as to an agreed corner, and they must find for the defendants."

To the first of these instructions there are two objections: First, it requires the defendant to show title derived from the commonwealth of Virginia or of this state, unless she has made out a good title upon adverse possession under the statute of limitations. Against the propriety of this requirement, it is urged that the plaintiff and defendants have derived their titles from a common source, which makes it unnecessary for the plaintiff to trace her title from the state. The general rule is that the plaintiff must re-

cover on the strength of his own title. He must make out a perfect title, showing a grant from the state. *Witten v. St. Clair*, 27 W. Va. 762; *Coal Co. v. Howell*, 36 W. Va. 489, 15 S. E. 214; *Low v. Settle*, 32 W. Va. 600, 9 S. E. 922; 10 Am. & Eng. Enc. Law (2d Ed.) 481. "No length of chain of paper title which does not reach the sovereignty of the soil is sufficient of itself to constitute prima facie evidence of title." 10 Am. & Eng. Enc. Law (2d Ed.) 484; *Newell on Eject.* 585. But the general rule is subject to very important qualifications. *Witten v. St. Clair*, supra. These qualifications rest upon the principle of estoppel for the most part. "According to the general rule, this proposition means that he can recover only on the strength of his title, as being good against the whole world, or as being good against the defendant by estoppel." 10 Am. & Eng. Enc. Law (2d Ed.) 481. In the examination of the decisions touching paper title, this expression is found to have been used by nearly all the courts. The estoppel which renders it unnecessary to make out a complete chain of title from the government—the original source—arises in numerous ways. Thus, in *Witten v. St. Clair*, Judge Snyder gives illustrations in the following language: "As where the defendant has entered under the title of the plaintiff, and in subordination thereto, as tenant, trustee, coparcener, or licensee. * * * Likewise, when a party in peaceable possession of land is entered upon and ousted by one not having title to, or authority to enter upon, the land." Where both parties assert title from a common grantor, and no other source, the estoppel arises. 10 Am. & Eng. Enc. Law (2d Ed.) 491; *Newell on Eject.* 579. Most, if not all, these exceptions to the general rule stand upon the principle of estoppel. It is certainly true of the one grounded upon common source of title. "Where parties claim title from one person as a common source, they are estopped from denying the title of the original claimant from whom they derived title." *Herman on Est.* § 593. The position that the titles of the plaintiff and defendants were derived from a common source is not tenable. That of the plaintiff is derived from Thomas S. White, while that of the defendants comes from Thomas S. White and Allen J. Currence. The one title was owned by Thomas S. White alone, while the other was owned by himself and another person in common. The mere fact that Thomas S. White was a co-tenant of Allen J. Currence would not estop the latter from claiming title to the full extent of his deed, although such claim might be hostile to an adjoining tract owned in its entirety by his co-tenant. As to the tract owned by them in common, there was a privity between them, but none as to the other tract. From this it is apparent that the two titles in conflict do not come from the same source. However, as by their deeds the defendants are estopped to deny the title of the plaintiff,

as has been already shown, it is unnecessary for her to make out a chain of title from the state. By their deeds they expressly recognize her title, and this is as full, complete, direct, and immediate an estoppel as could arise from their holding under titles from a common grantor. As the basis of practically all these exceptions to the general rule is estopped, it is sufficient, however it may arise. This being true, the instruction, in so far as it requires the plaintiff to go back to the state as the source of her title, is erroneous.

The next objection to the first instruction, if sound, is good against all the others, for, if the alleged impurity is found to exist in it, it has been carried into and infects all the others. This objection is that the instruction tells the jury that, in order to make out a title to adverse possession, that possession must have been actual, continuous, adverse, open, and exclusive, under color or claim of title, for 10 consecutive years next before the bringing of the suit; the contention being that such possession for any period of 10 years, whether next before the bringing of the suit or not, if prior thereto, ripens into a good title, and that it need not be continued down to the time of the commencement of the action. Newell on Eject. 736, says: "If a person holding lands in adverse possession abandon the same before the expiration of the statutory period, his abandonment will, of course, amount to an interruption of the possession, of the most effective kind; but, if the abandonment occurs after the adverse holding has ripened into a title, it will be otherwise. The law requires of the claimant holding adversely nothing but an adverse possession for the period required. As the period closes, his possession ripens into a title without any additional acts upon his part." Under our statute, such possession for 10 years gives perfect title, not a mere right to continue the possession, not a title to be lost by mere temporary abandonment of actual possession. It is not only a defensive title, but one which will sustain an action of ejectment as effectually as a deed or a grant. If, after title is acquired by adverse possession, the holder thereof loses the actual possession, he may maintain an action to regain it, just as if he had a perfect paper title. *Sutton v. Pollard*, 96 Ky. 640, 29 S. W. 637. In *Parkersburg Industrial Co. v. Schultz*, 48 W. Va. 470, 475, 27 S. E. 255, 256, Judge Brannon, delivering the opinion of the court, said: "The statute itself confers and invests title in the occupant as effectually as does descent, devise, or grant, so that he may not only defend, but, if afterwards another enter upon the land, he may maintain ejectment on the title conferred by the statute, though he may not have the scratch of a pen to show title." This is supported by the citation of numerous authorities.

As the fundamental proposition of law laid

down by the foregoing authorities has been clearly violated in that part of instruction No. 1 which requires the adverse possession of the plaintiff to have been for 10 consecutive years next before the bringing of her suit, instead of allowing her to show a period of 10 years of such possession at any time prior to the bringing of the suit, the court erred in giving it. By inspection of the remaining instructions given at the instance of the defendants, it is apparent that they followed the same rule. The second contains a repetition of the objectionable language found in the first. The third tells the jury that if the defendants, or either of them, have had adverse possession under claim or color of title within 10 years next preceding the institution of the suit, the verdict should be for the defendant. It is an enunciation of the same proposition in different form and language. In substance, the last instruction is the same as the third, and equally erroneous.

The plaintiff requested the court to give the following instruction, which was refused: "The court instructs the jury that although they may believe from the evidence that the defendants, or one of them, have introduced in evidence such a title, which, in the absence of proof as to the possession of the land in controversy by the plaintiff, would be held to be a perfect written title, and entitle the defendants to a verdict in their favor, yet if the jury further believe from the evidence that the plaintiff and those under whom she claims were in the uninterrupted, honest, continued, exclusive, visible, notorious, hostile, and adverse possession of the land in controversy, under colorable claim of title, for more than ten years, and that the defendant, just a short time before the institution of this suit, entered upon the land in controversy, claiming the same, that then such prior possession of the plaintiff and those under whom she claims entitles the plaintiff to recover in this action, and the jury should find for the plaintiff." While perhaps a little informal, this instruction is substantially correct in its statement of the law, and should have been given.

For the reasons here given, the judgment is reversed, the verdict set aside, and the case remanded for a new trial.

(54 W. Va. 241)

BASSELL v. CAYWOOD et al.

(Supreme Court of Appeals of West Virginia.
Nov. 28, 1903.)

CONTINGENT RIGHT OF DOWER—HOW CHARGEABLE—RIGHTS OF PURCHASER.

1. Where land is bona fide sold in the lifetime of a husband to satisfy a lien or incumbrance thereon paramount to the wife's contingent right of dower, and such land sells for more than enough to satisfy such paramount claim or claims and the necessary costs and expenses, such contingent right of dower in the surplus remains a charge (not assignable in

kind) on such land, unless the same is sold free and acquit from such contingency.

2. The purchaser who buys such land subject to such contingency assumes the risk thereof, and he cannot have the same charged up to or set off against the purchase price.

3. *Holden v. Boggess*, 20 W. Va. 62, and *George v. Hess*, 37 S. E. 564, 48 W. Va. 534, approved.

(Syllabus by the Court.)

Appeal from Circuit Court, Harrison County; John W. Mason, Judge.

Bill by John Bassell against John G. Caywood and others. Decree for plaintiff, and defendant John G. Caywood appeals. Reversed.

Davis & Davis and O. E. Schwartz, for appellant. Taney Harrison and John Bassell, for appellee.

DENT, J. "This is an appeal from a decree of the circuit court of Harrison county, passed at the May term, 1903, in favor of the appellee, John Bassell, against the appellant, John G. Caywood, sequestering part of the surplus funds arising from the sale of a house and lot in Clarksburg upon which two deeds of trust had been given by Alfred Caywood and wife (he being the father of appellant, John G. Caywood) to secure two debts to a creditor, Mrs. De Hass. One of the trusts was made on November 29, 1892, and the other on May 4, 1896, by Alfred Caywood and wife, and Alfred Caywood and his wife died in February, 1899, leaving the deeds of trust unsatisfied. On the 29th day of November, 1902, Edwin Maxwell, who was trustee in the deed of trust of May 4, 1896, and who had been appointed trustee in place of Mr. Clifford, who had died, to execute the trust of November 29, 1892, sold the property in the manner provided by law, and appellee became the purchaser at the price of \$5,501, of which sum he paid to the trustee, Maxwell, \$2,000.73, being the amount of the two deeds of trust plus the costs, commissions, and other expenses of sale, leaving an unpaid balance or surplus of \$3,591.26, for which appellee gave his notes, with personal security, payable in one and two years from date of sale. John G. Caywood, at the time of the sale, and prior thereto, was married, his wife being the defendant Rosa C. Caywood. The appellant, John G. Caywood, was and still is in bad health, and the chances all seemed, at the date of the sale, and still seem, to favor the death of appellant prior to the death of his wife, and as she, immediately after the sale, announced pretty emphatically that, should she survive him, she would claim dower in the surplus proceeds, and charge it upon the property, appellee filed his bill, setting up substantially what has been previously stated, alleging that defendant Rosa C. Caywood would not, in the opinion of appellee, should she survive her husband, be entitled to take dower in the surplus proceeds, and charge the value of it upon the lot, notwithstanding the decision in *Holden v. Bog-*

gess, 20 W. Va. 62, and appellee prayed by his bill that the present value of the dower of Rosa C. Caywood, assuming that her husband was then dead, should be secured, set apart, or sequestered during the life of appellant, so as to exonerate the property sold in the event the husband should die first. The appellant, John G. Caywood, by counsel, entered his demurrer to the bill, which was overruled by the court, and the defendants thereupon waived the right to answer, and the cause was submitted upon the bill taken for confessed, and the court, upon a hearing, passed a decree directing that appellee should pay to the receiver of the court the sum of \$739.37 as the cash value of the dower of Rosa C. Caywood, assuming her husband to be then dead, or that he would die upon the day after the date of the decree, and the court further directed that the fund should be held by the receiver during the life of John G. Caywood, unless his wife, Rosa C., should sooner die, in which event the fund was then to be paid to him, and, in the event she survived him, the principal, or rather so much thereof as might then be the equivalent of the cash value of her dower in the proceeds of sale, should be paid to her, and, in the meantime and during the joint lives of John G. and Rosa C. Caywood, the interest upon the fund was to be paid to him, and from this decree John G. Caywood has appealed. The decree also provided that when such sum should be paid by appellee he should be entitled to credit for it upon his second note given to the trustee, the first note having been paid."

This statement of the case is adopted from appellee's brief. It is evident therefrom that the object of the litigation is to have this court review and disapprove of its decision in the case of *Holden v. Boggess*, 20 W. Va. 62; otherwise the holding in the syllabus of that case that the purchaser "made his bids and purchased the land with reference to and subject to said contingent right of dower" (page 62) must be conclusive of this case, and determine it against the appellee; for if he purchased with reference to and subject to such contingent right of dower, he assumed all the risks of such contingency in addition to the purchase price he agreed to pay. Such is undoubtedly the risk he did take, for he was fully aware of the decision, although he may have also taken into consideration a belief that he might be able to have the decision nullified. This is an additional risk he personally assumed. The decision established a rule of property which ought not to be disturbed except for the most cogent reasons. The appellee's case furnishes no such reason, for he purchased with full knowledge of the rule, and which probably enabled him to purchase the property for a less price than he would have had to pay had his present contention been at that time established by a decision of this court. Other bidders no doubt accepted such rule as the law of the

land, and were deterred from higher bidding by reason of such contingency hanging over the property. So that the appellee has nothing to lose, but everything to gain, if he can transfer his assumed contingency from his own shoulders to those of the appellant. And it would seem to be equitable, even if the court should overrule the former decision, not to permit appellee thereby to escape the contingent risk he assumed. The decision does not and cannot hurt him, and yet it might be harmful to many others to overrule it at this time, when it has been standing over 20 years unquestioned. The appellee claims that he has a superior equity to the appellant. He has no equity, unless he can base it on his private belief that the law had been misconstrued, and therefore he purchased the property free from the contingency involved. This would be founding an equity on a personally assumed risk, while, on the other hand, the appellant and other bidders had the right to believe that the property was being sold subject to the contingency. The equity, it is to be regarded, rests with the appellant. When the law is known in advance, purchasers are presumed to purchase with full knowledge thereof, and it would be unfair and unjust to change it so as to affect contracts of which it has become a part. 23 Am. & En. En. Law, 28, 27 Am. Dec. 633; *Boon v. Bowers*, 30 Miss. 256, 64 Am. Dec. 159; *Wilson v. Perry*, 29 W. Va. 169, 1 S. E. 302. From this it is plain that the appellee is not in a position to ask this court to overrule the case of *Holden v. Boggess*, although the statute may have been erroneously construed. He has neither equity nor justice on his side. If the property had for any reason been sold free from the contingency, his position might have been different. There may be cases in which it would be proper for a trustee or court to sell property free from a contingent right of dower. In such cases the purchaser will be protected by a sequestration of a proper proportion of the proceeds of sale. Even if the appellee had some right to attack the decision referred to, this court could not overrule it, though it did not properly expound the law, except for good and cogent reasons to promote the ends of justice and vindicate the law. The decision is to the effect that, if a purchaser buy lands sold to pay liens thereon, and the wife of the owner has a contingent right of dower in the surplus proceeds of sale, such purchaser takes such lands subject to such contingent right of dower to the extent that the amount thereof may be charged against such lands in his hands when such dower right may become consummate, unless such dower right has been otherwise provided for or satisfied. The section of Code 1899 construed is section 3, c. 65, which reads as follows: "Where the land is bona fide sold in the lifetime of a husband to satisfy a lien or incumbrance thereon, created by deed in which the wife is united, or for the

purchase money thereof, whether she has united therein or not, or created before the marriage, or otherwise paramount to the claim of the wife, she shall have no right to be endowed in the said land. But if a surplus of the proceeds of sale remain after satisfying the said lien or incumbrance or purchase money, she shall be entitled to dower in said surplus, and a court of equity having jurisdiction of the case may make such order as may seem to it proper to secure her right." The appellee claims that this section means, and should be so construed, that such land is to be sold entirely free and acquit from such contingent right of dower; that it only attaches to the surplus, and that it is the duty of a court of equity in all cases to secure such right. On first impression this undoubtedly appears to be the true meaning of the statute, but when we come to take into consideration the nature of a contingent right of dower, that it is a mere inchoate expectancy, which may never become vested, about which no suit can be maintained, the construction of such section must be broad enough to accomplish the end of its enactment. *George et al. v. Hess*, 48 W. Va. 534, 37 S. E. 564. The first clause bars her dower in the land to the extent of the paramount liens, and also prevents the dower in the surplus being assigned in kind. The second clause gives her dower in the surplus, and by the retention of the word "dower" makes it an interest in and chargeable against the land except as qualified by the first clause, and this is that it cannot be assigned in kind, but may be to the extent of the surplus as a measure of value charged against the same. It is also provided that in any proper case a court of equity may secure such right of dower. There may be cases in which it may be proper and right to sell the land with the consent of those in interest, and with or without the consent of the doweress, free and acquit from such contingency; and in such cases it would be the duty of a court of equity having jurisdiction thereof to provide for the securing of such dower right. Ordinarily, the only way to provide for such contingency is to permit the land to be sold subject thereto. To give a different construction to this section, we must treat the dower right as something more than an inchoate expectancy, and change the common-law rules in relation thereto, and it might become necessary before sales could be made of lands in which a wife may have a contingent right of dower to have such wife impleaded, and the value of such contingency ascertained and secured, and thus impose upon courts of equity much unnecessary and vain labor. How much better it is to allow the purchaser to take the risk of such contingency? If he wants to get rid of it, he can do so by purchase, as a wife has the right to relinquish the same. Thus it is plain that the conclusion reached by the court in the case of *Holden v. Boggess* is neither unjust nor unrea-

sonable, although the language of the statute might be otherwise construed. If purchasers understand, as the purchaser did in this case, that in judicial and other similar sales they are purchasing subject to any contingent right of dower that may exist against the land, they may make their bids accordingly, and assume the risks thereof. If owners and others want the land sold free and acquit from such contingencies, they can make the necessary legal provision for so doing. To overrule *Holden v. Boggess*, we must also overrule *George et al. v. Hess*, as both these cases are dependent on the same legal principles, are constructions of the same statute, and mutually support each other.

In the cases of *Robinson v. Shacklett*, 29 Grat. 99, and *Hurst v. Dulaney*, 87 Va. 444, 12 S. E. 800, the Virginia court reached just the opposite conclusion to that reached by our court in the case of *Holden v. Boggess*. *Hogg's Equity Principles*, 130, note. It seems to me that an examination of these cases shows that the Virginia court followed the apparent language of the statute without regard to the purpose of the enactment, and without considering the quality and nature of a contingent right of dower at common law. It is true they left undetermined the question as to how such contingency was to be secured to the wife in case the land is sold prior to the death of the husband, holding that on account of its weight and importance they would leave it for future consideration when properly presented to them. This is the very question the court ought to have considered before pronouncing decree relieving the land from being charged therewith. They should have construed the statute as a whole, and not by piecemeal. This court construed it as a whole, and reached the just conclusion that in considering the nature of a contingent right of dower at common law and by statute there was no other truly equitable way to preserve it to the wife so that she could secure it when it became consummate at the death of the husband, except by making it a charge on the land when sold during coverture, and that this was the only way in which the true intention of the enactment could be effected. In doing so the court merely held that the land, unless otherwise provided, was sold subject to the contingent right of dower, and the purchaser assumed the risk thereof. This is the usual practice in equity when such contingency, being an inchoate expectancy, hovers over land. It is too uncertain for equitable consideration, and the risk thereof is left to the purchaser. On the other hand, the Virginia court holds that by virtue of the statute the land is sold free and acquit from, and the court finds no abiding place for such contingency. Now, if the court had gone further, and held that the common-law nature of a contingent right of dower had been so changed by the statute as to give a court of equity jurisdiction thereof during

the life of the husband, and that it had become a vested estate liable to be defeated on the death of the wife prior to that of the husband, and that provision therefor should be made in all cases coming within the purview of a court of equity, whether the wife was a party to the suit or not, then its determination might be accepted as final and just. Perceiving the difficulties presented, the court purposely avoided them. In doing so, it committed error, which hereafter will have to be rectified. In *Robinson v. Shacklett*, 29 Grat. 107, Judge Staples says: "The object of the statute seems to be to provide for a case in which the land is sold in the lifetime of the husband when the wife has a mere contingent right of dower. Whether the wife ought not to be a party to the suit to enforce the lien or incumbrance, and, if so, whether she is concluded by the decree; whether the court is bound to make an order at all events for the protection of her rights, or whether it has a discretion on the subject; and whether, if the court fails to make such order, and directs the surplus to be paid to the husband or distributed among his creditors, his wife has, after the death of the husband, any remedy, and, if so, what it is—are difficult questions, which do not arise in the present aspect of the cause, and ought not now to be passed upon. One thing would seem, however, to be very clear—that the land is not liable in the hands of the purchaser, nor is he bound to see to the application of the purchase money, or that an order is entered for the protection of the wife." In short, the court holds that the land is sold free and acquit from the contingent right of dower, but to determine what becomes of the contingency is too difficult a question for the present investigation of the court. In the case of *Chalmers v. Funk & Sons*, 76 Va. 717, the Virginia court held, Judge Staples delivering the opinion, that: "In the interpretation of statutes, as of deeds, the primary object is to ascertain the intention of the lawmakers, and to give that intention effect, although the construction may not be in conformity with the letter of the law. The whole statute must be taken together, and the different provisions reconciled, so as to make the entire act consistent and harmonious." If the court had followed out its own rules, and construed the statute as a whole, instead of avoiding such construction, its conclusion might not have been different from that reached by this court, which did construe the statute as a whole in the light of the common law. *Bank of Bramwell v. County Court*, 36 W. Va. 341, 15 S. E. 78. The Virginia court construes a clause of a section of the statute, and leaves a dependent clause not construed because it is difficult of construction standing alone. This court construes the whole section together, and arrives at a much more equitable and just construction, although not in harmony with the apparent letter of the law. Under

the decision of this court all such sales, whether made by a court or trustee, are subject to any contingent right of dower existing at the time of the sale in the subject-matter thereof, unless otherwise provided, and the purchaser assumes the risk of such contingency ever becoming vested. Under the decision of the Virginia court all such sales are made free and acquit from all such contingencies, and they are left to take care of themselves, subject to future determination of the court on proper case presented. It does not make any difference to a purchaser which of these rules prevail if he has notice thereof at the time of his purchase. The rule becomes a part of his purchase. He makes his purchase with open eyes, and if under it he purchases subject to the contingency, he assumes the responsibility thereof. If, on the other hand, he purchases free and acquit from such contingency, the responsibility never attaches to him. The plaintiff in this case is not an innocent purchaser. He was familiar with the rule, and stated it to the trustee making the sale. The purchaser in *Holden v. Boggess* might with some degree of propriety claim to be an innocent purchaser. Not so the purchaser in the present case. He knew of the conflict between the Virginia court and this court. He took the risk of being able to convince the court of its error. This does not make him an innocent purchaser, for he was fully aware of the dangerous character of the risk he assumed in so doing. He was probably urged on thereto by the decisions of this court in the cases of *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164; *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. 653, 86 Am. St. Rep. 17; *Ralston v. Weston*, 46 W. Va. 544, 33 S. E. 326, 76 Am. St. Rep. 834; and *Mayer v. Frobe*, 40 W. Va. 246, 22 S. E. 58. This case lacks the necessity and justice that influenced the court in the other cases referred to, and he fails to show any good cause for overruling the case attacked other than the mere letter of the law, without regard to its spirit and intention. His contention cannot be sustained. The case of *Iaegre v. Bossieux*, 15 Grat. 83, 76 Am. Dec. 189, is not inconsistent with this determination, as it is herein recognized that a court of equity, by consent of the parties in interest, may direct a sale free and acquit from a contingent right of dower. In such case the contingency does not follow the property into the hands of the purchaser, but attaches to the proceeds of sale, and it becomes obligatory on the court to make the necessary provision for the preservation of the wife's rights during coverture. The decision of this court in the cases of *Holden v. Boggess* and *George v. Hess* are approved, and, as plaintiff became the purchaser of the property in controversy subject to the contingent right of dower, he is not entitled to the relief prayed for in his bill.

The decree is reversed, the demurrer sustained, and the bill dismissed as being without equity.

(54 W. Va. 303)

H. O. HURLBURT & SONS v. STRAUB.

(Supreme Court of Appeals of West Virginia. Dec. 5, 1903.)

OFFICE JUDGMENT—SETTING ASIDE—GAMING—CHECK IN PAYMENT—MONEY LOANED—NEGOTIABLE INSTRUMENT—REVERSAL ON APPEAL.

1. Where the plaintiff has filed with his declaration at rules the affidavit required by section 48, c. 125, Code 1899, the circuit court has no authority to set aside the office judgment, regularly entered, until the defendant has pleaded to issue and filed his counter affidavit with his plea; but it is the duty of such court, in the absence of such affidavit, to enter up judgment on the plaintiff's affidavit.

2. When the defendant fails to file such affidavit at the first term of court at which such office judgment becomes final, he cannot file it at any succeeding term of court.

3. The alleged loser in a game of poker gave the winner a check for \$500, payable to an innocent merchant firm. The firm refused to accept it until the loser promised payment thereof on maturity. Such check is not void under section 1, c. 97, Code 1899, as it represents a debt between the firm and the loser, with which the winner has nothing to do.

4. The loaning of money to pay a gaming debt, not at the time thereof, but after such debt has been incurred, is not forbidden by the statute against gaming (chapter 97, Code 1899), even though the lender has knowledge for what purpose the money is going to be used.

5. A note or check payable to the winner in a gaming transaction is void, and no suit can be maintained thereon, even by an innocent holder for value, unless the maker has induced the purchase thereof by promising payment. In such case the maker is estopped, as against such innocent holder, from setting up the gaming consideration for such note or check.

6. A bona fide holder for value of a negotiable instrument not void, taken in due course of business, takes the same free from all equities existing between the maker and payee of which he has no notice.

7. On a reversal of a judgment, if the defendant's pleas show no defense to the action, this court will render judgment for the plaintiff.

(Syllabus by the Court.)

Error to Circuit Court, Taylor County; John Homer Holt, Judge.

Action by H. O. Hurlburt & Sons against Charles R. Straub. Judgment for defendant, and plaintiffs bring error. Reversed.

W. R. Dent, for plaintiffs in error.

DENT, J. H. O. Hurlburt & Sons complain of a judgment of the circuit court of Taylor county, in a certain action at law wherein they are plaintiffs and Charles H. Straub is defendant. The facts are as follows: Some time in the month of July, 1902, Charles H. Straub gave the following check to one P. L. Bartlett: "Grafton, W. Va. Oct. 15, 1902. The Grafton Bank, Pay to the order of Loar Bros. (\$500.00) Five Hundred 00/100 Dollars, for cash. Chas. H. Straub." Mr. Bartlett took the check to Loar Bros.' store, where they were carrying on the jewelry business, and asked that he be given the money on it. The members of the firm were absent, and the clerk in charge, know-

ing that the firm had before cashed checks for the maker, advanced \$100 on the check, and held the residue until the firm should see it. When it was shown to Mr. George Loar, a member of the firm, he declined to accept it until he should see Mr. Straub. He immediately called Mr. Straub's attention to it, and Mr. Straub told him the check was all right, that he had no money in the bank, but he would pay it on its maturity. Mr. Loar, being doubtful of Mr. Straub's financial ability, asked him if he would secure the check, and he assured him he would in any manner except by deed of trust on his real estate, as he did not want his wife to have anything to do with it. Mr. Loar, upon these assurances, accepted the check and paid the money to Bartlett, less the discount thereof. Mr. Loar was informed by Mr. Bartlett that the check was given in a coal deal. The next morning Mr. Loar again saw Mr. Straub, and asked him about giving security for the payment of the check. Mr. Straub informed him that he had changed his mind and would not pay the check. Loar Bros. assigned the check to the plaintiffs, who gave them credit for the amount on a wholesale merchandise bill. Neither Loar Bros. before acceptance, nor the plaintiffs, had any notice of the transaction between Bartlett and Straub, which it appears was a game of poker, and the indebtedness existing between Mr. Straub and Mr. Bartlett was for money lost or money loaned to be lost in such game. The check, being presented to the bank in due course of business, was protested for nonpayment. The plaintiffs then brought suit against Straub to enforce payment thereof. With their declaration they filed an affidavit under section 46, c. 125, Code 1899, of the amount they were entitled to recover. At December rules, Straub failing to put in an appearance, the office judgment was confirmed. At the January term the case was placed on the office judgment docket. Straub then appeared and moved to set aside the office judgment, and tendered his two several pleas in writing. The plaintiffs resisted the motion because he failed to file the affidavit required by the section aforesaid. The court, however, set aside the office judgment, and took time to consider of the pleas, to which action of the court the plaintiffs objected and excepted. The case so stood until the April term, when the court overruled the motion to reject the pleas, allowed them to be filed, and also allowed the defendant to file the affidavit required by section 46, c. 125, Code 1899, to which the plaintiffs objected and excepted because it came too late. The plaintiffs then filed a special replication to the pleas, in which defendant joined. The jury found a verdict in favor of the defendant upon his pleas, which the court on motion refused to set aside, but gave judgment accordingly, to which the plaintiffs excepted.

The first question is, did the court err in

setting aside the office judgment? This depends on the language of section 46, c. 125, Code 1899. After reciting the affidavit filed by plaintiff, this section, in relation to the defendant, says: "No plea shall be filed in the case either at rules or in court, unless the defendant shall file with the plea, his affidavit that there is not as he verily believes any sum due from him to the plaintiff upon the demand or demands stated in the plaintiff's declaration. * * * If such plea and affidavit be not filed judgment shall be entered for the plaintiff by the court for the sum stated in his affidavit, with interest thereon from the date of the affidavit till paid." This language is imperative, and gives the court no discretionary power in relation thereto. If the affidavit is not filed, the court must enter up judgment in favor of the plaintiff, and if he refuses to do so, and arbitrarily sets aside the office judgment, his action is *coram non iudice*, and he may be compelled to enter up judgment thereon by mandamus. *Mastillar v. Ward*, 52 W. Va. 74, 43 S. E. 178; *Quesenbury v. People's Building & Loan Association*, 44 W. Va. 512, 30 S. E. 73. Having no authority to set aside the office judgment, he could neither allow the pleas nor affidavit to be filed at the next term, but judgment should have been entered for the plaintiffs. And it is the duty of the court to reverse the judgment and enter up the judgment the circuit court should have entered for want of the defendant's affidavit presented at the proper time.

As this case presents some interesting questions that should be settled for the public good, we proceed to consider it on its merits. The main question is as to whether a recovery on a check of this character is forbidden by section 1, c. 97, Code 1899, which is in these words: "Every contract, conveyance or assurance, of which the consideration or any part thereof, is money, property or other thing, won or bet at any game, sport, pastime or wager or money lent or advanced at the time of any gaming, betting, or wagering, to be used in being so bet or wagered (when the person lending or advancing it knows that it is to be so used) shall be void." Under a similar but more explicit section the court of appeals of Virginia, when this state was a part thereof, held "that the assignee of a bond for money won at gaming cannot recover, though the assignment was for a valuable consideration, and though he had no notice of the origin of the bond, unless the obligor before the assignment induce him to take the bond by promising to pay him the money." And in *Woodson v. Barrett*, 2 Hen. & M. 80, 3 Am. Dec. 612, *Buckner v. Smith*, 1 Wash. 299, 1 Am. Dec. 463, and *Hoomes v. Stock*, Id. 389, the doctrine was established that, if an assignee is induced by assurances of payment from the obligor to become the purchaser of the note, he can enforce payment thereof. These cases are on the theory that

the contract is void and nonnegotiable in whatever hands found, innocent or guilty, unless the obligor has given new vitality thereto by inducing the purchaser to take it on promise of payment. Then it becomes a new promise between the obligor and purchaser, and is relieved from the inhibition of the statute. The statute forbids the loaning of money at the time of any gaming, to be used for the purposes thereof, when the lender knows it to be so used, but it does not forbid the loaning of money after such gaming, and not at the time and place thereof, to be used in the payment of debts thus contracted. In 14 Am. & Eng. En. Law, 642, the law is stated to be: "Where the loss is already incurred, any person, other than the winner, who advances money or other property to the loser to enable him to pay the loss, may recover such advance, in the absence of a special statute." In the case of *Armstrong v. The National Exchange Bank*, 133 U. S. 434, 10 Sup. Ct. 450, 33 L. Ed. 747, it is held that, "where losses have been made in an illegal transaction, a person who lends money to the loser with which to pay the debt can recover the loan, notwithstanding his knowledge of the fact that the money was to be so used." Both under the statute and decisions, the lender who has no knowledge that his money is going to be used for gaming purposes or to pay a gaming debt has the undisputed right to recover the same, nor is the note given for such loan either void or voidable.

In this case Loar Bros., at the instance of Straub, on promise of repayment and security, furnished the money to pay a debt which they did not know was a poker debt, on a check drawn in their favor by Straub. The check never became an evidence of debt until it was accepted and paid by Loar Bros. It is therefore an evidence of debt alone between Loar Bros., who had no part in or knowledge of the gaming, and Straub, the loser. The winner was not a party to it in any way, hence it is in no sense rendered void by the statute. It was accepted by Loar Bros. on the credit and promises of Straub alone. They would not have taken or accepted it from the winner, although they might have legally done so, as representative of a loan to Straub, if the latter had not agreed with them to pay it when it should fall due. If Straub had refused to promise payment of the check and repudiated it, they could have immediately recovered back from Bartlett the \$100 advanced by the clerk, but by his promises and assurance he induced them to pay the balance, and hence he ratified the unauthorized payment already made by their clerk. In the case of *Armstrong v. American Exchange Bank*, cited, the court lays it down as an established rule that "an obligation will be enforced, though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff does not require

the aid of the illegal transaction to make out his case." This rule applies to this case. Here the plaintiffs could make out their case without reference to the gaming contract. The check was nothing more than an invitation from Straub to Loar Bros. to pay for him the sum of \$500, without any specification of the reason therefor. If they had accepted the check without consulting him, it would have been binding on him (2 Mod. 279, and cases before cited), for the consideration, as between him and Loar Bros., was the cash payment specified on the check, and not a gaming consideration. Loar Bros. were not satisfied to accept it without consulting Mr. Straub. He assured them it was all right, would be paid, and he would do anything he could to secure it. The next day after they had accepted it they again sought him about securing it. He then told them he had changed his mind and would not pay it. Mr. Straub did not seek them either time to notify them not to accept the check or that it was for a gambling debt. They were compelled to seek him, and he at first assures them that it is all right and will be paid at maturity, and after they had accepted and seek him to make it secure he repudiates it. The check not being void under the statute, the consideration therefor being cash, the Hurlburt Bros., being innocent holders thereof, for value without notice, are entitled to recover thereon.

An examination of defendant's pleas shows that neither of them alleges that plaintiffs had any notice of anything that would vitiate it in their hands as the innocent holders thereof for value. The second plea does not pretend to make any such allegation. The first plea avers that the check was given to one Bartlett in payment of a gambling debt, and that Loar Bros., before acceptance, had notice that it would not be honored. And it further alleges "that said defendant is not the holder of said writing obligatory for a valuable consideration and without notice of the character of said instrument, but had full and complete information of its being issued at the gaming table and in payment of a debt contracted at the gaming table." The plaintiffs are nowhere mentioned in the plea. Assuming that the plaintiffs are meant by the word "defendant" in the clause last quoted, the allegation is that they had notice "of its being issued at the gaming table and in payment of a debt contracted at the gaming table." It does not allege that they had notice that Loar Bros. had notice before acceptance that it would not be honored.

Although plaintiffs had knowledge that the check was issued in payment of a debt contracted at the gaming table, it would be valid in their hands unless they had notice that the acceptors were notified that it would not be honored before they accepted and paid it. Both pleas are based on the theory that the check is void under the statute, which, as heretofore shown, is not true—not being

a contract between the winner and loser, but between the loser and Loar Bros., not parties to the gaming within the purview of the statute. The note not being void, the plaintiffs took it free from all equities existing between the maker and acceptor of which they had no notice. The only equity claimed to exist between the maker and acceptor is that the acceptor had notice not to accept prior to acceptance. The plea fails to allege notice of any such equity in the plaintiffs, hence as to them it was bad. Neither plea presenting any defense as against the plaintiffs, they should have both been rejected and judgment entered for the plaintiffs. All the other questions being legal, the only question of fact which could have been submitted to the jury was as to whether Loar Bros. had notice not to accept the check before they did so. On this, even the defendant's evidence is in favor of the plaintiffs. This, however, is an issue in which the plaintiffs are not interested, for there is no allegation in the pleas that they had notice of such defense. The gaming statute was enacted to prevent all kinds of gambling, and not for the purpose of allowing those who engage in such pastime unlawfully to foist on innocent parties, by any trick or device, their gambling debts or expenses. If the law permitted, how easy it would be for two gamblers with hardened consciences to fix up a check of this kind upon innocent parties, induce them to accept it on false representations, and, after they had mutually received and enjoyed the proceeds in common, avoid the check as being a gaming contract. Gaming of this kind would become very popular among gamblers, for they could continue to enjoy their beloved game of poker and make wholly innocent parties become their bankers and bear their losses. Such a law would be a law of promotion instead of prevention. If the defendant was really cheated, as he says, he may deserve some sympathy, yet he should not be permitted to make innocent parties pay his gambling debts. The lawbreaker must bear the penalties thereof. If a lamb does not want to be shorn, he must avoid the shears. The law will not permit him to drag the innocent beneath them.

The judgment is reversed, the verdict of the jury set aside, and a judgment entered for the plaintiffs for the sum of \$501.60, with interest thereon from October 16, 1903, until the 5th day of December, 1903, amounting in the aggregate to the sum of \$535.85, with interest thereon until paid.

(54 W. Va. 421)

WEES et al. v. COAL & IRON RY. CO.
(Supreme Court of Appeals of West Virginia.
Dec. 12, 1903.)

HIGHWAYS — OBSTRUCTION — INDICTMENT —
INJUNCTION—NUISANCE—DAMAGES.

1. Public roads and highways are common property of all the people, and for their ob-

struction the statute gives a remedy by indictment.

2. *Talbott v. King*, 9 S. E. 48, 32 W. Va. 6 (Syl., point 1), reaffirmed.

3. A private individual who is injured by the obstruction of a public road cannot, by a suit brought on behalf of himself and all others who are similarly situated who would come into the suit and contribute to its costs, enjoin such obstruction as a public nuisance.

4. When the alleged nuisance is of a public character, the court will consider the injuries which may result to the public by granting the injunction, as well as the injuries to be sustained by the plaintiff in refusing it.

5. And, when the public benefit derived from the thing complained of outweighs the private inconvenience, an injunction will not be granted.

6. Courts should exercise great caution in enjoining acts alleged to constitute public nuisances at the suit of private parties, lest, in protecting the latter, much greater injury be done to the public.

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County; John Homer Holt, Judge.

Bill by Perry H. Wees and others against the Coal & Iron Railway Company. Decree for defendant, and plaintiffs appeal. Affirmed.

W. B. Maxwell, for appellants. C. W. Dailey, for appellee.

McWHORTER, P. Perry H. Wees, Jesse W. Godden, Charles E. Mylius, Philip C. Harper, and W. Harrison Coberly presented their bill in equity to the judge of the circuit court of Randolph county against the Coal & Iron Railway Company, alleging that said company was engaged in the construction of a railroad southward from the city of Elkins to a point on Greenbrier river in Pocahontas county; that plaintiffs were landowners, owning land along or in the vicinity of the said line of railroad on or near the Shafer's Fork of Cheat river, in Randolph county, said railroad running through a part of the lands of plaintiffs Wees, Godden, and Harper, and near the lands of plaintiffs Mylius and Coberly; and alleged that there were a large number of other landowners similarly situated with reference to said railroad as the plaintiffs, and that plaintiffs' suit should be held and treated as a suit brought on behalf of the plaintiffs and all others who were similarly situated who would come into the suit and contribute to the cost thereof; that a public road had been established many years ago from a point within what are now the corporate limits of the city of Elkins, southward to the Dry Fork of Cheat river in said county, and commonly known as the "Seneca Road," and maintained as such public road for more than 20 years, and probably for more than 50 years, by the authorities of Randolph county, at considerable expense in repairs from year to year; that some six years prior to the filing of their bill the county court of said county at a heavy expense constructed a steel or iron bridge across said

¶ 2. See *Highways*, vol. 25, Cent. Dig. § 435.

Shafer's Fork of said river on the line of said public road, and the plaintiff Harper, after the erection of said bridge, relying on the permanency thereof, purchased a farm on which the same was located, which farm lies on both sides of said river, and he expected to use said public bridge so as to receive the full benefits of said farm; that about one-half in value and productiveness of said farm was on each side of said bridge, and the farm was much more valuable with the use of said bridge than if the same were destroyed; that plaintiff Mylius, after said bridge had been erected, purchased a small parcel of five or six acres of land on the south side of said river, near the end of said bridge, and erected a storehouse thereon, at a total expense to himself of about \$1,000, and engaged in the mercantile business, and with said bridge remaining had good prospects of having a successful business, but with said bridge destroyed his prospects of success were greatly injured; that there had been a public road established by said county court leading up the northern side of Cheat river from said Seneca road from near the northern end of said bridge, and that plaintiffs Wees and Godden were the respective owners of farms located on this road, and, while it had not yet been entirely completed, it was so far completed that the said plaintiffs were able to use the same in getting to and from their said farms from Seneca road, and the new road was the only practicable way of getting to and from their said farms; that the defendant, without any authority whatever from the said county court or from the landowners, entered upon the said Seneca road at a number of places, and took the same at other places crossing over the said road, and for several miles of the distance, particularly some two or three miles below said bridge, destroyed the said road to such an extent that the same was not safely passable for teams, stock, or persons, and were then diligently employed laying their tracks on what it had made its roadbed, utterly destroying a large part of said public road, and making it impassable and unsafe, and injuring the substance of the value of the land of plaintiffs, and largely decreasing the value of said lands; that defendant had not restored the road so taken by it to its former condition, or so as not necessarily to impair its usefulness; that defendant had also taken and destroyed the said public road leading up Shafer's Fork from said Seneca road, so that plaintiffs Wees and Godden and all other persons similarly situated had no practicable way to get to and from their farms, which were located on said road which defendant had destroyed, without permission from the county court or landowners, and had made no road equally convenient in lieu of the same; that the defendant, in the construction of its road, in cutting timber from its right of way above said bridge, felled a large part of said timber into said Cheat river, and a

flood, having come in said river, washed said timber down against said bridge and destroyed it, and that defendant should be required to restore it; that defendant, by reason of the taking of said county roads and destroying said bridge without the authority of the county court or the plaintiffs and other persons, was guilty of such an obstruction of said roads and such irreparable damage to the plaintiffs and each of them and to the public as amount to a nuisance, and that it should be inhibited, restrained, and enjoined, and by mandatory injunction required, to restore said roads, and each of them, and the bridge to their former usefulness; that, as the said roads and bridge were located, there was standing south of said bridge many millions of feet of merchantable timber, the natural place to market which, when sawed into lumber, was on the railroad near the northern or western end of said bridge, and plaintiff Mylius was the owner of a large part of said timber; that unless said bridge was restored he would have to haul his said lumber about two miles down said river before he could cross the said river to the said railroad, and there were many other landowners similarly situated who also had timber which they would at some time want to market, and to not restore the bridge would entail upon these timber owners loss upon the value of their timber, which loss was wholly conjectural, unliquidated, and not thereby subject to an action at law; and prayed for a mandatory writ of injunction requiring defendant to restore both of said public roads to their former usefulness or state, or to such state as not to unnecessarily impair their usefulness, or to make an equally convenient road in lieu of each of said roads, and restore said bridge in as good condition as before it was destroyed, or erect an equally good new bridge, and provide plaintiffs and each of them as good public rights of way to their land as they had before defendant injured and took said roads, and as good a bridge across the said river at the same location as the bridge destroyed, and that defendant be inhibited from further obstructing said roads with its tracks, engines, and cars until it had restored said roads, and for general and special relief.

On the 28th of June, 1902, the judge granted an injunction as prayed for, but with the exception that it should not be construed to prevent the defendant from proceeding with its work of constructing its railroad, if it proceeded to restore the public roads mentioned in the bill as rapidly as practicable.

The defendant, on the 8th day of July, 1902, gave notice to the plaintiffs that on the 18th of July, in the town of Grafton, it would tender its answer to said bill before the judge of said court, and move the judge to dissolve the injunction awarded by him. On the 9th day of July, 1902, the plaintiffs gave the defendant notice that on the same day, the 18th day of July, at Grafton, they would move the judge of the circuit court of

Randolph county, in vacation, to so far modify the injunction as to absolutely inhibit, restrain, and enjoin defendant, its agents, servants, employes, and all others on its behalf, from further operating its line of railroad or doing any further work or labor thereon, and from running any locomotive trains or cars thereon, so far as the same in any way or manner interfered with the public roads or any part of said public roads as complained in plaintiffs' bill, and that said injunction when so modified be made effectual, effective, and complete until such time as said cause could be matured for bearing upon the merits, and until it had restored said roads and each part thereof, as by law it was in duty bound to do.

There is nothing in the record indicating that anything was done on or after the 18th of July, the day on which the defendant had given notice that it would tender its answer, and on which day plaintiffs gave notice to defendant that they would move to enlarge the injunction, except the taking of depositions by both parties, plaintiffs and defendant, between that time and the 28th day of August (except as it is implied in the final decree that the said motions were heard in vacation), when the cause came on to be heard "upon the motion made by the defendant in vacation to dissolve the injunction heretofore awarded in this cause, to which the plaintiffs appeared, upon the answer of the defendant and exhibits tendered therewith upon the making of such motion to dissolve, which answer and exhibits are now indorsed by the clerk as filed, upon general replication to such answer upon motion of plaintiffs to enlarge the injunction, also made in vacation, at the time of defendant's motion to dissolve the injunction, to which motion defendant appeared, and upon depositions taken by the plaintiffs and the defendant, and upon plaintiffs' exceptions to defendant's depositions, and filed before the hearing of the respective motions in vacation, and was argued by counsel and considered by the court. Upon consideration whereof, the court is of opinion that the motion of the plaintiffs to enlarge the injunction should not be granted, and doth refuse to enlarge the injunction, and is further of the opinion that the injunction should be dissolved; wherefore it is adjudged, ordered, and decreed that the injunction heretofore awarded in this cause on the 28th day of June, 1902, be and the same is hereby wholly dissolved, and that the defendant recover of the plaintiffs its costs in this behalf expended; and, no sufficient reason appearing against it, the bill of the plaintiffs is dismissed."

There is filed with, as a part of, the answer of the defendant, a demurrer to the plaintiffs' bill, in addition to the usual general demurrer, that "the bill is not sufficient in law." It is alleged, as ground of demurrer, that the bill does not show any such special interest on the part of plaintiffs, or any of them, as

justified an injunction at the instance of private individuals against the alleged interference with a public road or against an alleged nuisance; that the plaintiffs' allegations of irreparable injury to plaintiffs were not based upon any intelligible statement of facts, and the allegations as to the destruction of the bridge over Shafer's Fork of Cheat river, being the result of defendant's acts, and upon which the mandatory injunction as to restoring such bridge had issued, were vague, uncertain, indefinite, and not supported by any reliable statement of facts, and that such statements as were made were not sufficient grounds for such injunction, and, without waiving their demurrer, answered the bill, denying the material allegations thereof, and filed with its answer, as exhibits, three several deeds made by the plaintiffs J. W. Godden, P. H. Wees, and Philip C. Harper, for the right of way for said railroad through their respective lands, wherein the rights of way were definitely set out and described, and also filed as exhibits with their answer copies of orders of the county court establishing the new road from the bridge across Shafer's Fork on the Seneca road to the line between Z. D. Wees and P. H. Wees, and also a copy of an order and judgment from the records of the circuit court of Randolph county, dated January 27, 1902, showing that upon appeal by Philip C. Harper, from the order of the county court establishing said road, to the said circuit court, the order of the county court establishing the said road was set aside and annulled, and judgment was rendered in favor of said Harper against the county court for his costs of the appeal; and denied that there was any established road above the location of the bridge to or through the lands of plaintiffs Wees and Godden, but averred that there was only a rough bridle path running up the river from the bridge on the south side of the river to the lands of Godden and Wees, and that fences of the landowners were built across said path; that respondent's railroad was not located along or upon said path, except in one place, where it crossed the same, and respondent's roadbed was there located upon the land that was sold and conveyed to it by the owners. Respondent admitted that it had at one or more places crossed the Seneca road, and at other places encroached upon the same with its roadbed, but denied that it did so without authority from the county court, and filed with its answer an order of the county court dated February 28, 1900, authorizing it to construct its railroad "across, along, and upon any highway, roads, or turnpikes within the boundary of Randolph county," and providing that any such highway, road, or turnpike, or any part thereof, so taken or occupied, should be restored as the statute provides; and averring that wherever it had interfered with any such road it had complied with the requirements of the law; and averring that whether respondent had had to

make practically a new road on account of taking up the old road, or part of it, with its roadbed, it had constructed a road more solid, wider, and of a better grade than the road occupied or partly occupied, and that such obstruction as there had been made of the county road was only such a partial temporary obstruction as was unavoidable; that wherever it had crossed the Seneca road it had put in and was maintaining proper road crossings as was required by law and by the order of the county court; that as to the two or three miles of the said Seneca road below what was the site of the bridge across Shafer's Fork, it denied the destruction of said road to such an extent as to make it not safely passable for teams, stock, or persons, and averring that the county court of Randolph county had determined to change the location of said road, and, instead of continuing it on the southerly or easterly side of the river along the railroad of respondent to the bridge site, it had determined to cross the river about two miles below the bridge site at a place called "Kimmell Hole," and intersect the road again near the northern end of the bridge site, and near the residence of plaintiff P. C. Harper and the site of the store of plaintiff Mylius; and respondent, in consideration that it would be relieved thereby from one or more crossings over the said road, agreed with said court that it would construct the road on the location adopted on the northerly side of said river, and it had been proceeding with all practicable dispatch to make said road, and had expended considerable money thereon, all of which was known to the plaintiffs, as they had presented their bill to the circuit court of said county praying for an injunction to restrain the county court from altering said road; and filed with its answer a certified copy of the proceedings of the county court directing the alteration of the location of said road; denied that the construction of its railway had caused the washing out of the bridge over Shafer's Fork by reason of timber felled by it into said river, but averred that the abutment of the said bridge at the northern end was washed out in such a manner as to indicate plainly that the bridge was destroyed owing to that abutment having been undermined and going to pieces; and averred that it was the purpose of the county court to rebuild the bridge about two miles further down the river, and have the road cross the river at that point, as was also alleged in plaintiffs' bill, and that such action would be wise and greatly promote the public interests; that, under direction of the county court to construct the road on the easterly side of the river, James Coberly and C. M. Marsteller had contracted to construct the same at the price of \$1,200, to be paid by respondent, and the contractors were proceeding with the work with all practicable diligence, and had it then nearly half completed, and said road was used or could be used in traveling

the Seneca road from Kimmell Hole to an intersection of the old road on that side of the river, which had never been discontinued, and that it was the intention and purpose of respondent to have said contractors continue the work until completed; that the county court could not agree with the plaintiff Mylius on compensation to be allowed him for damages to grow out of the construction of the new piece of road, and directed proceedings to be instituted for the condemnation of the right of way, and such proceedings would at once be instituted but for the fact that Philip C. Harper and Mylius took an appeal from the action of the county court, and respondent was advised no proceedings could be taken to condemn the land of Mylius for the road during the pendency of the appeal; that under all the circumstances respondent was under no obligations to restore the road for the 75 or 100 rods below the bridge site, where it did not take the road for its railway bed, but where the supposed county road fell in or slipped down the hill, even had no action been taken by the county court for changing the location for that part of the road; that the supposed public road on the westerly side of the river to the ford about one-fourth of a mile below the bridge site where the Seneca road crossed the river could be traveled as well as it could before respondent began the construction of its railroad, with the exception of the place where the high water had interfered with it; that in every instance where the railroad had interfered with the road it had been restored to its former state; and prayed that the injunction awarded in vacation be dissolved.

This is a suit by the plaintiffs, who are landowners, on behalf of themselves and all others who are similarly situated who would come into the suit and contribute to its costs. This means all the citizens of that community. The object of the suit is to enjoin the obstruction of what are claimed to be two public roads, and this is attempted to be done by private individuals, who show by their bill that they are situated as are the rest of the members of the community or citizens of the neighborhood. The direct injury complained of is in being deprived of the use of the public roads, which are alleged to have been taken and occupied or destroyed by the defendant in the construction of its railroad. This is a damage to the whole community, and does not appear to work any special or peculiar injury to the plaintiffs, but the injury to plaintiffs, while it may be greater than to some others, yet it is only greater in degree; persons having more use for public roads or occasion to use them more extensively than others, the road being obstructed will, of course, be of greater or less injury to those having use for the road in proportion to their respective needs. In *Talbott v. King*, 32 W. Va. 6, 9 S. E. 48 (Syl., point 1), it is held: "An individual cannot enjoin a public nuisance, such as the ob-

struction of a road, unless it works special and peculiar injury to him, and that injury must not be trivial, or such as may be compensated in damages, but must be serious, affecting the substance and value of the plaintiff's estate. The first point of syllabus in *Bridge Co. v. Summers*, 13 W. Va. 476, reaffirmed." It is well said in the opinion in that case, at page 10, 32 W. Va., page 50, 9 S. E.: "Were it the law that any one consequentially sustaining damage from obstruction of a road, like others, or even greater in degree than others, may go into equity by injunction, a vast field of private litigation would be opened. To justify it, the injury must be special and peculiar to the plaintiff, and, moreover, serious, and certainly depreciating the value and enjoyment of his estate. The highways are the common property of all, and by our law are under the guard and care of the state. For their obstruction the law gives a remedy by indictment. The general rule of law is well settled, and individuals cannot enforce a public right or redress a public injury by suits in their own names. *Brainard v. Railroad Co.*, 7 Cush. 510. Endless would be the litigation were every individual allowed to do so upon his own impulse or for private ends. It is safer and more prudent to trust the vindication of the public right to the public prosecutors and grand juries, and courts should rather limit than widen the jurisdiction to entertain private suits in such cases." In *Blackwell v. Railroad Co.*, 122 Mass. 1, Chief Justice Gray writing the opinion of the court, it is held: "No action lies to recover damages for the obstruction of a navigable stream by the building of a bridge across the same, whereby the owner of a parcel of land and a wharf above the bridge is prevented from coming to the wharf from the sea in vessels, although his wharf is the only one above the bridge used for business purposes, and he is thereby compelled to abandon the use of his wharf for such purposes, and to transport his goods by land at an enhanced expense." In a well-considered note to *Murdock's Case*, 2 Bland, 461, 20 Am. Dec. 381, 391, in treating of the mandatory injunction, it is said, "Every case of this kind must depend upon its own circumstances, and, unless the damage which will ensue from withholding a mandatory injunction will be extreme, or at all events very serious, the writ should not be issued," citing *Durell v. Pritchard*, L. R. 1 Ch. Ap. 244; *City of London Brewery Co. v. Tennant*, L. R. 9 Ch. Ap. 219. "The comparative convenience or inconvenience to the parties from granting or withholding the injunction must be considered." *Kerr on Inj.* 231. In 1 *Spelling on Injunctions*, § 417, it is said: "Where the alleged nuisance is of a public character, the court will consider the injuries which may result to the public by granting the injunction, as well as the injuries to be sustained by complainant in refusing it.

Where the public benefit derived from the thing complained of outweighs the private inconvenience, an injunction will not be granted, and courts habitually exercise great caution in enjoining acts alleged to constitute public nuisances at the suit of private parties, lest in protecting the latter much greater injury be done to the public. Where the evidence is conflicting and the public injury doubtful, that alone constitutes good reason for withholding this extraordinary relief. For these reasons, a railroad being not per se a nuisance, a strong case must be presented to justify an injunction against its construction upon the ground of injury to the public"—and cases there cited. And in *Hogg's Eq. Principles*, § 232, in speaking of mandatory injunctions, it is said: "An injunction of this kind is rarely granted before final hearing, though it may issue interlocutorily where an extreme or serious damage would ensue from withholding it, and in case of interferences with easements; but this is done with caution and hesitation, and only in extreme cases"—and cases there cited.

The record of the county court of Randolph county shows clearly that no road has ever been established on the location starting from Seneca road near the bridge site to the line between Z. D. Wees and P. H. Wees, as claimed by the plaintiffs. The order of the county court establishing said road, made on the 7th day of July, 1899, was set aside and annulled by the judgment of the circuit court on the 27th of January, 1902, on appeal taken by Philip C. Harper, when judgment was rendered against the county court for appellant's costs and the cause ordered stricken from the docket. It is contended by appellants in case at bar that the road was established except as to where it passed through the lands of the appellant Philip C. Harper, but this is not the fact, as the judgment of the circuit court set aside and annulled the whole order of the county court establishing the road, without any reservation whatever. Besides, the defendant files with its answer a deed from the plaintiff J. W. Godden, and wife, for the right of way through his land in consideration of \$1,500 cash, and the deed of plaintiff P. H. Wees, and wife, in consideration of \$1,250 cash, and the deed of Philip C. Harper and wife in consideration of \$500 cash, by which deeds the said parties respectively conveyed to the defendant the right of way upon which they were constructing their said railroad, and the plaintiffs cannot be heard to complain that defendant is constructing its railroad on the rights of way so conveyed to it by them. Defendant also filed with its answer a copy of the record of the county court of Randolph county in a proceeding to change the location of Seneca road from a point in said road at or near the residence of P. C. Harper down Shafer's Fork of Cheat river on the east side to a point at or near the falls

or the Kimmell Hole. On the 14th of September, 1901, viewers were appointed to view a route for said road. The viewers appointed made their report to the county court, recommending a change from the westerly to the easterly side of the Shafer's Fork of Cheat river, giving as their reasons that it would shorten the distance; that it would put the road on much better ground for a road, as it would be on the sunny side of the hill, where it would be always dry; that it would take it away from the line of the railroad, being on the opposite side of the river, and that it would be a much better grade than could possibly be established on the other side of the river; and recommending the bridge site known as the "Kimmell Hole," with a natural abutment on the west side of the river, and the approach on either side of the bridge could be easily made and at small cost. The viewers reported the names of the landowners, and the amount of damages that would accrue to each of them. The county court adopted their report, and ordered the change of location of the Seneca road from the west side to the east side, as reported by the viewers, and ordered that the road on the west side between the points named be abandoned from and after the time of the completion of the road on the new location on the east side of the river. The Coal & Iron Railway Company submitted its proposition in writing to the county court to construct said road on the proposed location, in view of its change from the west side to the east side of the river, which proposition was accepted and ordered filed, and, the court being unable to agree with R. M. Dyer and O. E. Mylius for the right of way through their lands, the prosecuting attorney was ordered to institute and prosecute in the circuit court, in the name of the court, proceedings to acquire the condemnation of the right of way through the lands of Dyer and Mylius.

The court did not err in dissolving the injunction and dismissing the bill, and the final decree of the circuit court is affirmed.

(34 W. Va. 119)

PINNELL v. HINKLE et al.

(Supreme Court of Appeals of West Virginia.
Nov. 14, 1903.)

GUARDIAN AND WARD—ACTION ON BOND—LIABILITIES—NECESSARIES FOR WARD—SUMMONS.

1. An action at law on a guardian's bond cannot be sustained until after a settlement of his accounts.

2. A guardian cannot be sued for necessities for his ward unless he expressly promises to pay therefor. There is no implied promise which will sustain such action against him for necessities furnished the ward without his order, but, if he make an express promise to pay an action against him as an individual can be sustained.

3. A summons from a justice is against "B. L. Hinkle, guardian for Joseph E. and Mary Friend, infants." It is an action against Hinkle as an individual.

(Syllabus by the Court.)

Error to Circuit Court, Randolph County; John Homer Holt, Judge.

Action by Edith Pinnell against B. L. Hinkle and another. From a judgment of the justice court dismissing the action, plaintiff appealed to the circuit court, and from an order dismissing the action she brings error. Reversed.

Wamsley & Coberley, for plaintiff in error. Keenan & Tyree and C. H. Scott, for defendants in error.

BRANNON, J. Edith Pinnell brought an action before a justice of Randolph county against "B. L. Hinkle, guardian for Joseph E. and Mary E. Friend, infant children of W. H. H. Friend, deceased, and N. Shiffet, surety on the official bond of B. L. Hinkle." The action was dismissed as to Shiffet in the justice's court on motion of plaintiff. The case went by appeal to the circuit court. Hinkle moved the court to dismiss the action because it was intended to collect money from the defendant as guardian out of the corpus of the estate of the infants, and the court dismissed the action. The case having been dismissed before trial, we must find ground for dismissal only from the face of the summons. The action, as begun, was on the guardian's bond. An action at law cannot be maintained on a guardian's bond until there has been an account or settlement, as provided by law, showing a balance in his hands. *Roberts v. Colvin*, 8 Grat. 358; 9 Ency. Pl. & Prac. 976; *Perkins v. Stimmel* (N. Y.) 21 N. E. 729, 11 Am. St. Rep. 659. Whether, after such settlement, only the ward, or also a person who has furnished necessities to the ward, can sue, it is not necessary to say, in view of dismissal as to the surety. Section 7, c. 82, Code 1899, requires the guardian out of the proceeds of the ward's estate to provide for his maintenance and education, and whether a third party furnishing maintenance can sue a guardian and sureties upon such settlement I do not say. If he could, it would be error to dismiss an action in advance of evidence, as it cannot be presumed that there was or was not such settlement and balance. But, the case having been dismissed as to Shiffet, we need not say it is a suit against Hinkle as guardian. The account filed does not appear to be part of the record. It, however, appears to be for necessities for the wards. Looking at the summons, it imports that the liability is on account of his relation of guardian to the two infants. That, we may say, though we treat the suit as one against Hinkle individually, is the ground of action. A guardian cannot be sued for necessities for his ward, unless he make an express promise to pay. He cannot be sued on

¶ 1. See *Guardian and Ward*, vol. 25, Cent. Dig. § 630.

an implied promise. *Young v. Warne*, 2 Rob. 420; *Call v. Ward* (Pa.) 39 Am. Dec. 64; *Schouler, Domes*, Rel. § 337; *Broadus v. Ross*, 3 Leigh, 12; *Hutchinson v. Hutchinson*, 19 Vt. 437; 3 Rob. (New) Prac. 266. These authorities show that, if the guardian promise, he is personally liable. Now, in absence of evidence, we cannot, nor could the circuit court, presume there could be no evidence of an express promise. There may or may not have been. It was error in the court to assume there was no such evidence, as its dismissal of the action imports it did. And how could the court say that it would or would not infringe on the principal of the ward's estate? The action is to be treated as one against Hinkle as an individual, the word "guardian" being mere descriptio personae. *Thompson & Lively v. Mann* (W. Va.) 44 S. E. 246; 3 Rob. (New) Prac. 265; *Snead v. Coleman*, 7 Grat. 300, 56 Am. Dec. 112.

The argument is made that there are two wards, each with distinct interest, and the debt of one separate from that of the other, and, if there be a solid judgment, it cannot be told how much is for account of one, how much for the other. But the suit is against Hinkle as an individual. If he said to the plaintiff, "I will pay you for the board of these two children," he could sue for board of both in one suit. If he made separate promises at different times, they could be united in one action in separate counts. There is no requirement of formal pleading in a justice's court. And this is only the summons. If a man agrees to pay for board of several of his hands, must there be separate action for each? The matter of how much would be chargeable to the estate of each ward if Hinkle made a promise would be a matter in settlement of his guardian account.

We think it was error to dismiss the action on the mere face of the papers, and we reverse the judgment, and remand the cause for further proceedings, if the plaintiff shall elect to further prosecute her suit.

(54 W. Va. 381)

NEWMAN et al. v. RUBY.

(Supreme Court of Appeals of West Virginia.
Dec. 12, 1903.)

SUBSCRIPTION—JOINT OWNERSHIP—RIGHTS
AND LIABILITIES—PARTNERSHIP—
ACTION AT LAW.

I. T., as agent of F. & C., presented to R. a written contract for the purchase of a stallion at the price of \$1,800, which specified that those who should execute the contract and join in the purchase of the horse should, after the purchase, own interests therein by shares of \$100 each, the interest of each party to be determined by the number of shares for which he should subscribe. R. signed it, subscribing for two shares, and delivered it to T., upon the verbally expressed condition that it should not be effective as to him unless M. and W. should sign it, and, they refusing to join in the enterprise, T. obtained the signatures of 15 other persons who took the remaining 16 shares, and

executed and delivered to T. two negotiable notes for the sum of \$900 each, without notice of the condition upon which R. had signed, and F. & C. delivered the horse at R.'s stable, and indorsed and delivered one of the notes to a stranger, without having obtained R.'s signature thereto, and without the knowledge of the other parties to the contract, who afterwards paid it, and then instituted an action to recover from R. one-ninth of the sum so paid, proving the additional fact that, after the contract had been completed and shown to R., he expressed approval thereof. *Held*, that they may recover in an action at law.

2. A partner who has paid into the capital of the firm the amount which his co-partner had bound himself to pay may recover it from the latter in an action at law, as money paid for his use, no adjustment of the partnership accounts being necessary to a determination of the case on its merits.

(Syllabus by the Court.)

Error to Circuit Court, Wetzel County; M. H. Willis, Judge.

Action by B. B. Newman and others against A. C. Ruby. Judgment for plaintiffs, and defendant brings error. Affirmed.

J. W. McIntire and B. T. Bowers, for plaintiff in error. Cornett & Newman and T. P. Jacobs, for defendants in error.

POFFENBARGER, J. This is a writ of error to a judgment for \$111.83, rendered by the circuit court of Wetzel county, in an action commenced before a justice of the peace, which was carried up to the circuit court by appeal. The principal sum recovered is \$100, which the 15 plaintiffs claim to have paid for the use of the defendant, A. C. Ruby, as a part of the sum which he agreed to contribute in a partnership or joint ownership venture in respect to the purchase and handling of a stallion in 1898. At that time one Tracy, an agent of Fletcher & Coleman, of Wayne, Ill., brought to New Martinsville a Percheron horse which he proposed to sell for the sum of \$1,800, and began his negotiations with the defendant, Ruby. He had a printed form of contract which Ruby signed, with the understanding that it was to be signed by John McMunn and John Witten. Tracy took the paper with Ruby's signature on it, and obtained the signatures of 15 other persons, but McMunn and Witten did not sign it. The parties who did sign it after Ruby do not appear to have had any notice of the agreement under which he executed the paper. No copy of this paper appears in the record, the paper itself having been misplaced before the action was brought. Evidence of its contents was given. Some two or three of the plaintiffs testified that it fixed the price of the horse at \$1,800, for which two notes of \$900 each were to be executed by the parties signing it, and that it specified the interest each signer was to have in the horse, and the amount which he bound himself to contribute to the undertaking, by making the shares \$100 each. They also testified that the paper had on it Ruby's

subscription to two shares when they signed it. After the other sixteen shares were made up, two \$900 notes, both negotiable, were executed by all the parties except Ruby, he not being present at the time, and they supposing that he would sign them. He did not, however, and the first note was indorsed by the payees, and passed into the hands of Joseph Probst. Ruby denies that any of the blanks in the printed form were filled up at the time he signed it, and also that he subscribed for any number of shares. He further claims that he repudiated the whole matter, and announced that he would have nothing to do with it, because McMunn and Witten had not joined him in the enterprise, and he had not authorized Tracy to obtain the signatures of the persons who did sign. He is, to some extent, corroborated by other witnesses. But G. B. Woodcock, B. B. Newman, Louis Dulaney, and Jacob Yoho, all parties to the transaction, testified positively and fully, not only that they had no notice of Ruby's repudiation and refusal to go on with the undertaking until after the notes had been executed and delivered, but also to several admissions in different forms on the part of Ruby, and conduct on his part well calculated to lead them to believe the contrary. At the maturity of the first note it was paid by the makers, and then this suit was brought to recover from Ruby said sum of \$100, his proportion of the amount paid.

That the paper was in the form in which the witnesses for the plaintiffs say it was, and bore the subscription of Ruby to two shares, and that none of the plaintiffs had notice of the agreement under which he subscribed until after the note had been made and delivered, are facts so well supported by evidence that the finding in reference thereto by the court below cannot be disturbed. The same is undoubtedly true as to Ruby's acquiescence for a short time after this transaction. Woodcock testified that, after the contract was signed up by all the parties, it was shown to Ruby, and he expressed himself as being perfectly satisfied, and that when they went to organize the company he said it was impossible for him to go, but that they might go on and organize, and he would be satisfied with whatever they did, and that after the organization was effectuated, and he was informed as to who the officers were and what had been done, he expressed himself as being well pleased. Ruby denies this, but the circuit court has found against him.

By signing the contract and delivering it to Tracy to obtain other signatures sufficient to make up the \$1,800 at \$100 per share, without anything on the paper to indicate what parties were to join him in the enterprise, or that his subscription was conditional, Ruby placed himself in a situation similar to that of one who signs a bond or other obligation upon condition that certain

other persons shall sign it before it shall become effective as to him. The paper he signed was not only an obligation to Fletcher & Coleman, but a contract of co-partnership or joint ownership with such persons as might thereafter subscribe for the remaining 16 shares. The subscribers for these 16 shares, relying upon his subscription, and without any notice that it was conditional, executed a negotiable note, whereby they placed themselves almost in the same situation as if they had parted with \$1,800 cash, \$200 of which was on the faith of his signature. Had Ruby signed a note upon such condition, and it had passed into the hands of a stranger, for valuable consideration, without notice of the condition, he would be absolutely bound. The principal involved here is exactly the same.

"A bond which is a complete and perfect instrument on its face at the time of its delivery to the obligee was executed by persons as sureties upon the condition that it should not be delivered until executed by other persons, and it was placed in the hands of the principal obligor, and without being so executed it was delivered by the obligor to the obligee, who was not informed of the condition. The bond is the valid bond of the sureties, and they cannot set up the condition against the obligee." *Nash v. Fugate*, 24 Grat. 202, 18 Am. Rep. 640; *Nash v. Fugate*, 32 Grat. 595, 34 Am. Rep. 780. To the same effect, see *Miller v. Fletcher*, 27 Grat. 403, 21 Am. Rep. 356; *Lyttle v. Cozad*, 21 W. Va. 183; *Webb v. Baird*, 27 Ind. 368, 89 Am. Dec. 507; *Cutler v. Roberts*, 7 Neb. 4, 29 Am. Rep. 371.

But, aside from this principle, it was competent for Ruby to waive that condition, and there was evidence that he did waive it, by looking over the contract after it had been completed, expressing his satisfaction with it, and encouraging, at least one of the parties to go on and organize the "company," as it was called, under it. He denies this, but, as stated, the court has found against him, and the evidence against him is as strong as the evidence in his favor. Hence, under the rule, this court cannot disturb the finding. *Board v. Parsons*, 24 W. Va. 551; *Lewis v. Alkire*, 32 W. Va. 504, 9 S. E. 890; *Hysell v. Coal Co.*, 46 W. Va. 158, 33 S. E. 95; *Englerth & Rowland v. Kellar*, 50 W. Va. 259, 40 S. E. 465. His condition is even worse than that. The case was tried by the court in lieu of a jury, and is regarded as standing upon a demurrer to the evidence, considering the plaintiff in error as demurrant. *Board v. Parsons*, 24 W. Va. 551; *Clafin v. Steenbock*, 18 Grat. 842; *Lewis v. Alkire*, 32 W. Va. 504, 9 S. E. 890; *Black's Adm'r v. Thomas*, 21 W. Va. 713. By demurring to the evidence he has admitted, in favor of the demurrees, all inferences of fact that may be fairly deduced from the evidence. *Mapel v. John*, 42 W. Va. 30, 24 S.

E. 608, 32 L. R. A. 800, 57 Am. St. Rep. 839; Talbott v. Railroad Co., 42 W. Va. 561, 28 S. E. 311; Garrett v. Ramsey, 26 W. Va. 345; Gunn v. Railroad Co., 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575; Lewis v. Alkire, 32 W. Va. 504, 9 S. E. 890.

The only other objection to the judgment is the claim that the action involves the settlement of partnership accounts, and therefore presents a subject-matter belonging to exclusive equity jurisdiction—one not cognizable by a court of law. A part of the claim set up originally in the justice's court was open to this objection, but the circuit court eliminated it, and refused to permit the plaintiffs to take anything there except the \$100, with interest and costs. This sum is clearly no part of the partnership account. It is a part of what Ruby agreed to contribute as capital, and for this an action at law may be maintained. "The remedy at law for one partner against another (save by the action of account) is, in general, limited to instances where the justice of the case may be attained without the settlement of the accounts of the partnership, which a court of law, except in the action of account, has no facilities for doing, and even in that action very imperfect facilities. But where no such adjustment of the partnership accounts is requisite to reach the merits of the case, a partner may as readily sue a co-partner, in a court of law, as a stranger. Hence, upon any covenant by deed, or upon any special undertaking without deed, whether the undertaking be express or implied, an action at law may be instituted by one partner against his fellows, supposing that the covenant or special undertaking be one whereby a partner agrees with his co-partners to do a specific thing, notwithstanding it relates to the partnership—as to advance a due proportion of the capital stock, in order to its formation; to pay a certain rent for premises occupied; to pay for work done before the doer of it became a member of the firm; * * * and, in short, to do any specific thing where the particular transactions are insulated and separated from the joint account." 3 Min. Inst., part 2, p. 700; 15 Enc. Pl. & Pr. 1043; Gow on Part. (2d Ed.) 86; Wadsworth v. Manning, 4 Md. 59; Currier v. Webster, 45 N. H. 226; Glover v. Tuck, 24 Wend. 153; Morgan v. Nunes, 54 Miss. 308.

"If a contract, though made concerning the partnership affairs, and in furtherance of the joint undertaking, is the individual contract of the parties who are parties to it, and if it is made by them in their own name, and not in the name of the firm, an action may be maintained thereon by one against the other, during the continuance of the partnership." Wright v. Michie, 6 Grat. 354.

From these principles, it results that the judgment must be affirmed.

(64 W. Va. 433)

GROSS v. LEWIS & SCHMIDT.

(Supreme Court of Appeals of West Virginia.
Dec. 16, 1903.)

CONTRACT—REFUSAL TO PERFORM.

1. If, during performance of a contract, or after the time for performance arrives, one of the parties, by word or act, openly and clearly refuses to perform his promise in whole or in part, the other party is thereupon exonerated from performing his part of the contract.

2. When a court, by its decree or judgment, deprives one person of his money or property, to be paid or delivered to another, such action should be warranted by sufficient legal justification. *Held*, in this cause, the evidence does not support the decree.

(Syllabus by the Court.)

Appeal from Circuit Court, Tucker County; John Homer Holt, Judge.

Bill by George W. Gross against James Lewis and Peter W. Schmidt. Decree for plaintiff, and defendants appeal. Reversed.

E. D. Talbott and Wamsley & Coberly, for appellants. C. H. Scott, for appellee.

MILLER, J. George W. Gross, at the August rules, 1899, filed his bill in chancery in the clerk's office of the circuit court of Tucker county against James Lewis and Peter W. Schmidt. Plaintiff also sued out in said cause an attachment against the estate of said defendants, which was, by the sheriff of said county, levied upon a tract of land situate in the county aforesaid, described as containing 497 acres. Both the bill and affidavit for the attachment aver that the defendants are nonresidents of this state. The bill alleges that the defendants are indebted to the plaintiff in the sum of \$312.50; that therefore, to wit, on the 14th day of February, 1898, the plaintiff and defendants entered into a contract whereby defendants sold to plaintiff all the hemlock timber on the Haddix Run side of a certain tract of land, owned by them, containing 497 acres, situate on Haddix and Clover runs, in Tucker county, fully described in a deed of conveyance by Charles W. Mayer to defendants, bearing date on the 18th day of June, 1889. A copy of the deed is filed with, and made part of, the bill. The plaintiff further avers that the contract price for the said timber on said lands was 50 cents per thousand feet; that he took possession of said timber, and in May, 1899, sold the same to A. McCauley at the price of \$1.12½ per thousand feet; that immediately after he entered into the contract for the sale of said timber to McCauley, and when said McCauley was about to begin the manufacture of said timber into lumber, the defendants repudiated the sale made to plaintiff by them, and refused to allow McCauley to carry out his contract with plaintiff for the purchase of said timber; that defendants, without any cause whatsoever, re-

¶ 1. See Contracts, vol. 11, Cent. Dig. §§ 1424, 1425.

puddled and refused to comply with their contract with him for the sale of the timber, and prohibited him from selling said timber to McCauley or any one else, and prevented him from cutting and causing said timber to be cut and sold, and the funds to be realized thereon by plaintiff at the price of \$1.12½ aforesaid, whereby plaintiff would have made the profit of 62½ cents per thousand feet upon the whole quantity of said timber; that there was on the said land 500,000 feet of hemlock timber, bought by him from the defendants as aforesaid, and by him sold to McCauley at the price aforesaid; and that he has been damaged in the sum of \$312.50 by reason of the refusal of defendants to carry out their said contract with him, and because defendants prohibited him from delivering said timber to McCauley. The plaintiff also alleges that the defendants are the owners of said 497 acres of land, and further says that defendant James Lewis, who was then, and still is, the owner of the undivided half of said 497 acres, did on the 1st day of November, 1896, convey his said interest therein by deed to his codefendant, Schmidt, for the pretended consideration of \$1,500 cash, but plaintiff charges that no consideration was paid or to be paid by Schmidt to Lewis for said land; that said conveyance was made in fraud and without any consideration. The plaintiff prays that he may have a decree to subject said land to the payment of his said demand of \$312.50, with interest thereon, and the costs of his suit; that said deed from Lewis to Schmidt be set aside and canceled as to his demand; and that the said land be sold to satisfy the same. The deed from said Charles W. Mayer and his wife to said Lewis and Schmidt, bearing date as aforesaid, for said 497 acres of land, reserves on its face a lien upon said land in favor of Mayer to secure the payment of two notes, for \$500 each, executed by the defendants, bearing the same date as the said deed, and payable to Mayer on the 1st day of January and July, respectively, 1890, being for parts of the purchase money for the land; but Mayer is not made a party to said cause.

On the 23d day of November, 1899, the said circuit court entered a decree in the cause, reciting that it was heard upon the bill and exhibits, the order of publication as to the defendants, and the order of attachment against the property of the defendants levied as aforesaid. The decree then finds that there is due the plaintiff from the defendants the sum of \$320.31, and declares the said sum to be a lien upon the tract of 497 acres of land. "And it appearing that the said defendant Lewis hath conveyed his half interest in the said tract of land to his codefendant, Peter W. Schmidt, which conveyance is without consideration and fraudulent and void as to the said debt of the plaintiff, and to that extent is set aside, canceled, and annulled." The decree further provides for a

sale of the land in default of the payment of the sum decreed against the defendants.

On the 7th day of March, 1900, the defendants tendered to the court their petition, accompanied by proper bond, praying that the proceedings in said cause might be reheard, which petition and bond were accepted by the court and filed, the bond approved, and said defendants permitted to make defense as in such case is provided by statute. Defendants' petition seems to have been intended for, and treated as, their answer to the bill. This could be done, so far as it contains proper matter for an answer. *Sturm v. Fleming*, 22 W. Va. 404. It specifically denies every material allegation of the bill. The defendants aver therein that it is not true that petitioner, Lewis, without any consideration, or with any fraudulent intent, conveyed his one-half interest in said tract of 497 acres of land to Schmidt, but it is true that said Mayer on the 18th day of June, 1889, conveyed said tract of land to petitioners; that on the 1st day of November, 1896, petitioner Lewis conveyed to Schmidt his moiety of the same, and that Schmidt paid him for it. They further deny that Lewis is a joint owner of said tract of land, in equity or otherwise. A copy of said last-mentioned deed is in the record, from which it appears that it was duly admitted to record in the county of Tucker on the 5th day of February, 1896. Depositions for both plaintiff and defendants were taken and filed in the cause.

The plaintiff, in answer to the question, "State whether you purchased the hemlock timber and bark on that certain tract of land, containing four hundred and ninety-seven acres, on Haddin creek, Tucker county, owned by the defendants, about February, 1898; if so, state at what price, and all about it?" said: "Why, I did purchase it. I purchased all the hemlock on the Haddix Creek side of the survey at fifty cents a cord for the bark, and fifty cents a thousand for the timber." Witness further stated: "I just made the offer of fifty cents a thousand for the timber, and fifty cents a cord for the bark." In answer to another question, as to the quantity of the timber and bark on that part of the tract of land tributary to this Haddix creek, plaintiff further stated: "I think there was about six hundred thousand feet of the hemlock timber. Somewhere close to two hundred and fifty cords of bark. I sawed about two hundred and fifty thousand feet of timber off of that part of the tract for I. H. Rinard. I estimated the balance of it, in a rough way, at three hundred and fifty thousand feet, but there was more than that. I made this estimate when I was peeling the bark off of it." The witness further stated, that he had sold the timber purchased from the defendants on the 5th day of May, 1899, to A. McCauley, at \$1.12½ per thousand, in the tree. He filed a copy of a contract in writing with McCauley, dated May 5, 1899,

showing that, in consideration of \$1.12½ per thousand feet, he had sold to McCauley all the hemlock, poplar, red oak, and white oak timber on the Haddix Creek side of the Mayer tract of land, owned by P. R. Schmidt. He also testified that Lewis sold the timber to I. H. Rinard; that Lewis told him that he could not cut the timber; that he notified McCauley what Lewis had done; that McCauley then tore his signature from the said contract with plaintiff; that by his contract he was making 62½ cents per thousand feet on the timber; and that he had cut the timber all down. Plaintiff also filed several letters addressed to him, signed by James Lewis, all purporting to have been written at McKeesport, Pa. The first is dated January 7, 1898, in which Lewis says: "I seen schmidt about the bark and hemlock I couldn't do any better with him than you offered he wants to know how he is to git his money. You state in the next letter that you will pay him as you get the money out of it," etc. The next letter is dated January 26, 1898, and says: "I seen Smith about the hemlock. I have told him that it had better be sold he has agreed to sell it. Let me know what you can give for the hemlock and bark [hemlock] by the thousand and the bark by the cord or what you will give for the hemlock by bulk," etc. Another letter, dated February 14th, states: "That is all right about the pay. You git at it, and git it off this year." And the last letter, dated February 21, 1898, says: "You can do as you like with the Tannery about the pay for the bark. Will leave that to you," etc. No specific time of payment appears to have been agreed upon by the parties for the hemlock timber.

The defendant James Lewis testifies that he sold to Gross the hemlock timber on Haddix creek for 50 cents per thousand for the timber, and 50 cents per cord for the bark; that Gross was to cut the timber; that the sale was in the early spring of 1898; that Gross cut down part of the hemlock timber, and peeled the bark off of what he cut down; that he picked out and went through the best part of the timber; that he had been told by Gross that Gross had sold the timber to McCauley; that he objected to Gross making sale of the hardwood timber to McCauley, because he had sold no hardwood timber to Gross; that he made no attempt whatever to stop the sale of the hemlock timber; that by the term "hardwood timber" he meant poplar, oak, chestnut, beech, birch, and all except the hemlock; that Gross had no right to sell, and had no claim whatever on, the poplar, red oak, and white oak timber mentioned in his contract with McCauley dated May, 1899; that afterwards Gross told witness that he would throw up his contract for the bark and hemlock; that witness could work it, sell it, or do as he pleased with it, as he (Gross) would have no more to do with it. "I received it from him. He told me I could have it." Afterwards witness sold the hemlock

and hardwood to I. H. Rinard. Witness further testifies that he never at any time refused to allow Gross to cut the hemlock timber, that Gross did not object to the sale of the hemlock timber by defendant to Rinard, and that Gross afterwards sawed a part of it for Rinard.

Samuel W. Gainer swears that Gross told him that he had thrown up his contract with Lewis, and was not going to have anything more to do with it; that he had sent him word that he was not going to handle his timber; that it was the hemlock timber referred to. W. D. Murphy states that Gross told him in May, 1899, that he had given up the contract betwixt him and Lewis for Lewis' hemlock timber. He (Gross) said Mr. Lewis could take the timber, and do what he pleased with it; that he did not care if it lay there and rotted. He would have no more to do with it. H. H. Gross testifies that Gross told him that he had thrown up the contract between himself and Lewis, and would have no more to do with it. I. H. Rinard says that he purchased the hemlock timber on Haddix, theretofore sold by Lewis to Gross; that there was about 400,000 feet manufactured by him on the 497-acre tract.

Gross was recalled, and denied that he threw up his contract for the timber, or that he ever stated to witnesses Gainer, Murphy, or Gross that he had done so. He further stated that he had a verbal contract whereby he was to have all the hardwood on the part of the tract tributary to Haddix creek.

On the 15th day of June, 1903, the said cause was again heard upon the plaintiff's bill, and exhibits filed therewith, upon the order of publication against the defendants, order of attachment levied upon the 497 acres of land, the said petition of defendants, the depositions taken and filed as aforesaid, and upon the former orders made and entered. On consideration whereof it was adjudged, ordered, and decreed that the plaintiff should recover from the defendants, James Lewis and Peter W. Schmidt, \$385.31, with interest thereon from the 15th day of June, 1903, and the costs of said suit. "And it appearing that the said defendant James Lewis hath conveyed his half interest in said tract of land to his codefendant, Peter W. Schmidt, which conveyance is without consideration, fraudulent, and void as to the said debt of the plaintiff, George W. Gross, and to that extent is set aside, canceled, and annulled." The decree then provides for a sale of said land in default of the payment by defendants of the amount decreed against them within a time given. From the aforesaid decree the defendants obtained an appeal, and assign errors, which are to the effect that the said decree is erroneous, to their prejudice, and should be reversed.

From the foregoing statement it may be concluded that on the 18th day of June, 1899, Charles W. Mayer and his wife, by deed of that date, conveyed to the defendants the

said tract of 497 acres of land; that on the 1st day of November, 1895, Lewis conveyed his one undivided half interest therein to Schmidt; that said last-mentioned deed was admitted to record in said county on the 5th day of February, 1896; that some time in the early part of 1898 plaintiff bought the hemlock timber, and bark thereon, on the Haddix Run part of said tract of 497 acres of land; that no specific time of payment for the hemlock timber was agreed upon by the parties, and that nothing had been paid by Gross thereon; and that afterwards he attempted to sell the said hemlock and also the poplar, red oak, and white oak timber on said parcel of said 497 acres to Rinard.

It is plainly evident that Lewis, at the time of the alleged sale of the hemlock timber and bark to Gross, was not the owner thereof. In what capacity he was acting for Schmidt, is not shown, and is immaterial, because Schmidt does not repudiate that sale. It is equally as plain that Gross did not buy the "hardwood" on the land, and that he had no right thereto. The evidence upon which the court found the amount of damages in favor of the plaintiff is very vague and uncertain—too much so to be the basis of a decree against the defendants. "I [the plaintiff] think there was about six hundred thousand feet of the hemlock timber. * * * I sawed about two hundred and fifty thousand feet of timber off that part of the tract for I. H. Rinard. I estimated the balance of it, in a rough way, at three hundred and fifty thousand feet, but there was more than that. I made this estimate when I was peeling bark off of it." It will be borne in mind that Lewis sold to Rinard the poplar, red oak, and white oak, as well as the hemlock; and Rinard says that there was 400,000 feet of hemlock timber on the 497-acre tract, which he manufactured. Gross had manufactured none for himself. When a court, by its decree or judgment, deprives one person of money or property, to be paid or delivered to another, such action should be warranted by sufficient legal justification. The proof is overwhelming that Gross abandoned his contract and refused to perform the same. It is not contended that he had paid anything to defendants on the timber. He had cut part of the hemlock, but that was necessary for the purpose of removing the bark therefrom. Clark on Contracts, p. 648, says: "It may also happen that, in the course of performance of a contract, one of the parties may, by word or act, deliberately and avowedly refuse performance on his part. In such case the other party is exonerated from a continued performance of his promise, and is at once entitled to bring action." Defendants did not see fit to sue Gross, but sold the hemlock, along with other timber, to Rinard. On the evidence, the court should have found for the defendants. There is no proof whatever that the deed by Lewis to Schmidt was in fraud of any right of Gross, or that it was

intended to be so. As is shown, it was executed and recorded more than two years before the timber deal between Gross and defendants took place. A plaintiff who alleges fraud must clearly and distinctly prove the fraud alleged in his bill. *Armstrong v. Bailey*, 48 W. Va. 778, 28 S. E. 766. It was error to set aside and cancel said deed as to plaintiff's alleged demand. It seems to us that the circuit court, upon the hearing, should have abated the said attachment, and dismissed the plaintiff's bill.

For the reasons stated, the decree complained of is reversed and set aside, the attachment abated, and the bill dismissed.

(54 W. Va. 364)

GOFF v. GOFF.

(Supreme Court of Appeals of West Virginia.
Dec. 5, 1908.)

DIVORCE—ALIMONY—RECEIVER—BOND.

1. In a suit for divorce, the question of allowances to the wife for maintenance pendente lite, and to enable her to carry on the suit, to be paid by the husband, is within the sound discretion of the court, or judge in vacation, under section 9, c. 64, Code 1899; and the exercise of this discretion, which is a very broad one, will not be reviewed unless it is made to appear that it has been grossly abused.

2. Where, in a suit for divorce and alimony by a wife, the allegations of the bill and the record show the defendant to be the possessor of an estate worth from \$75,000 to \$80,000, composed largely of real estate, and the defendant has been enjoined in the suit from disposing of any of his real estate, and has responded to an order in the cause requiring him to pay a specified sum for temporary maintenance of plaintiff, and expenses of carrying on her suit, *held*, the appointment of a special receiver by the judge in vacation to take charge of the personal property of the defendant is an abuse of judicial discretion.

3. When a trust company, which is properly doing business under the laws of this state, shall be appointed a special receiver in any case or proceeding, it is not required to give bond. The capital of such company, together with any deposits required to be made by it with any officer or officers of the state, whether such deposits be a part of said capital or not, are to be taken and considered as the security required by law for the faithful performance of its duties.

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County; John Homer Holt, Judge.

Action by Louise L. Goff against Charles P. Goff and others. From decree and orders entered, defendant Goff appeals. Reversed.

W. B. Maxwell and L. Greynolds, for appellant. O. W. Dailey, E. D. Talbott, and T. P. R. Brown, for appellee.

McWHORTER, P. On the 10th day of February, 1902, Louise L. Goff presented her bill in chancery, in vacation, to the judge of the circuit court of Randolph county, verified by her affidavit, against her husband, Charles P. Goff, Charles M. Kittle, the Elkins National Bank et al., debtors of said Charles P.

¶ 1. See *Divorce*, vol. 17, Cent. Dig. §§ 613, 770.

Goff, praying for a divorce from bed and board against the said defendant Goff, for cruel and inhuman treatment, reasonable apprehension of bodily hurt, and other matters alleged and set out in her bill, and for alimony and for money to carry on and prosecute her suit, and praying that the court would commit the custody, care, and management of the said defendant Goff's large estate to some competent person, that the same might be protected and preserved in the interest of plaintiff and of said Goff, and others who might have an interest therein; that the defendants who were debtors of said Goff and all other persons be restrained and enjoined from paying to him any of the money they owed him; that a deed made by Goff to the defendant Kittle, dated the 20th of August, 1901, for an undivided moiety in the undivided one-fourth interest owned by said Goff in the 6,806-acre tract of land known as the "Goff-Arnold Land," for the reasons set out in the bill, be annulled, vacated, and set aside, and the said Kittle enjoined and restrained from selling or conveying the interest in said land so conveyed to him by Goff; that the gift or supposed gift of the diamond ring by said Goff to Kittle be canceled and set aside and declared null and void, and that Kittle be required to surrender and deliver possession of said ring to some suitable person, to be named by the court, to be held by such person to answer any further order or charge touching the same, and that the court will make such provision for the maintenance of said Goff out of his estate as might be proper; and that Goff be enjoined and prevented from imposing any restraint upon the personal liberty of the plaintiff; and for general relief. Whereupon the judge made an order granting the injunction prayed for, and appointed Kent B. Crawford a receiver to take charge of the diamond ring, and directed the defendant Kittle to surrender the same to Crawford, who was required to give bond, in the penalty of \$800, to have the ring forthcoming to answer any future order of the court respecting the same, and further ordered the defendant Goff to pay the plaintiff \$500, to enable her to carry on her suit, and for temporary maintenance. On the 22d day of February, 1902, the judge of said court made another order in said cause, reciting that plaintiff had presented to him in vacation her bill, verified by affidavit, praying for a divorce from bed and board against the defendant Goff, for alimony, and other matters of relief therein specified, and that it appeared that process to answer said bill had been regularly sued out of the clerk's office of said court, and duly served upon all the defendants, and reciting that the vacation order made on the 10th of February, 1902, inadvertently directed said Goff to pay to the plaintiff \$500 to carry on this suit, and for temporary maintenance, without any notice to said Goff of plaintiff's intention to ask for said sum. On motion of plaintiff, it was or-

dered that that part of the order which directed the payment of said sum of money be set aside and annulled; and it further appearing from affidavits filed that the defendant Charles P. Goff on the 10th of February, 1902, left his residence and the town of Beverly, and that the only persons occupying his residence were defendant Charles M. Kittle and a small boy, who were absent from the premises a great part of the time, leaving the house and effects therein uncared for and unprotected, it was further ordered that the defendant Charles P. Goff, his agents, servants, and representatives, be restrained and enjoined from preventing the plaintiff from returning to said residence and dwelling therein, if she should elect so to do, for the purpose of preserving and caring for the same, and the household goods, furniture, and chattels therein, with full power to control in said house as to its occupancy and management for the said purposes during the absence of said Goff from said residence. The restraining order of February 10th was so modified as to permit the debtors of Goff to pay their indebtedness to the general receiver, if they should elect so to do, taking proper receipts therefor from said receiver, and provided that a copy of said order of the 22d of February be served upon the defendants in the cause. The defendants Charles P. Goff and Charles M. Kittle filed their separate answers. A large number of depositions were taken and filed in the cause by both plaintiff and defendant Goff, and on the 16th day of May, 1902, the cause was heard in court upon process duly executed upon all the defendants, the answers of Goff and Kittle, and general replications thereto, and the depositions and exhibits taken and filed in the cause, and upon the orders theretofore entered; but, the court not then being ready to dispose finally of the cause on its merits, it was heard upon the motion of the plaintiff for an allowance for temporary maintenance, and also for expenses and attorney's fees in the prosecution of the suit, when it was ordered and decreed that plaintiff be allowed the sum of \$60 per month, beginning January 21, 1902, for her support, and \$500 on account of costs and attorney's fees in prosecuting her suit, to be paid out of moneys coming into the hands of the general receiver of the court from payments made to him by Goff's debtors. It was further ordered that any debtor of Goff might pay to plaintiff moneys not exceeding the amount specified in the order, and take a receipt from plaintiff for such sum. And on the 15th day of July, 1902, in vacation, the judge of said court, in pursuance of a notice served upon defendant Goff, on the 7th day of July, heard the motion of plaintiff to appoint a special receiver in the cause, to take charge of the personal property of the defendant Goff, when the notice of such motion was filed, together with the affidavit of plaintiff, Louise L. Goff, which motion to appoint such

receiver was resisted by the counsel of Goff, who was present at the hearing. Upon the hearing of the motion the court appointed the Trust Company of West Virginia, at Elkins, special receiver of the personal property and effects of defendant Goff, with power and authority to collect such outstanding indebtedness as was due or might become due, of said Goff, and especially the claim due from Mable, McClure, and Stephenson, mentioned in the affidavit of plaintiff; and the judge being informed by counsel for defendant Goff that they had in their hands sufficient money furnished by Goff to pay such alimony as had been awarded to plaintiff by the court, and put in their hands for that purpose, they were directed to pay the same to plaintiff or her attorneys. These are all the orders or decrees entered in the cause.

The defendant Goff appealed to this court, and insists that the court erred in entering each and all of said orders and decrees. The first order that was entered on February 10, 1902, in so far as it allowed \$500 to the plaintiff before the issuing and service of process in the cause, was null and void to the extent only of such allowance. "The judge had no jurisdiction to enter a decree for alimony pendente lite or permanent alimony without first in some manner summoning the husband to appear, and thus affording him an opportunity to be heard; and, should such a decree be entered without first citing the husband, a writ of prohibition will lie to prevent its enforcement." *Coger v. Coger*, 48 W. Va. 135, 35 S. E. 823. It is contended by appellant's counsel that the judge had no jurisdiction in vacation, and without notice to Goff, to review the order of February 10th, and cite section 1, c. 134, Code 1899. That section has reference to the correction of orders and decrees in which errors of the nature mentioned have occurred, and not to orders and decrees which were without the jurisdiction of the judge or court, and are simply nullities. Prohibition lies where there is an effort to enforce, or where there may be an attempt to enforce, a void order or decree. The court could at any time in term, on motion, or on its own motion, have set aside the order of February 10th, as null and void. The judge, by his attempt in vacation to set it aside, showed that he did not propose to enforce it. The case has not been heard or passed upon by the circuit court upon its merits, and the appellate court can only consider such questions as are brought before it upon the four orders entered in the cause and complained of. Section 6, c. 64, Code 1899, provides that "a divorce from bed and board may be decreed for cruel or inhuman treatment, reasonable apprehension of bodily hurt, abandonment, desertion, or where either party after marriage becomes a habitual drunkard." Section 7 of the same chapter gives chancery jurisdiction in all matters pertaining to divorce suits to the circuit courts, and section 9 provides: "The court in term, or

the judge in vacation, may at any time pending the suit, make any order that may be proper to compel the man to pay any sum necessary for the maintenance of the woman, and to enable her to carry on the suit, or to prevent him from imposing any restraint on her personal liberty. * * * Or to preserve the estate of the man so that it be forthcoming to meet any decree which may be made in the suit or to compel him to give security to abide such decree."

It is insisted by appellant's counsel that the judge of the circuit court, by the order of February 22d, erred in appointing plaintiff receiver of the real estate of defendant, and without requiring bond and security, as provided in section 28, c. 133, Code 1899. The order is very peculiar. It does not, in terms, appoint plaintiff receiver of the home and effects therein of defendant; and yet it takes the custody and control of it from the agents and employes of defendant, and places plaintiff in the custody thereof, with full control, in and during the absence of defendant. Although it changed the possession of the residence and effects therein for the time being, the order does not clothe her with all the powers and duties of a special receiver of the property; and it was evidently not the purpose to appoint her as such receiver, as her occupancy is limited by the language of the order to the time that the defendant remained absent, and it is fairly implied that upon his return she shall relinquish her occupancy or possession. Whether this should be construed as appointing her receiver or not, no motion was made to set aside this ex parte vacation order; and, under the decisions of this court, no appeal will lie therefrom until such motion has been made and overruled. "An ex parte order granting an injunction is not appealable until after a motion made to vacate or set it aside." *Brast v. Oil Co.*, 46 W. Va. 613, 33 S. E. 302. In the opinion in that case it is said: "It is not an adjudication between parties. One side has not been heard, and, until he moves the court that granted the injunction to correct it, he has no right of appeal. Appeals are to correct errors committed after hearing, and not to review mere preliminary orders made in the absence of one of the litigants. Such orders are still in the breast of the court until finally heard and determined. The party affected thereby has an easy remedy by motion, and an appeal will not lie until such motion proves ineffectual." 11 Enc. Pl. & Pr. 96; *Aldinger v. Pugh*, 57 Hun, 181, 10 N. Y. Supp. 684; and other authorities there cited. In case of *Clark v. Bryan*, 48 W. Va. 271, 37 S. E. 543, there was held to be "an appeal improvidently awarded to an ex parte vacation order made by the judge of the circuit court awarding an injunction and appointing a receiver." This case is referred to by counsel for appellant as a case in point, but which it was claimed was abandoned by counsel for appellant, and was not argued in

the appellate court, and the attention of the court was not called to the authorities which the counsel claim fully sustained their views to the contrary. Why counsel chose to abandon an appeal which was, according to their contention, well taken, and was supported by the authorities, is not made to appear. The case of *Clark v. Bryan* has not been overruled, and stands as the authority of this appellate court, to the effect that "an ex parte vacation order made by a judge of the circuit court is nonappealable." And for the very good reason that provision is made in sections 5, 6, c. 134, Code 1899, for the correction of all such errors by the court committing them. Said section 6 provides that no appeal, writ of error, or supersedeas shall be allowed or entertained by the appellate court from any such order or decree until such motion has been made and overruled, in whole or in part, by the trial court. The order of May 16th was entered in open court when the case was heard upon the question of alimony and an allowance for costs and attorney's fees, etc. This question of allowance is addressed to the sound discretion of the court or judge in vacation, he having full authority to make such allowances under section 9, c. 64, Code 1899, and it is only a question of the abuse of such discretion that the appellate court can deal with. In *Wass v. Wass*, 42 W. Va. 460, 28 S. E. 440, it is held that the amount of alimony pendente lite allowed the wife in a divorce case is addressed to the sound discretion of the court, under all the circumstances of the case, and the condition of the parties must also be taken into consideration; and in *Miller v. Miller*, 92 Va. 196, 23 S. E. 232, it is held: "The amount of alimony to be decreed is within the sound discretion of the trial court, to be fixed according to the established principles, and upon an equitable view of all the circumstances of the particular case." In *Hogg's Eq. Pr.* p. 582, it is said: "The circuit court is clothed with the exclusive right to award alimony pendente lite, and the exercise of this discretion, which is a very broad one, will not be reviewed unless it is made to appear that it has been grossly abused." *Gussman v. Gussman*, 140 Ind. 433, 39 N. E. 918; *Sellers v. Sellers*, 141 Ind. 307, 40 N. E. 699. Appellant complains that the order granting the alimony and allowance was made when the case was submitted to the court for hearing. The pleadings and evidence taken in the case are very voluminous, there being nearly 460 pages in the record. To give the cause the consideration due to it was quite an undertaking for the court, while a cursory examination would satisfy the court that the plaintiff was entitled to relief, whether all she claimed or not. The pleadings and the evidence showed the financial condition of the parties and their condition in life, so that the court had little trouble in arriving at what was a reasonable allowance and alimony. In *Bailey v. Bailey*,

21 Grat. 43, it is said: "The general rule is that the wife is entitled to the support corresponding to her condition in life and the fortune of her husband; and when delinquency of the husband has been established, and the wife is the injured party, driven by his cruelty or other wrongful conduct from the comfort of domestic enjoyment, she should be liberally supported." There seems to have been no abuse of the sound discretion of the court in making the allowance for alimony, as well as for fees and expenses of the prosecution of the plaintiff's suit; the record fully sustaining the action of the court in that particular. As to the appointing of a receiver of the personal property under the order of July 15, 1902, after due notice to the defendant, the judge of the circuit court in vacation had full power, under section 28, c. 133, Code 1899, to appoint such receiver, in case the circumstances of the case warranted such action, if there was a necessity for it, such as "danger of the loss or misappropriation of the same or a material part thereof." Section 6823, 5 Thompson on Corporations, says: "Unless there is a statute giving the right to a receiver in a given state of facts, no one can demand the appointment of a receiver therein ex debito justitiæ; but the question whether or not a receiver will be appointed in a given case is addressed to the sound discretion of the chancellor, under all the circumstances. The discretionary power possessed by courts of equity of appointing receivers, or refusing applications for such appointment, will not be interfered with on appeal, except in cases where the discretion has been manifestly abused; this being the general rule as to the appellate review of discretionary action." Let us consider a little the facts in the case, and see if they are such as to warrant the application by the court of this drastic remedy. This is a suit for divorce, and, according to the allegations of plaintiff's bill, defendant was possessed of a large estate, worth at least \$80,000, a large part of which consisted of real estate. This was, at the instance of plaintiff, tied up by injunction, to await the action of the court, so that defendant could not dispose of it; and it was liable to any final decree that might be awarded in favor of plaintiff. Defendant had responded to the order of the court requiring him to pay \$500 for costs and expenses of carrying on plaintiff's suit, and for the payment of the \$60 per month for plaintiff's temporary support. Was there any reason for the court taking possession by its receiver of the large personal estate of the defendant, thus depriving him of the use of the whole of his estate? This was a clear abuse of the judicial discretion, and so much of the decree or order of July 15, 1902, as appointed the Trust Company of West Virginia receiver of the personal property of the defendant should be set aside and held for naught.

It is further insisted by counsel for appel-

lant that it was error to appoint the Trust Company of West Virginia as special receiver of the personal estate of defendant in the order of the 15th of July, 1902, without requiring bond for the faithful performance of the duties of receiver. Section 5, c. 85, p. 187, of the Acts of 1901, relating to the incorporation and regulation of title and trust companies, provides that whenever such company shall become trustee, assignee, receiver, guardian, etc., the capital of such company, together with such other assets as are named therein, "shall be taken and considered as the security required by law for the faithful performance of such duties."

For the reasons herein stated, so much of the order of February 10, 1902, as ordered the payment of \$500 by defendant to plaintiff for temporary maintenance, and appointing Kent B. Crawford receiver of the diamond ring of defendant, is set aside and held for naught, as is also so much of the order of February 22, 1902, as places plaintiff in the possession and custody of the residence and the property therein of defendant. Such order, while in itself not appealable, because it was such error as could have been corrected on motion by the circuit court, and the cause being properly here by appeal from the decree of July 15, 1902, appointing the Trust Company of West Virginia special receiver, and said order being complained of in said particular, this court will make such order as the circuit court should have rendered, and will set aside such part of said order of February 22, 1902; and so much of the order of July 15, 1902, as appointed the trust company special receiver is reversed and annulled, and the cause is remanded to the circuit court for further proceedings to be had therein.

(54 W. Va. 344)

MILLER v. FIREMAN'S INS. CO. OF BALTIMORE.

(Supreme Court of Appeals of West Virginia. Dec. 5, 1903.)

INSURANCE—CANCELLATION OF POLICY—AUTHORITY OF AGENT.

1. A fire insurance policy gives right to the company to cancel it on five days' notice. The company instructs its local agent to take up the policy for cancellation, and the agent informs the assured that the company elected to cancel the policy, and stated to him that he would procure him a policy in another company for which he was agent. The assured, with this understanding, delivered up the policy to the agent for cancellation, and the agent delivered it to the company, and it was canceled by it. *Held*, that the policy was thereby canceled.

2. An insurance agent directed by his company to take up for cancellation a policy of insurance has no power to take it up with a condition that he would get for the assured a policy in another company, and the surrender of the policy to such agent for such cancellation on such condition is an absolute cancellation.

Dent, J., dissenting.

(Syllabus by the Court.)

Error to Circuit Court, Summers County; J. M. McWhorter, Judge.

Action by James H. Miller against the Fireman's Insurance Company of Baltimore. Judgment for plaintiff, and defendant brings error. Reversed.

Peyton & Perkinson and Northcott, Perry & McComas, for plaintiff in error. Miller & Read, for defendant in error.

BRANNON, J. J. B. Lavender, agent of the Fireman's Insurance Company of Baltimore at the town of Hinton, issued to James H. Miller its insurance policy for the sum of \$1,000, insuring said Miller against loss by fire on certain books and office furniture in his law office, in said town of Hinton, for the period of three years, for which the premium was fully paid to said Lavender. On December 19, 1900, J. B. Lavender went to James H. Miller, and told him that the Fireman's Insurance Company was going out of business in West Virginia, and wanted him to procure a return of said policy for cancellation, and told Miller that, if he wished, he would give him another policy in another company as good without additional cost. And Miller in his testimony says that, "with this understanding, I gave him the policy." Thereupon said policy was delivered by said J. B. Lavender to U. O. Michaels, special agent of said insurance company, who was in town for the purpose of taking up and canceling policies, which fact was told Miller; and said policy was thereupon canceled and destroyed by said company, and said Lavender given credit for the proper amount of return premium. Afterwards, on the 3d day of September, 1901, the property which had been embraced in said policy was destroyed by fire; and then Miller enquired of said Lavender if he had ever issued him any new insurance upon said property, and, finding that he had not, set about to make proofs of loss under the destroyed policy in defendant company, and on the 9th day of November, 1902, instituted action in the circuit court of Summers county, wherein a judgment was rendered in favor of plaintiff, Miller, for the sum of \$925, from which this writ of error is prosecuted.

There is but one contention of importance in the case, and that is as to whether or not the policy sued upon had, prior to the loss complained of, been canceled. It is contended by the defendant that the surrender of the policy to Lavender amounted to an agreement to surrender the policy for cancellation, and constituted a waiver on the part of the insured to have the notice given him which was provided in the policy, and the payment to him of the return premium as provided for therein. On the other hand, it is contended by plaintiff that the circumstances under which said policy was returned through Lavender to the company for cancellation, amounted to nothing more than a conditional surrender, and that the condition upon which the surrender was made was not complied with

prior to the time of the loss. Lavender was agent for several companies. Miller's statement in evidence is: "One evening Mr. Lavender came into the office, and told me that the company was going to quit business here; that their special agent, Mr. Michaels, was in town, and wanted to take up my policy. He said, if I wished, he would give me another policy in another company as good, without any additional cost. With this understanding, I gave him the policy."

The policy gave the company right to cancel on notice. Miller waived notice, assented to cancellation, asked no notice, and gave up the policy with final intent, because he knew that the local agent received it for the very purpose of delivering it as a surrendered policy to the general agent then in the town to take up policies. It could be canceled by consent without notice. See *Ins. Co. v. Johnson*, 105 Fed. 286, 44 C. C. A. 477. To show further that Miller considered it a cancellation, he lay nine months without mention of any condition as annexed to the cancellation to the company, so that it might take steps to protect itself, and never inquired of the agent for a policy in another company. Strange that he should thus be silent so long, if he had made only a conditional surrender! "Acts speak louder than words." Miller claims that he surrendered the policy with the condition that Lavender should procure him a policy in another company, but he knew that, while Lavender had authority to cancel, he had no color of authority to make a conditional cancellation—one leaving the company still liable. He had either to surrender or not surrender the policy. He could not make a surrender upon such condition. As he surrendered, it was a surrender freed of condition. Dealing with an agent, he was bound to know his limited authority. Otherwise who would be safe from an agent's unauthorized act? In making such a condition (it was not such) the agent would be acting to the harm of the principal. Apply here the rule in *Rohrbough v. Express Co.*, 50 W. Va. 149, 40 S. E. 398, (4), 88 Am. St. Rep. 849, and we find that he could not do so, and that Miller was bound to know this: "The powers of an agent must be exercised for the benefit of his principal only, and when he acts otherwise, with the knowledge and participation of the person relying upon his unauthorized act, his principal is not bound." What benefit did the company get from this condition? It was to its harm, because it kept the company still bound. The sufficient answer to this theory of conditional surrender is that the parties could not make such a condition. That condition would be a contract which the agent had no right to make. But if the parties could make such condition, they did not do so. It was no condition, but an independent agreement between Miller and Lavender, unknown to the company, with which it had nothing to do. The cancellation was one thing between certain parties. The procuring of new insurance was another thing between other parties. Miller sur-

rendered the policy, and appointed Lavender his own agent to get another policy, leaving part of the premium in his hands to pay for another policy; otherwise he would have demanded it. In *Hillock v. Traders' Co.*, 54 Mich. 531, 20 N. W. 571, a general agent went to the place where a policy had been placed, and sent the local agent to the insured party to cancel the policy; and this agent went to the insured party and informed him that the company had ordered him to cancel the policy, and said, "Will see if I can put it in some other company for a year," and the insured said, "All right. Be sure you put it in good companies." No premium was returned; nothing said about it. The policy was not actually surrendered. Judge Cooley delivered a labored opinion, and said: "The dealings of these parties had come to an end when Brown had responded to the notice of cancellation that it was all right, and directed the agent to procure new insurance. This company was not concerned with what should take place between Brown and Estee afterwards. Brown was looking to Estee for new insurance, and would be entitled to a return of the premium on failure to obtain it; and Estee would be expected to bring the amount into their own settlement, as they saw fit." The syllabus says: "The actual tender of unearned premium is unnecessary to the cancellation of an insurance policy, if the minds have met on the point that the policy is to be canceled; and, if the insured directs the insurance agent to procure other insurance, it is presumable that he means him to use for the purpose the money that he would have to return, and the direction would be a waiver of such tender." It was held that formal surrender of the policy was not necessary. Here there was a formal surrender. Miller made no actual condition. His words did not so import. Why did he not retain the policy until a new policy should be delivered, if he made it a condition? In the case of *Hopkins v. Phoenix Ins. Co.*, 78 Iowa, 344, 43 N. W. 197, after reciting the following facts: "A policy provided that it might be terminated at any time on notice to the insured, and refunding or tendering a ratable proportion of the premium for the unexpired term. The evidence showed that the company's local agent, acting under instructions, notified the insured that the policy was canceled; that assured carried the policy to their office to surrender it, but defendant's agents did not call for it; it was not delivered; and that assured began negotiations for other insurance." Held, that those facts were sufficient to justify a finding that the policy had been canceled; and held, further, that "the assured, having acquiesced in the cancellation, though no payment of the premium or tender of the premium was made, is estopped to set up the nonpayment." "A policy which in terms provides that it may be terminated at any time at the option of the company is avoided from the time when the insured has notice that the local agent has received instructions that it would be no longer liable.

In such case direction to the agent to cancel the policy is, when communicated to the insured, as effectual to terminate the risk as would be the most express notice that the policy had been terminated." *Springfield Co. v. McKinnon & Call*, 59 Tex. 507. The moment Miller knew that the company elected to cancel, and he surrendered the policy, that moment liability ceased. No condition could be made. Miller made this law more emphatic still by giving up the policy. The case of *Holden v. Putman*, 46 N. Y. 1, 7 Am. Rep. 287, does not apply. It holds: "One party to a contract is not estopped from enforcing it by the execution of an instrument purporting to cancel the contract for a consideration, where none in fact is received by him, and the act is induced by false representation of the agent of the other party." The agent got the cancellation by falsely stating that he had already obtained other insurance. No cancellation existed, because of this downright fraud. It was an instrument procured by fraud, and had no legal effect.

Estoppel. Can Miller allow the company to rest in confidence for nine months, the policy all the time in its possession, having allowed the agent money to return the premium, and then for the first time after the fire set up a claim?

It was error to allow Miller to say he dealt with Lavender as defendant's agent as to the new insurance, giving his mere opinion of his own action.

Under these principles, instruction 1 (that the acts of an insurance agent within the scope of his authority bind the company), while good in the abstract, had no relevancy to the case, and was misleading to the jury. The authority of the agent was not at all in question, except as to making the so-called condition (there was none), and there was no evidence at all tending to show authority for that.

The plaintiff's instruction 2 is bad because it tells the jury that the policy could not be canceled without mutual consent, unless the right be reserved in it to cancel, and, if reserved, could only be done according to its terms, which must be strictly complied with, unless waived, and, if waived on a condition, that condition must be complied with. There is a power of cancellation in the policy. The instruction misleads by saying the terms of cancellation must be complied with, intending to rely on want of notice, when the evidence clearly showed waiver and consent cancellation; and it introduced the so-called condition into the case, as it could refer to no other condition than that, when in fact there was no condition, and, if there had been one between Miller and Lavender, it would not bind the company. The instruction did not fit the case as presented by the evidence, in law or fact, and was misleading. No. 3 is bad for substantially similar reasons. It also said there must be return of the premium, when the evidence showed that Miller left it in the hands of Lavender to buy in-

surance in another company. It was an arrangement between them. No. 4 is bad for similar reasons. It was also misleading. The evidence did not warrant it. I think these instructions contain elements inconsistent with defendant's instruction given.

The court refused defendant its instruction 1, to the effect that if Lavender applied to Miller to deliver him the policy, telling Miller that he had been instructed by the company to take up the policy, and that Lavender was agent for other companies, and Miller knew he was, and Lavender said he would write Miller insurance, in place of this policy, in another company, and Miller delivered to Lavender the policy in suit, then the delivery of the policy to be taken up by the company, and the delivery of the policy under such circumstances, was a waiver of the clause providing for five days' notice of surrender, and payment of return premium. Under principles above stated, this instruction should have been given.

Defendant's No. 2 was refused. It should have been given. It says that if Lavender, for the company, asked surrender of the policy for cancellation, and Lavender was agent for other companies, and Miller knew it, and he promised Miller to write other insurance without additional cost, then the surrender of the policy under such circumstances amounted, in law, to a waiver of five days' notice of cancellation, and the promise of Lavender to get other insurance could not make him agent of the defendant, but the agent of another company, and his promise would not bind the defendant.

The court refused defendant's instruction 4, to the effect that if the agent Michaels directed Lavender to cancel the policy, and Lavender applied to Miller for the surrender of the policy for cancellation, and Lavender was agent for other companies, and Miller knew this, and Lavender stated that he would write Miller insurance, in lieu of the policy in suit, in another company represented by him, without further cost, and then Miller surrendered the policy, and relied on Lavender to write him insurance in another company, and made no further inquiry of Lavender as to whether such other policy had been issued, and demanded no such policy prior to the fire, and after the fire did inquire of Lavender whether he had issued such new policy, and searched himself for such a policy, but found none, then Miller was estopped to deny that he surrendered the policy in suit, and the same was canceled before the fire. This instruction ought to have been given. Is it possible that Miller could, when told by the company that it desired the surrender of the policy for the very purpose of cancellation, waive notice, by not demanding it, surrender the policy, agree to look for insurance through his agent chosen to secure such new insurance, knowing that the company had possession of the policy and regarded it as surrendered for cancellation, and negligently rest for months without a

hint of dissatisfaction to the company, and thus lull it into a feeling of security, and after the fire, for the first time, seek to put the loss upon the company? Would not this action and negligence on his part estop him from doing so? Why did he not let the company know that he deemed the policy still in force, and thus enable it to give notice of cancellation? The strong fact to show that Miller himself regarded the policy as canceled is that after the fire he went to Lavender to inquire about a policy in another company, and looked for one among his papers. Miller comes squarely out as a witness, and says he thought he had a policy until, after the fire, he looked in his safe, and could not find it. This shows he did not look to the defendant's policy. He says he forgot to attend to it. Is the defendant to compensate him for forgetfulness and negligence, when it has done nothing wrong? If he regarded the defendant company as bound to find new insurance in another company under the alleged conditional cancellation of the policy, why did he not demand the new policy in so long a time? It affords ground to say that he did not look to the defendant to find new insurance.

Judgment reversed, verdict set aside, and new trial granted.

DENT, J. (dissenting). In Judge BRAN-NON'S opinion, he relies almost wholly on the claim that the defendant's agent had become the plaintiff's agent to secure him other insurance. He rejects plaintiff's evidence entirely on this question, and attempts to infer such agency from the declarations of the plaintiff's agent, whose testimony on the point is as follows: "I stepped into Mr. Miller's office and asked him for the policy; told him that the company had requested me to take it up; told him I would give him another policy, or write him in another company as good, and it would not cost him any more." He made the promise of a new policy before he received the old one, the plain object being to prevent the return of the premium. He neither returned the premium, nor requested the plaintiff to sign the cancellation form on the back thereof. He was acting as agent for the defendant. He induced the surrender of the policy, without repayment of the premium or cancellation, on the false promise of a new policy. Where does the plaintiff's agency come in? Does the deception practiced by the defendant's agent with its presumed knowledge transfer such agent from the defendant to the plaintiff, and at the same time authorize the defendant to keep the premium, contrary to the stipulations of its policy? The insurance defendant is undoubtedly bound by the misrepresentations of its agent, made to secure the policy without compliance with the terms thereof or the return of the premium. To hold otherwise is to relieve insurance companies from the ordinary rules governing

principal and agent. The principal is bound by the false representations of the agent, though he neither authorized them nor was informed of them. *Crump v. U. S. Mining Co.*, 7 Grat. 352, 56 Am. Dec. 116; *Honaker v. Board of Education*, 42 W. Va. 170, 24 S. E. 544, 32 L. R. A. 413, 57 Am. St. Rep. 847; *Curry v. Hale*, 15 W. Va. 867; *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368; *Mechem on Agency*, § 739; *Hern v. Nichols*, 1 Salk. 289; *Fitzherbert v. Mather*, 1 T. R. 12; *Locke v. Stearns*, 1 Metc. (Mass.) 560, 35 Am. Dec. 382; *Bank v. Kimberlands*, 16 W. Va. 555.

Because defendant's agent did induce plaintiff to turn over the policy to him, without refunding the premium, by falsely promising to furnish him another in lieu thereof, there is no reason why he should be treated as plaintiff's agent. To accomplish this, not only must the agent's evidence be strained, but plaintiff's evidence must be rejected altogether. Plaintiff has a right to deny such agency, and also to testify against the same. There is nothing to work an estoppel against him. He has the right to say how he dealt with the defendant's agent, and to deny that he gave any commission to him to act in his behalf, and also to say what induced him to surrender the policy contrary to its terms. He has the right to give his understanding of the transaction, and, if he is contradicted, it is for the jury to say whether they believe him or not. The court has no just right to reject his testimony, and then infer, from circumstances that do not justify it, that plaintiff adopted the defendant's agent as his agent. The fact that the defendant is an insurance company does not justify a departure from the ordinary rule governing similar cases. On the question of the necessity of the return of the premium, the rule is stated to be that, as a condition precedent to the cancellation of the policy, in addition to giving the necessary notice, the insurer must return or tender the unearned premium. But where the policy does not require the prepayment of the unearned premium, it is but an incident not affecting the main object, and therefore it is not prerequisite. 16 Am. & En. En. Law (2d Ed.) 875; *Southern Ins. Co. v. Williams*, 62 Ark. 382, 35 S. W. 1101; *Manlove v. Ins. Co.*, 47 Kan. 309, 27 Pac. 979. In the latter case it was held that "the acts of the insurance company in deciding to close up its business, and notifying the plaintiffs that the company would not be liable on its policies issued to them, without returning to the plaintiffs the unearned cash premium paid by them to secure said policies, did not operate as a cancellation of said policies." The policy in controversy provides that "if this policy be cancelled as hereinbefore provided * * * the premium having been actually paid, the unearned portion shall be returned on surrender of this policy"; thus making the return of the unearned portion of the premium a condition precedent to the surrender of the policy. The plaintiff was in-

duced to waive this obligation of the policy on the representation of the defendant's agent that he would furnish another policy without additional expense. The defendant undoubtedly had complete notice of this representation, for it retained the premium and received the policy without requiring plaintiff to sign the cancellation receipt blank on the back thereof. In short, it was a party to the false promises of its agent that induced the surrender of the policy without repayment of the unearned premium, and received and enjoyed the benefits of such false promises. It is said, however, that plaintiff was guilty of laches in not calling attention to the matter until after his property was destroyed by fire. Plaintiff rested under the assurance of defendant's agent that a new policy would be given him in lieu of the old one, and until such promise was fulfilled he had the right to feel safe under the old policy. It was for the defendant to look after and make good the promise of its agent, or to notify the plaintiff of the dissolution of such agency. If it had compelled the agent to make good the unearned premium, or required him to procure a release thereof from the plaintiff, he would have been forewarned, so as to have been able to secure other insurance. But the defendant trusted its agent, and plaintiff was led to trust him because defendant retained his premium. He believed he was insured, because he had paid for it, and his money was never returned. Judge BRANNON'S position is that the agent was the defendant's for the purpose of securing the policy and retaining the premium, but plaintiff's agent when he neglected to carry out the promises that secured the policy and the retention of the premium. When he tells the truth, he is the defendant's agent; when he makes false promises for defendant's benefit, he is the plaintiff's. This is wholesome argument for the defendant, who gets the premium without being responsible for the insurance; but it is bad for the plaintiff, who pays for the insurance, but gets it not. The defendant received and retained the premium for insuring plaintiff's property, and it should be held liable for the loss, unless it can show that the policy was unconditionally surrendered by the plaintiff for cancellation. *Holden v. Ins. Co.*, 46 N. Y. 1, 7 Am. Rep. 238; 16 Am. & En. En. Law (2d Ed.) 870. This it has failed to do.

(54 W. Va. 54)

STATE ex rel. MORLEY v. GODFREY,
Mayor.

STATE ex rel. ATKINSON v. SAME
(Supreme Court of Appeals of West Virginia.
Nov. 14, 1903.)

GAMING — MUNICIPAL CORPORATIONS — ORDINANCES — STATUTORY REGULATION.

1. Chapter 151 of the Code of 1899 fully covers and includes gaming and gaming devices, so far as the Legislature deemed it expedient

to legislate upon the subject. It specifically defines what shall be offenses thereunder, and fixes fines and penalties for violations thereof.

2. Unless the charter of a city, town, or village confers upon it authority so to do, the council thereof has no right or power to pass an ordinance to regulate or prohibit gaming or gaming devices, or to prescribe and enforce penalties for a violation of such ordinance.

3. Held, that the ordinance passed by the council of the town of Bramwell on the 6th day of July, 1903, is unauthorized and void.

Brannon, J., dissenting.

(Syllabus by the Court.)

Applications by the state, on the relation of J. E. Morley, and on the relation of E. W. Atkinson, for writs of prohibition to A. I. Godfrey, mayor of the town of Bramwell. Writs granted.

H. A. Ritz and J. M. McGrath, for petitioners. J. F. Engle and F. W. Brown, for respondent.

MILLER, J. The town of Bramwell, in the county of Mercer, is a municipal corporation, chartered as such by the circuit court of that county, under the provisions of chapter 47 of the Code of West Virginia of 1899, and has no other charter. The respondent, A. I. Godfrey, is the mayor thereof, duly elected, qualified, and acting as such. On the 16th day of July, 1903, the council of said town made and passed an ordinance, with a preamble, in the words and figures following:

"Whereas, certain persons have, within the corporate limits of the town of Bramwell, openly engaged in gambling by operating a money-making device, known as 'Slot Machine,' to the manifest corrupting of the morals of the citizens of the said town: Now, therefore:

"Section 1. Be it ordained by the council of the town of Bramwell, that any person or persons, who shall keep or exhibit any gaming table, faro bank or keno table, or any slot machine or any table or machine of like kind, under any denomination, whether the game be played with cards, dice or otherwise, or shall be concerned in interest in keeping or exhibiting such table, bank or machine, shall be fined not less than \$100.00.

"Sec. 2. A second conviction for the offense named in the first section of this ordinance shall be punished by a fine of not less than \$100.00 and imprisonment in the town jail not exceeding 30 days.

"Sec. 3. Any person who shall play upon any table or machine mentioned in the first section of this ordinance and thereby either wins or loses any sum of money shall be fined not less than \$10.00."

It further appears from the record that, at the time and since the passage of said ordinance, petitioner Morley was the proprietor of a hotel in Bramwell; that there was in the waiting room or lobby of that hotel a

¶ 2. See *Municipal Corporations*, vol. 36, Cent. Dig. §§ 1312, 1322.

slot machine, upon which people were allowed to play; that said machine did not belong to Morley, but to petitioner Atkinson; and that Morley had permitted Atkinson to place the same in the hotel. On the 9th day of July, 1903, a warrant was issued by said A. I. Godfrey, as mayor of said town of Bramwell, against petitioner J. E. Morley upon the charge of keeping and exhibiting the said slot machine in violation of the provisions of said ordinance, and also a warrant against petitioner E. W. Atkinson upon the charge of playing upon said machine. Petitioners were arrested upon the warrants issued against them, respectively, as aforesaid, and taken before Godfrey, as mayor, and each required to enter into a recognizance to appear before said mayor at a time fixed to answer the aforesaid charges. Petitioners then presented their respective petitions to Hon. Joseph M. Sanders, judge of the circuit court of Mercer county, praying that writs of prohibition might issue to prohibit the said A. I. Godfrey, mayor as aforesaid, from trying petitioners upon said warrants for the alleged offenses therein charged. The writs prayed for were denied by said circuit judge, but upon presentation of similar petitions to a judge of this court a rule was awarded upon each petition against Godfrey, as mayor of the town of Bramwell, requiring him to show cause, if any he can, why writs of prohibition shall not issue against him as prayed for. The same question being involved in both cases, they are considered and disposed of together.

Petitioners allege that said ordinance is invalid; that the council of the town of Bramwell had and has no authority to pass such ordinance; that the warrants issued by said mayor as aforesaid thereunder were and are without legal authority, and are therefore void. They further contend that the subject of gambling and gambling devices is fully covered by state law, and that, the Legislature not having granted power to such municipal corporations to regulate it, the town is without authority to do so. Respondent, Godfrey, moves the court to quash the rule, and urges, in support of his motion, that the ordinance in question is authorized by a clause of section 28 of chapter 47 of the Code of 1899, by which it is required of the council of a city, town, or village to protect the persons and property of the citizens of such city, town, or village, and to preserve peace and good order therein. The cases of *Moundsville v. Fountain*, 27 W. Va. 182, *Jelly v. Dils*, 27 W. Va. 267, and *Judy v. Lashley*, 50 W. Va. 628, 41 S. E. 197, 57 L. R. A. 413, are cited by him.

In the two cases first mentioned, the question of the right of the towns of Moundsville and Parkersburg to require license under their respective charters from persons to sell spirituous liquors therein, and to punish offenders for unlawful sales, was determined in favor of the cities. In referring to those

cases, Judge Poffenberger, in *Judy v. Lashley*, 50 W. Va. 628, 634, 41 S. E. 197, 200, 57 L. R. A. 413, says: "This position must not be confounded with the position announced in *Moundsville v. Fountain*, 27 W. Va. 182, and *Jelly v. Dils*, 27 W. Va. 267, holding that municipal corporations may punish for unlawful retailing of spirituous liquors, etc. The statute expressly gives power to such corporations to impose license taxes upon the privilege of making such sales, from which it results that the council must have power to enforce its regulations. That is a very different matter from the case under consideration." Those cases do not apply to the cases now before us.

Chapter 151 of the Code of 1899 devotes 12 sections to the offenses of gaming, lotteries, and lottery tickets. It defines the several prohibited acts, and fixes the respective fines and punishments for violations thereof. This chapter seems to legislate upon and fully cover the whole subject mentioned in its title. The Legislature having thus legislated, has the town of Bramwell power to make and pass the ordinance in question? Points 1 and 2 of the syllabus in *Judy v. Lashley*, supra, hold:

"The police power of a municipal corporation depends upon the will of the Legislature, and a city, town, or village can only exercise such police power as is fairly included in the grant of powers by its charter.

"Section 28 of chapter 47 of the Code [of 1899], by vesting in the councils of municipal corporations power and duty 'to protect the persons and property of the citizens of such city, town, or village, and to preserve peace and good order therein,' does not confer power to punish acts made criminal by the state law and fully covered thereby, except such as would be attended with circumstances of aggravation not included in the state law. Such power must be specifically and expressly given by the Legislature before it can be exercised by such corporation."

Said section 28 enumerates certain powers conferred upon the council. Section 29 further provides that, "to carry into effect these enumerated powers, and all others conferred upon such city, town or village, or its council, by this chapter or by any further act of the Legislature of this state, the council shall have power to make and pass all needful orders, by-laws, ordinances, resolutions, rules and regulations, not contrary to the Constitution and laws of this state; and to prescribe, impose and enact reasonable fines, penalties and imprisonments in the county jail or the place of imprisonment in said corporation, if there be one, for a term not exceeding thirty days, for a violation thereof. Such fines, penalties and imprisonments shall be recovered, and enforced under the judgment of the mayor of such city, town or village, or the person lawfully exercising his functions." There is no specific authority conferred by our statute upon

cities, towns, or villages to regulate gaming or gaming devices.

In *Gas Co. v. Parkersburg*, 30 W. Va. 439, 4 S. E. 652, this court said: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily and fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby. All acts beyond the scope of the powers granted are void. Much less can any power be exercised, or any act done, which is forbidden by charter or statute. These principles are of transcendent importance, and lie at the foundation of the law of municipal corporations. 1 Dill. Mun. Corp. § 89 (55)."

In 20 Am. & Eng. Enc. Law (2d Ed.) 1140, the rule is thus stated: "The rule is general that the powers of a municipal corporation are to be strictly construed, and, if there is a reasonable doubt of the existence of a particular power, the doubt is to be resolved in the negative."

It is not necessary, for the determination of these cases, to decide whether or not the slot machine is included within the meaning of the sections of chapter 151 above stated. The ordinance under consideration places it in the same class as the gambling devices enumerated in section 1 of that chapter, and prescribes penalties for the violation of said ordinance. This the council, either by the express terms of the statute or by fair implication, had no legal authority to do.

For the reasons stated, the ordinance aforesaid was and is void and of no legal effect. The motion to quash said rule is therefore overruled, and the writ in each case is awarded as prayed for.

POFFENBARGER, J. (concurring). It has been suggested that the writ of prohibition does not lie in this case, although the ordinance under which the respondent is proceeding is absolutely void. The argument in support of this position is that the mayor, sitting as a judge, has the power to decide the question of the validity of the ordinance, incidentally, in determining the question of the guilt or innocence of the petitioner, and that, having power to begin the consideration of that question, he has jurisdiction within the meaning of the statute. Some decisions are contrary to that position. The first case that seems to be in conflict with it is that of *McConiha v. Guthrie*, 21 W. Va. 134, in which a

judge of a circuit court was restrained by the writ of prohibition from proceeding to condemn, upon the application of a railroad company, land for railway purposes within 20 feet of dwelling houses situated on a tract of land through which the railroad company was seeking to acquire a right of way. The statute in force at that time prohibited the taking of land within 20 feet of a dwelling house for railroad purposes, but whether it was in force or had been repealed was a controverted question in the case, upon which the court had to pass. It erroneously decided that the statute had been repealed. Upon the application for the writ of prohibition, this court held that the statute had not been repealed, and that, although the circuit court had jurisdiction of the parties and of the subject-matter, it had exceeded its legitimate powers in awarding the condemnation of dwelling houses. In delivering the opinion, Judge Snyder, admitting that there was jurisdiction of the cause, said: "There are no circumstances under which such houses and land can be invaded. The question of the right to condemn such houses and land arose incidentally or collaterally during the proceedings, and the court, having no jurisdiction or power to condemn or invade the same, clearly exceeded its legitimate powers in appointing commissioners to invade such property. The action of the court in this matter was not an erroneous exercise of conceded jurisdiction, as was the case in the particulars hereinbefore considered, but was entirely without authority or jurisdiction." This clearly means that, in giving the property in question immunity from condemnation, and conferring upon it a status and character which rendered it secure from invasion or molestation by railway companies seeking rights of way, the Legislature had incidentally and indirectly imposed a limitation upon the judicial power of the state in respect to condemnation of lands for purposes of public use. In doing that, the Legislature had said in effect that no court should have power to condemn it. In deciding this case, the court does not seem to have regarded it as of the slightest consequence that the circuit court was called to determine whether or not the statute had been repealed. Nothing is said on that subject, as bearing upon the jurisdiction of the court. This decision proceeds upon the theory, apparently, that the circuit court was bound to know the limits of its authority. This court simply ascertained that the statute was in force, and that it did inhibit the act in question, and thereupon awarded the writ of prohibition.

A similar case is that of *Wilkinson v. Hoke*, 39 W. Va. 403, 19 S. E. 520, in which a writ of prohibition was awarded against a judge of a circuit court, prohibiting the enforcement of a judgment for costs in a case in which a statute declared that no judgment for costs should be rendered. It was a judgment in violation of a plain, positive statute;

but it might be said that, as the court was called upon to decide whether costs should be awarded, it must consider the case before it in the light of the statute, apply the statute to it, and determine judicially whether the cause was such a one as was contemplated by the statute, and therefore, having the right to consider that question, it had jurisdiction. But this objection seems not to have been made.

Another case of the same general nature is that of *Railway Co. v. Pinnacle Coal Co.*, 44 W. Va. 574, 30 S. E. 196, 41 L. R. A. 414, in which a writ of prohibition was awarded against a justice of the peace, restraining him from the enforcement of a judgment for freight paid to the railroad company in excess of the rates allowed by a supposed statute. The justice had erroneously decided that this statute was in force; but it had been repealed, as this court held upon the application for the prohibition. The writ was awarded upon the theory that there had never been before the justice any cause of action, or any matter for which he could possibly have rendered a judgment. As there was no statute limiting the rates to be charged by railway companies, and the cause of action set up by the plaintiff had no existence unless the statute was in force, the court could render no judgment without awarding something which the law did not give. That which was laid before the justice for his action did not amount to a cause of action, and, in taking cognizance of it, he transcended his powers, or assumed to have jurisdiction over that which could not constitute the subject-matter of jurisdiction for any court.

Another similar case is that of *City of Charleston v. Beller*, 45 W. Va. 44, 30 S. E. 152, in which a judgment for costs rendered against the city of Charleston in a criminal case, in violation of the statute, was prohibited by this court. Here, as in the case last above mentioned, the circuit court had nothing before it that could constitute a cause of action; for neither the common law nor any statute authorized costs against the city. It was also similar to the case of *Wilkinson v. Hoke*, because it was a judgment which the law prohibited.

Judy v. Lashley, 50 W. Va. 628, 41 S. E. 197, 57 L. R. A. 413, in which a writ of prohibition was awarded against the mayor of a town, proceeding under a void ordinance to enforce a judgment for a fine, is a cause almost like the one under consideration now. The only difference is that the application for the writ in *Judy v. Lashley* was not made until after judgment, while in this case it came before judgment. In that case, the question now under consideration was not raised. All the argument related to the validity of the ordinance, and it was not suggested that, although the ordinance was void, a proper case for prohibition had not been made.

These decisions hold that an inferior court

cannot uphold its jurisdiction upon the ground that it has a right to consider, and is bound to consider, the law determining its jurisdiction. It will be observed that the law which set limits upon the jurisdiction in all these cases related to the matters with respect to which the court was called upon to act, and only incidentally restricted the power of the court, and did not relate directly to jurisdiction.

The case of *Buskirk v. Judge*, 7 W. Va. 91, may possibly be in conflict with them. A prohibition was applied for to restrain the judge of a circuit court from trying a man upon an indictment for murder, upon the ground that, at the date of the application, there was a statute in force which required that, in all cases of felony, the respondent should have a preliminary examination before the county court before he could be put on trial in the circuit court, unless such right were waived, and that he had not waived it, but had demanded it, and it had been refused. This court refused the writ, holding that the circuit court had jurisdiction to say whether the defendant was entitled to a preliminary examination, and that if, in passing upon that question, it erred in denying the right claimed, and put him upon his trial without such examination, the act of the court would not be in excess of its powers, nor beyond its jurisdiction, but simply an error, which would be corrected by the appellate court on a writ of error. Haymond, J., delivering the opinion of the court, said the writ was directed to the judge and parties to a suit in an inferior court, commanding them to cease from the prosecution thereof, upon the suggestion either that the case originally, or some collateral matter arising therein, did not belong to that jurisdiction, and that beyond these two grounds it seemed that the court would not interfere. Proceeding, he said: "When the matter is within the general jurisdiction of the court below, and in the conduct of the trial they have not exceeded their authority, the court above will not, on an application for a writ of prohibition, inquire whether they have decided right or not."

Which of these two propositions most nearly conforms to the principles of the common law relating to the subject of prohibition? If it appears that by the common law the scope of the writ of prohibition is broader than that given to it in *Buskirk v. Judge*, the result will tend to show that the proposition announced in the other cases is the true rule.

The rule of the common law was announced in *Mendyke v. Stint*, 2 Mod. 272, as follows: "First, that if any matter appears in the declaration which sheweth that the cause of action did not arise *infra jurisdictionem*, there a prohibition may be granted at any time; secondly, if the subject-matter in the declaration be not proper for the judgment and determination of such court, there also a prohibition may be granted at any time; thirdly, if the defendant, who intended

to plead to the jurisdiction, is prevented by any artifice, as by giving a short day, or by the attorney's refusing to plead it, etc., or if his plea be not accepted or is overruled, in all these cases a prohibition likewise will lie at any time." This proposition is also laid down in 8 Bacon, Abr. 232. The second one of the propositions above laid down may cover the question here under consideration, but the cases illustrating its application were generally those in which it appeared that the inferior court had not jurisdiction of the subject-matter, because the subject-matter belonged to the jurisdiction of some other court. Thus, in *Curling v. Long*, Com. 261, a prohibition went from the King's Bench to the Chancery Court of Cinque Ports at Sandwich, inhibiting the trial by that court of a right by custom to charge four pence per pound for all freight taken from the pier of Ramsgate. The bill set up this right, predicated the cause of action upon it, and prayed a discovery. Holt, C. J., said the writ might go as to so much of the bill as pertained to the establishment of the right, saying: "You must not try that there." The court was permitted to proceed as to so much of the bill as related to the discovery. In *Rowland v. Hockenulle*, Ld. Ryd. 698, the Court of Exchequer of Chester, a chancery court, was prohibited from proceeding to try a question of freehold. In *Delyve v. Proudfoot*, 1 Show. 396, a prohibition was granted against the commissioners of policies of insurance, whose jurisdiction extended to suits by the insured against the underwriters. A suit at common law had been commenced in the King's Bench on the policy, and afterwards the defendants summoned the plaintiff before the commissioners to obtain a judgment there that the policy be delivered up on the ground of its having been procured by fraud. As the defense of fraud could have been made under the general issue in the King's Bench, that court had jurisdiction of the matter over which the commissioners attempted to take jurisdiction. Although the commissioners had jurisdiction of the class of cases to which that one belonged, they could not try that particular case, because another superior court, having concurrent jurisdiction of the class of cases, had taken actual cognizance of that one.

Several illustrations of the use of this writ will be found in 8 Bacon's Abr. 230, 231. There it is said: "If there be one entire contract above 40 shillings, and a man sue for it in a court-baron, severing it into divers small sums under 40 shillings, a prohibition shall be granted, because this is done to defraud the court of the king." Upon the same ground the writ went to the hundred court and to the court of the honor of Eye. These were all common-law courts, and not spiritual courts, as to which the writ was used far more extensively.

In *Mayor, etc., of London v. Cox* and others, L. R. 2 H. L. 289, the common-law principles governing the writ of prohibition are

extensively discussed, in answering questions propounded by the House of Lords to the judges; and there it is clearly shown that prohibition lies where an inferior court does an act which is prohibited by the statute. St. Westm. I. enacted, "of great men and their bailiffs and others (the king's officers only excepted, unto whom especial authority is given), which at the complaint of some or by their own authority attach others passing through their jurisdiction with their goods, compelling them to answer upon them upon contracts, covenants, and trespasses done out of their power and their jurisdiction, when indeed they hold nothing of them, now within the franchise where their power is, in prejudice of the king and his crown and to the damage of the people, it is provided, that none from henceforth so do; and if any do, he shall pay to him that by this occasion shall be attached his damages double, and shall be grievously amerced to the king." Prohibition went against the "great men and their bailiffs" who violated this statute. The opinion in the case last referred to, at page 255, says: "The form of writ upon this statute is in the Register, and also in Fitzherbert, *Natura Brevium*, with the following comment: 'If bailiffs, mayors, or others who claim jurisdiction to arrest a man upon a plaint before them, or to attach his goods, etc., do arrest one for trespass or contract who was not within their jurisdiction, the party arrested, etc., shall have a prohibition directed unto them.'"

Further light is thrown upon the nature and use of this writ in the following quotation from the opinion in *Mayor, etc., of London v. Cox* and others: "In order to look straight at this question, we must first shut out certain sources of confusion which have introduced themselves into the argument; and for this purpose we must endeavor to state the law of prohibition distinctly upon points which were mixed up together in the discussion at the bar. As, for instance, it is obvious that our answer must be limited to cases in which there is an absence of jurisdiction, and the prohibition is asked for upon that ground because there are exceptions which, from their very nature, must be first raised in the court below. These occur in cases where there is jurisdiction over the subject-matter, and in which, therefore, prohibition will not go for mere irregularity in the proceedings, or even a wrong decision of the merits (*Blaquiere v. Hawkins*), but in which it will be granted for a denial or perversion of right, such, for instance, as refusal of a copy of the libel, in which case the prohibition is only *quo usque*, or refusal of a valid plea to a subject-matter of complaint within the jurisdiction, in which case, although, if the plea had been received, it might have been tried in the court below, yet, if it be refused, then upon its validity and truth being established in the court above, the prohibition is absolute (*White v. Steele*). In these cases

there is entire jurisdiction over the subject-matter. Another class in which the exception must first be taken in the court below is that in which there is general jurisdiction over the subject-matter, but a defense is raised which the court is incompetent to try, as where, in a suit to repair a chancel, the impropiator pleads a custom for the parish to repair, or raises a question of parish or no parish, which must be tried by a jury. See *Duke of Rutland v. Bagshaw*. In such a case the prohibition goes so soon as it appears that the special court cannot proceed without trying the custom, or taking a step towards trying it, even though it be not yet in issue, or a plea thereof refused. *French v. Trask*; *Byerley v. Windus*. And in this class of cases the prohibition acts simply in aid of the special or inferior court, by trying what the court had no jurisdiction to try, and upon an affirmative decision the prohibition is absolute; but upon a negative decision there is a judgment of consultation, upon which the special or inferior court proceeds with the cause unhampered by the objection."

These authorities seem to put it beyond question that, if it appears on the face of the proceedings that the lower court had no right to try the case, there is sufficient ground to warrant the issuing of a writ of prohibition. In some of the cases the subject-matter of the action was not proper for the court; in others, although the case was of that general class belonging to the jurisdiction of the court, some collateral matter arose in the case, just as it did in *McConiha v. Guthrie*, over which the court had no control; and in others, the case made out was one belonging to the general class over which the court had jurisdiction, and no such collateral matter arose, but it appeared that the cause of action had not arisen within the territorial jurisdiction of the court. In all these cases, the inferior court was called upon to consider whether it might proceed or not. If that gave jurisdiction to such an extent as to render its decision merely erroneous, and subject to correction on appeal, then there could have been no prohibition in any case. Such clearly was not the common-law practice. The inferior court proceeded at its peril. If, in determining the question of its own jurisdiction, it erred, the writ of prohibition issued against it. It was bound to know the law setting the limits upon its jurisdiction, and could no more justify or uphold its jurisdiction, under the plea of ignorance of the law, than can an individual in reference to his contracts or his acts.

This writ has been used less extensively in Virginia and in this state than it was in England in earlier times. Up until 1855, it seems to have been awarded in only three cases in Virginia: *Miller v. Marshall*, 1 Va. Cas. 158; *Hutson v. Lowry*, 2 Va. Cas. 42; and *Jackson v. Maxwell*, 5 Rand. 636. In *Miller v. Marshall*, a justice of the peace was prohibited from trying an action involving the

title to a freehold estate; a matter not belonging to the jurisdiction of the justice, but to that of the county and corporation courts. In *Hutson v. Lowry*, a justice of the peace was prohibited from proceeding in several actions in which a single debt had been divided into several parts for the purpose of attempting to give jurisdiction over an amount in excess of what the law permitted a justice to take cognizance of. Here again the matter shown in the complaint was not a proper subject-matter for the jurisdiction of the court, but belonged to that of a higher court. In both of these cases, the justice had the right to consider, and was bound to consider, whether he could proceed. He decided that question erroneously, the error related to his jurisdiction, and the writ of prohibition went against him. The same procedure was had in *Bodley v. Archibald*, 33 W. Va. 229, 10 S. E. 392. A similar case is that of *Warwick v. Mayo*, 15 Grat. 528, in which, upon a declaration in prohibition against the mayor of a city, the court held that: "In a proceeding before the mayor or other justice to impose a penalty upon a party for obstructing a street, if a claim to the freehold is set up in the defendant or in those for whom he acts, the mayor or justice has jurisdiction to try the fact whether the claim is bona fide made. In such case, if the claim is bona fide made, the jurisdiction of the mayor or justice is ousted. He cannot inquire into the validity of the claim, and he has no power in such cases to proceed to a summary conviction." This is a case in which an inferior court had general jurisdiction of the cause of action, and a collateral matter arose in the progress of it which he had no power or authority to try, and prevented his further proceeding in the case. It was not a matter which could not be tried at all, as was the collateral matter which arose in the *McConiha Case*, but one which was triable in another court. As the right which confronted the court in *McConiha v. Guthrie* is of a higher character, and absolute in its nature, one over which no court had power or authority, it would seem upon reason to have more effectually stopped the progress of the case than the collateral matter which arose in *Warwick v. Mayo*, or in the several cases cited from the English books.

A question very similar to this one is mentioned, but not decided, in *Mayo v. James*, 12 Grat. 17. Point 1 of the syllabus reads as follows: "The mayor of the city of Richmond has authority to try cases in which a party is prosecuted for the violation of a city ordinance. Quære, whether in such a case a prohibition will lie to his proceeding to try the case, on the ground that the ordinance is in conflict with an act of the General Assembly. And it seems it will not." The charter of the city conferred upon the mayor power to "take cognizance of such cases as may be tried before him under the laws of the state, and

in all cases in which any ordinance or by-law of the city is alleged to have been violated." The argument was that he had power to decide whether the ordinance in question was valid or not, and it was no excess of jurisdiction to do so. *Moncure, J.*, said: "I am inclined to think that this argument is well founded." But he added that it was unnecessary to decide the question. He based his opinion upon the cases of *Home v. Earl Camden*, 2 H. Bl. 533, and *Arnold v. Shields*, 5 Dana, 18, 30 Am. Dec. 669. *Home v. Camden* did not decide the question, but left it in the form of a query. That was a case of misconstruction of a statute by the prize court in admiralty, a court which proceeded not according to the common law. These courts and the spiritual courts were subjected to the most rigid supervision by the writ of prohibition. They were repressed and restrained by it in cases in which it was not applied to the temporal courts, because, when they misconstrued statutes or proceeded otherwise than according to the common law, they substituted for the common law the civil law and the law of nations, and the superior courts jealously guarded against that, prohibiting even where the inferior court had undoubted jurisdiction, and the right to construe the statute incidentally in deciding the case on its merits. It was not regarded as a case of excess of jurisdiction. A case later than that of *Home v. Camden* is *Gould v. Capper*, 5 East, 345, in which it was held that, where a spiritual court misconstrues a statute which results in a judgment contrary to the common law and according to the civil law, prohibition does lie; but it was admitted that it was not a case of excess of jurisdiction. Lord Ellenborough said, in the course of his opinion, in which he reviewed and analyzed numerous cases: "Adverting, I say, to these authorities and circumstances, we cannot feel ourselves warranted in holding that the grounds of granting prohibition are so narrow and limited as to be confined solely to cases of excess of jurisdiction." In *Home v. Camden*, 4 Term R. 22 (382), Buller, J., confirms this view. He said: "It is much to the satisfaction of the judges of the present times that the principles on which prohibitions are granted are clearly settled. For, on reading some of the cases that were determined in the last century, we cannot but see that they happened at a time when it was the fashion of the courts of Westminster Hall to run down the ecclesiastical courts." And Lord Chief Justice Vaughan himself said: "It does not seem as if this court had, in some of the cases, bordered on things that were spiritual, which should not have been done; and in one of the old cases, though it was admitted that the ecclesiastical court had jurisdiction, a prohibition to the court of delegates was granted merely to support the original sentence below."

Arnold v. Shields fully supports the proposition and opinion of Judge Moncure. He holds that a justice of the peace has jurisdiction to try the right to a penalty which a void statute purports to give, and that, in erroneously deciding that the statute is valid, he does not transcend his jurisdiction, but simply commits an error which is the subject of an appeal. In a later Kentucky case (*Pennington v. Woolfolk*, 79 Ky. 13) a statute conferring upon a county court power to assess and fix the value of property for purposes of taxation was held unconstitutional, and the county court prohibited from proceeding under it. In *City of Owensboro v. Sparks*, 99 Ky. 351, 38 S. W. 4, the court refused a writ of prohibition to prevent a municipal court from proceeding to punish offenses which void city ordinances purported to create, holding that the proper method of testing the validity of the ordinance is by appeal from the judgment of the police court. *Ex parte Roundtree*, 51 Ala. 42, holds that "this court will interfere by prohibition to restrain a circuit judge from sitting as the presiding judge of a statutory inferior court, when the act creating that court, and making him the presiding judge thereof, is declared unconstitutional."

In *McInerney v. City of Denver*, 17 Colo. 302, 29 Pac. 516, a writ of prohibition was awarded against a proceeding under a void city ordinance.

The Louisiana court has fluctuated in its decisions. In *State ex rel. v. Judge*, 39 La. 132, 1 South. 437, the court held that, "when a party is prosecuted for a crime under a law alleged to be unconstitutional, in a case which is unappealable, and where a proper plea setting up the unconstitutionality has been overruled by the judge, a proper case is presented for the exercise of our supervisory power in determining whether a judge is exceeding the bounds of judicial power in entertaining a prosecution for a crime not created by law." The decision in *State ex rel. v. Judge*, 44 La. 1100, 11 South. 683, holds the contrary, as does also *State ex rel. v. Wilder*, 49 La. 1211, 22 South. 661. In *State ex rel. v. Rost*, Judge, 49 La. 1451, 22 South. 421, the last point of the syllabus says: "Even in a case not appealable, it would not be too late, after conviction and sentence, to invoke relief at the hands of this court, through its remedial writs, from the effects of a statute void for unconstitutionality." Upon the whole, the Louisiana court seems not to doubt that in such case the writ lies, but it will not be permitted to go if there is a remedy by appeal. This makes it purely a discretionary writ, and upon this theory the decisions may be harmonized.

In *Houseman v. Kent Circuit Judge*, 58 Mich. 364, 25 N. W. 369, the court holds that "prohibition issues to restrain a court of equity from proceeding with the exercise of power conferred upon it by an invalid act."

In *State ex rel. v. Simons*, 32 Minn. 540, 21 N. W. 750, a writ of prohibition was allowed against a judge who was assuming to exercise powers which an invalid statute purported to give.

In *Donovan v. Mayor and Council*, 29 Miss. 247, 64 Am. Dec. 143, a prohibition was awarded against the marshal of a city, restraining him from selling hogs found running at large, under an ordinance directing it, which ordinance was held void for unconstitutionality.

In *Zylstra v. Charleston*, 1 Bay, 382, a prohibition was awarded against proceedings under a void city ordinance. In *State ex rel. v. Simons*, 2 Speer, 761, proceedings under a void statute were prohibited.

In *People v. Splers*, 4 Utah, 385, 10 Pac. 609, 11 Pac. 509, criminal proceedings before a justice of the peace under an unconstitutional statute purporting to give jurisdiction were prohibited.

In *re Schumaker*, 90 Wis. 488, 63 N. W. 1050, holds that "a writ of prohibition will not be granted against proceedings in the circuit court to incorporate a village, on the ground that the statutes authorizing such proceedings are unconstitutional. The ordinary remedies at law are ample." From the reasoning it is to be inferred that the writ was withheld, not because it could not be granted, but in the discretion of the court.

In *Railroad Co. v. Commissioners*, 127 Mass. 50, 34 Am. Rep. 338, the court held that "the owner of land taken by the manager of a railroad owned by the commonwealth, under a statute which does not make adequate provision for the payment of compensation for the land so taken, may have a writ of prohibition to the county commissioners to prevent them from proceeding with the assessment of the damages caused by the taking."

In *Sweet v. Hulbert*, 51 Barb. 312, a writ of prohibition was awarded to prohibit a county judge from appointing commissioners to carry into effect an unconstitutional statute providing for the issuing of bonds by a municipal corporation in aid of the construction of a railroad. In the syllabus it is said: "A writ of prohibition issues to forbid a court and party to whom it is directed from proceeding in any matter designated, then pending before it. It will lie to prevent the exercise of unauthorized power by an inferior tribunal, in cases where it has jurisdiction, as well as where it has not jurisdiction." This case seems to be very much like that of *McConiha v. Guthrie*. In the opinion it is said: "The property of the citizen cannot be taken from him without his consent, except by due process of law, or by eminent domain, or by taxation. Against every other mode he is protected."

While the question now under consideration is not discussed, nor particularly mentioned, in the case of *Weston v. Charleston*, 2 Pet. 449, 7 L. Ed. 481, that case seems to

confirm the proposition that the writ lies against proceedings under a void ordinance. The city of Charleston levied an unconstitutional tax of 7 per cent. on stock of the United States. The common pleas court of South Carolina awarded a writ of prohibition against the collection of the tax. To the decision of that court a writ of error was awarded by what was called the "Constitutional Court of South Carolina," where the judgment was reversed. To that judgment the Supreme Court of the United States awarded a writ of error, and reversed the judgment of the Constitutional Court, thereby reinstating the writ of prohibition.

Thus it appears that the decisions are in conflict, and that there is a wide difference of opinion among the judges upon the question presented. But the decisions seem to preponderate in favor of the jurisdiction by prohibition in such case. As by the common law a writ of prohibition could be had upon the mere ground that the cause of action did not arise within the territorial jurisdiction of the court, or that the subject-matter of the action belonged to the jurisdiction of some other court, or that a collateral matter which was triable by some court, but not by that particular court, had arisen in the cause, all of which defects might have been treated as mere grounds of error, remediable by appellate proceedings, it would seem strange that a court could not be prohibited, when attempting to do those things which the law had placed entirely beyond the reach of all judicial power. It is true that the object of the writ in general was to restrain each court within its own jurisdiction, and thus secure order and harmony in the administration of justice. But it has been shown that this writ was used, not only to keep courts within their jurisdiction, but to defend and uphold the common law against the encroachments of other systems of law. Can it be supposed that the laws and courts which were constituted for the purpose of preserving and vindicating the rights of the citizen were objects of greater solicitude and more jealous care than the rights of the citizen himself? Bacon says that the object of prohibitions in general was the preservation of the rights of the king's crown and courts and the ease and quiet of the subject. If a court was subject to prohibition when it invaded the jurisdiction of another, took upon itself that which was triable, and was only in fault because of its encroachment upon the jurisdiction of another court, with much more reason it ought to be amenable to the writ of prohibition when it undertook to try that which no court could try.

This conclusion is somewhat strengthened by observations on the subject of jurisdiction expressed in the opinion in *Windsor v. McVeigh*, 93 U. S. 282, 23 L. Ed. 914, which are as follows: "All courts, even the highest, are more or less limited in their jurisdiction. They are limited to particular classes of ac-

tions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments. * * * Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. * * * The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act; * * * and the reason is that the courts are not authorized to exert their power in that way." These views are expressed upon the law relating to collateral attack upon judgments. In the law of collateral attack, everything is intended in favor of jurisdiction, where the judgment is rendered by a court of general jurisdiction. But even there a fatal defect or want of jurisdiction, such as is indicated in the language quoted above, makes the judgment absolutely void for want of jurisdiction.

Can it be possible, then, that before the court pronounces its void judgment, does an act which it has no power to do, prohibition does not lie, when it concededly lies in so many cases of less importance and gravity? This proposition has been solemnly laid down and asserted by this court in *Ensign Co. v. Carroll*, 30 W. Va. 533, 4 S. E. 782. In an action before a justice of the peace for the recovery of money due on contract, there had been two new trials, the last of which resulted in a verdict for \$5.79. The law allowed no more new trials, nor any appeal. Then the judgment debtor filed a bill in equity, and, upon it, obtained an injunction to the judgment. That bill did not contain a single allegation of a kind or character to give jurisdiction in equity for a proceeding of that kind. A court of equity can enjoin a judgment, where there has been fraud in its procurement of such a character that it could not have been relieved upon in the action at law, and under some other peculiar circumstances. No such allegations appeared in the bill. There was nothing in it that gave the court so much as a pretext to say that it presented a cause of action within its jurisdiction. Upon an application to this court, a writ of prohibition was awarded against the judge who granted the injunction.

The other side of the rule is illustrated in 46 S.E.—13

the three cases of *County Court v. Boreman*, 34 W. Va. 87, 11 S. E. 747, *County Court v. Armstrong*, 34 W. Va. 326, 12 S. E. 488, and *County Court v. Boreman*, 34 W. Va. 362, 12 S. E. 490. In the first two of these cases writs had been obtained from the circuit court by parties who had no such interest in the proceeding pending in the county court as entitled them to a writ of prohibition. Moreover, at their instance, the circuit court, by appellate process, undertook to review the action of the county court in respect to a matter that was not a subject of review by any court. Writs of prohibition were promptly awarded against the judges of the circuit courts. In the last case the parties, who had endeavored to have the circuit court review these proceedings by certiorari and writ of error, sued out of the circuit court an injunction against the county court, on the ground that in proceeding to alter the location of a bridge, and build a new bridge, it was creating a debt in violation of the Constitution and laws. This was new and original matter, which had not appeared in the proceedings up to that time, and which constituted ground for an original proceeding in a court of equity. Then the county court applied for another prohibition, and this court, looking at the bill, and seeing that it purported to state a cause of action upon which a court of equity had authority and power to act, refused the writ of prohibition, without subjecting the bill to an examination to ascertain whether it was good on demurrer. It was enough that there was something in that bill calling for the exercise of the judicial power of the court. It had the right to say whether the bill was good or bad, having jurisdiction of that class of causes which the bill purported to set out. This was very different from the bill in *Ensign Co. v. Carroll*, which made no pretense of setting out a cause of equity jurisdiction, and which furnished nothing upon which the court had any power to act.

This view accords with the law relating to the acquisition of jurisdiction of the person, where the court has jurisdiction of the subject-matter. If it has no jurisdiction at all over the person, it cannot proceed. There must be something in the form of process, and something in the form of a return of process, in order to give jurisdiction. If there is no pretense of either, then the court has no power to say it has jurisdiction. There is nothing for it to consider in that connection. But, if there is a defective process or defective service, then the court has power to decide whether the process or return is sufficient. There is no ground for a writ of prohibition; for, if the court has power to decide at all, its erroneous decision does not take away its jurisdiction. Works on Courts and Their Jurisdiction, p. 634.

In this case the complaint, upon which the mayor issued his warrant and undertook to proceed, set out that as an offense which the

law does not recognize as an offense. It called for a prosecution in respect to a matter as to which no court has any authority to entertain a prosecution, and the court was bound to know this, because its jurisdiction and power was circumscribed and limited to that extent.

How far is the writ discretionary? This is determined by statute in some of the states. Our statute gives it as matter of right. Until 1882 our statute was the same as Act 1 Wm. IV, c. 21; but in that year it was amended. But the amendment is only declaratory of the common law, for the action of the court in allowing or refusing it was always reviewable. *Home v. Earl Camden*, cited; *Forster v. Forster*, L. R. 4 B. & S. 187; *Mayor, etc., v. Cox*, L. R. 2 H. L. 239. The writ is not favored by the American courts nor by the later English courts, and it is generally refused where the applicant has another adequate remedy.

The common-law rule is stated in *Mayor, etc., v. Cox*, cited, as follows: "There is, indeed, a distinction, after sentence, between a patent and a suggested defect; for if the party below, whether plaintiff or defendant, thinks proper, instead of moving for a prohibition, to proceed to trial in the special or inferior court, and is defeated, then, if the defect be of power to try the particular issue only ('defectus triationis,' as it has been called), the right to move for a prohibition is gone. If the defect be of jurisdiction over the cause ('defectus jurisdictionis'), and that defect be apparent upon the proceedings, a prohibition goes after sentence. *Roberts v. Humby*. If it be not apparent, but the party, instead of moving for a prohibition, pleads in the special or inferior court the facts ousting the jurisdiction, and such court improperly decides that it has jurisdiction, he may, notwithstanding such decision, upon satisfying a superior court that it was erroneous, obtain a prohibition. *Thompson v. Ingham*, followed in *Chew v. Holroyd* and *Marsden v. Wardle*. Where, however, the defect is not apparent, and depends upon some fact in the knowledge of the applicant which he had an opportunity of bringing forward in the court below, and he has thought proper, without excuse, to allow that court to proceed to judgment without setting up the objection, and without moving for a prohibition in the first instance, although it should seem that the jurisdiction to grant a prohibition in respect of the right of the crown is not taken away, for mere acquiescence does not give jurisdiction (*Knowles v. Holden*), yet, considering the conduct of the applicant, the importance of making an end of litigation, and that the writ, though of right, is not of course, the court would decline to interpose, except, perhaps, upon an irresistible case, and an excuse for the delay, such as disability, malpractice, or matter newly come to the knowledge of the applicant (see *Case of the Admiralty*). The objection in such case is that the applicant comes too late—not, as here, that he comes too soon; and the cases cited at the bar as to ap-

plication after sentence are therefore inapplicable."

For the foregoing reasons, I concur in the decision.

BRANNON, J. (dissenting.) I dissent, because I do not think prohibition lies. The mayor had jurisdiction of cases of this general nature; that is, to entertain, hear, and determine prosecutions for the violations of town ordinances. And the fact that the ordinance is invalid does not go to say that he has no jurisdiction, but only that there is no law to call for judgment. There is the ordinance colorably warranting the prosecution, but upon hearing it turns out, in law, not to warrant it; but that does not show absence of jurisdiction to hear and determine, does not show that there was not jurisdiction to start with. If the rule is otherwise, then you can prohibit any court from entertaining a case where there is no law to warrant judgment, or where the act is for any reason invalid. The mayor has the right to begin to consider—right to pass on his own jurisdiction; and you prohibit him from doing just what the law commands him to do—consider and determine. Appeal is the regular remedy. This case does not present a question of jurisdiction, but only raises the question whether there is any law to warrant conviction for the particular act. In this court in late days prohibition is becoming appeal, writ of error, and certiorari, in anticipation of final decree or judgment. *Jelly v. Dils*, 27 W. Va. 267; *Buskirk v. Judge*, 7 W. Va. 91; dissenting opinion in *N. & W. Co. v. Pinnacle Co.*, 44 W. Va. 583, 30 S. E. 196, 41 L. R. A. 414; *County v. Boreman*, 84 W. Va. 362, 12 S. E. 490; *Haldeman v. Davis*, 28 W. Va. 384. It is better that all courts go on to judgment, as presumably right decision will be attained, than to call them to a halt before we know whether they will decide right or wrong. Judge Moncure expressed a like opinion in *Mayo v. James*, 12 Grat. 17. See *King v. Doolittle*, 51 W. Va. 91, 41 S. E. 145. The Supreme Court of the United States holds this doctrine. It says there must be no other remedy. "Where an inferior court has clearly no jurisdiction of a suit, and the defendant has objected to its jurisdiction at the outset, and has no other remedy, he is entitled as a matter of right to a writ of prohibition." *Smith v. Whitney*, 116 U. S. 167, 29 L. Ed. 601. It makes no difference that the amount is too small for appeal. *Ex parte Ferry Co.*, 104 U. S. 519, 26 L. Ed. 815. "Where there is a plain and adequate remedy by appeal, prohibition will not lie." *In re Huguley*, 184 U. S. 297, 22 Sup. Ct. 455, 46 L. Ed. 549. "But the sounder doctrine, and that sustained by the great preponderance of authority, is to the effect that prohibition only lies where the court either lacks jurisdiction of the subject-matter, or, having jurisdiction, exceeds it in some incidental matter or in rendering judgment, and no appeal or writ of error or other remedy is available at all, or, if available, is

inadequate to meet the emergencies of the case, or to afford the relief to which the injured party is entitled." Spell, Extra. Relief, §§ 1725, 1727. I think these propositions are good law in Virginia. *Supervisors v. Wingfield*, 27 Grat. 329. "It will not lie to restrain an inferior court from exercising jurisdiction in a particular case, if such court has jurisdiction of cases of that kind." *Haldeman v. Davis*, 28 W. Va. 324. "Like all other extraordinary remedies, prohibition is granted only in cases where the usual and ordinary forms of remedy are insufficient to afford redress." High, Extra. Rem. § 770. Not to take the place of appeal. Id. § 771. "In the exercise of jurisdiction by prohibition, it is important to distinguish between the nature of the action which it is sought to prohibit, and the sufficiency of the cause of action stated in the proceedings." Id. § 767a. "Prohibition, being an extraordinary writ, cannot be resorted to when the ordinary and usual remedies, such as appeal, writ of error, certiorari, or other modes of review, or injunction, are available." 16 Ency. Pl. & Prac. 1130. I feel sure that Virginia, West Virginia, and other American law is, in great weight and better reason, against the writ in this case.

Carry the other doctrine to its logical results. If chancery takes up a case proper for a law court; if a circuit court entertains an indictment for an offense when the statute on which it is based is unconstitutional, or does not apply to it, or the common law makes it no offense; if a circuit court rejects a plea in abatement, and compels the defendant to defend a suit having no jurisdiction over him; if the writ in an action is void—in these and many other cases prohibition would lie. Why not?

(54 W. Va. 354)

OBER v. STEPHENS.

(Supreme Court of Appeals of West Virginia.
Dec. 5, 1903.)

REAL ESTATE AGENT—CONTRACT—VALIDITY— LICENSE—PENALTY—STATUTE OF FRAUDS.

1. The general rule is that a contract in violation of law is void; but where the statute requires a license "to practice the business of stock or other broker, by buying or selling for others, stocks, securities or other property for a commission or reward," and imposes a penalty for a violation thereof, a contract of real estate agent to sell real estate for another for commission or reward, in violation of such requirement, is not for that reason absolutely void.

2. Unless it clearly appear that the Legislature intended more, it will be held that the penalty imposed excludes all others.

3. *Kennedy v. Ehlen*, 8 S. E. 398, 31 W. Va. 540 (Syl., point 3), approved and reaffirmed.

(Syllabus by the Court.)

Error to Circuit Court, Wetzel County; M. H. Willis, Judge.

Action by M. V. Ober against John Stephens. Judgment for plaintiff, and defendant brings error. Affirmed.

Cornett & Newman and E. B. Snodgrass, for plaintiff in error. E. L. Robinson, for defendant in error.

McWHORTER, P. M. V. Ober brought his action before a justice of the peace of Wetzel county against John Stephens to recover "amount due for sale of real estate according to contract, \$250," and recovered judgment for the amount claimed. Stephens appealed from the judgment to the circuit court of Wetzel county. When the case was called, the defendant tendered two pleas in writing, numbered 1 and 2. The first was a plea of non assumpsit; the second was to the effect that at the time plaintiff alleged that defendant employed him as an agent to sell for him defendant's farm for the commission claimed, and at the time the sale was made by plaintiff as real estate agent or broker and as alleged agent for defendant, plaintiff was a real estate broker and practiced the business of such broker by buying and selling, for others, real estate for commission and reward, and was also on both of the said occasions without a state license therefor, and was at the said time a citizen of the state of West Virginia and county of Wetzel, which plea was verified by the affidavit of the defendant. The plaintiff objected to the filing of said plea No. 2, which objection was sustained by the court; the court being of opinion that the matter set up in said plea marked No. 2 could be given in evidence under the general issue. The defendant excepted to the ruling of the court in rejecting the plea. A jury was impaneled to try the issue on the first plea, and in the course of the trial the defendant took several bills of exceptions. The defendant asked the court to give to the jury five several instructions. Numbers 1 and 2 were given. The first was to the effect that the burden of proof was on the plaintiff; that he could not recover unless it be shown by a preponderance of evidence that plaintiff made the contract sued on, as alleged by plaintiff; and the second that even if they believed from the evidence that defendant authorized plaintiff to sell his farm as agent, still plaintiff could not recover if the jury further believed from the evidence that all the terms or any of the material terms of the sale were omitted and not agreed upon by the parties. The third, fourth, and fifth instructions asked by the defendant were as follows:

"(3) The court instructs the jury that no person without a state license shall practice the business of a real estate broker by buying or selling real estate for others for profit or reward; and if you believe from all the evidence that the plaintiff was a real estate broker, without state license, at the time he claimed to have sold defendant's farm, or at the time that he claimed to have been authorized by defendant to sell his farm, for \$250 for his services in making such sale, you will find for the defendant.

(4) The court instructs the jury that a real estate broker is one who buys or sells real estate for others for profit or reward, and that a real estate agent who buys or sells land for others for profit or reward is a real estate broker. (5) The jury are instructed to find for the defendant." Which instructions the court refused to give, and gave the following instruction: "The jury are instructed that if you believe from all the evidence and circumstances that the defendant, John Stephens, employed M. V. Ober to sell his farm at the price of twenty-five thousand dollars, and that plaintiff, M. V. Ober, did sell said Stephens farm at the price and upon the terms agreed upon in said contract of employment, and if you further find from all the evidence and circumstances of the same that said Stephens was to pay said Ober two hundred and fifty dollars for making said sale, then you should find for plaintiff"—for the plaintiff over the objection of the defendant. To the ruling of the court in refusing to give said three instructions for the defendant, and in overruling defendant's objection to the said instruction given for the plaintiff, the defendant excepted.

On the 27th day of May, 1902, the jury found for the plaintiff, and assessed his damages at \$250. The defendant moved to set aside the verdict because it was contrary to the law and the evidence, and grant him a new trial, of which motion the court took time to consider, and on the 14th day of June, 1902, the court set aside the motion and entered judgment in favor of plaintiff upon said verdict against the defendant, John Stephens, and John C. McEldowney, his security on the appeal bond. The defendant procured from one of the judges of this court a writ of error, assigning several errors.

The first and third assignments of error raise the question of the validity of the contract sued upon, by reason of the plaintiff practicing the business of real estate agent in buying and selling property for others for a commission or reward without having a state license therefor, as provided in chapter 82, Code 1899. It is contended by plaintiff in error that for the cause stated plaintiff Ober's contract is void, being in violation of law, and could not be enforced.

The first assignment is that the court erred in not permitting plea No. 2 to be filed. Under the ruling of the court admitting all the evidence under the general issue that could have been introduced by the defendant under the plea, this was immaterial.

The third assignment of error is in refusing to instruct the jury as set out in bill of exceptions No. 4—refusing the instructions of the defendant Nos. 3, 4, and 5, hereinbefore copied. The authorities touching the validity of the act are conflicting, many of those without this state holding in favor of the proposition of defendant—that the contract of plaintiff is void, being in violation of the statute which forbids any person "to practice the business of stock or other broker,

by buying or selling for others, stocks, securities or other property for a commission or reward," without a license therefor. In *Stevenson v. Ewing*, 87 Tenn. 46, 9 S. W. 230, it is held that: "Real estate brokers are forbidden by Acts 1885 [p. 18], c. 1, § 46, to pursue their avocation without license; and an unlicensed broker who, in violation of this act, negotiates the sale of land for another, cannot recover any compensation for his services. The contract for compensation in such case is illegal and void." The section referred to provides that the occupation of real estate broker "shall be deemed a privilege and be taxed and not pursued or done without license." Much stress seems to have been laid in the opinion in that case upon the words of the statute "not pursued or done without license." This decision quotes with approval from *Cooley on Taxation* (2d Ed.) p. 572: "When a tax takes the form of a tax on the privilege of following an employment, convenience in collection will commonly dictate the requirement of a license, and the person taxed will be compelled to pay the tax as a condition to the right to carry on the business at all. In such case the business carried on without a license will be illegal, and no recovery can be had upon contracts made in the course of it"—and cites *Johnson v. Hulings*, 103 Pa. 498, 49 Am. Rep. 131, where it is held: "An unlicensed real estate agent subject to penalty for doing business without a license cannot recover compensation under a contract for such business;" and also *Holt v. Green*, 73 Pa. 198, 13 Am. Rep. 737, where it is held: "A commission broker who has not procured a license as required by the act of Congress of June 30, 1864, held not entitled to recover his commission in a state court." See, also, *Buckley v. Humason*, 50 Minn. 195, 52 N. W. 385, 16 L. R. A. 422, 36 Am. St. Rep. 637, and many other authorities to the same effect. The only West Virginia Case relied upon by the plaintiff in error on this point is the case of *Jackson v. Hough*, 88 W. Va. 236, 18 S. E. 575. This question was not there passed upon, as it did not clearly arise. While that was an action similar in its nature to the one at bar, the plaintiff, Jackson, was asked as a witness the question "whether he had license to engage in the business of real estate agent or broker"; the defendant insisting that the court erred in refusing this question to be asked. It is there said that it was not error, inasmuch as no evidence had been given or was proposed to show that plaintiff carried on the business of real estate broker, save the single sale in question. It is said in the opinion (at page 241, 38 W. Va., page 577, 18 S. E.): "If one should undertake or profess to follow that business, no doubt one sale would be sufficient to bring him within the letter and spirit of the statute; but one is not within its letter or spirit who, without any manifestation of carrying on such vocation, merely makes one sale." There is but a mere

inference to be drawn from the language here used, that in case it had been shown that Jackson was a real estate broker, and without a license, the court might have held that he could not recover for his services as such.

There are many authorities without this state holding that such contract is not void, notably *Ruckman v. Bergholz*, 87 N. J. Law, 437; *Fairly v. Wappoo Mills* (S. C.) 22 S. E. 108, 29 L. R. A. 215; *Mandlebaum v. Gregovich*, 17 Nev. 87, 28 Pac. 121, 45 Am. Rep. 433; *Trust Co. v. Hoffman* (Idaho) 49 Pac. 314, 37 L. R. A. 509; *Lester v. Bank*, 33 Md. 558, 3 Am. Rep. 211. These decisions are based upon the theory that the object of the law in such cases requiring a license and imposing a penalty for carrying on a business which is legitimate and proper in itself is to raise revenue, and the penalty provided for carrying on the business stated without a license is exclusive, and not intended as prohibitory. In *Clark on Contracts*, Hornbook series, at page 388, in treating the subject the author says: "Sir William Anson states as the tests of prohibition, not only the purpose of the penalty, but also its continuity. His summary is substantially that, where a penalty is imposed by statute upon the carrying on a trade or business in a particular manner, it may be assumed *prima facie* that agreements made in breach of such statutory provisions are illegal and void; that if the penalty is imposed, not for the benefit of the public in general, but for the security of the revenue, it is possible that the agreement was only intended to be penalized, and not prohibited; that if, in addition to this, it appears that the penalty is imposed once for all upon the offending person, and not upon each successive agreement in breach of the statute continuously, it is almost, if not quite, certain that agreements so made are not intended to be vitiated." And cases there cited. However, it seems to me this point is well settled by this court in the case of *Tie & Lumber Company v. Thomas*, 33 W. Va. 566, 11 S. E. 37 (Syl. point 2), 25 Am. St. Rep. 925: "A contract made by a foreign corporation before it has complied with the statutory prerequisites to the right to do business in another state will not, on that account, be held absolutely void, unless the statute expressly so declares; and, if the statute imposes a penalty upon the corporation for failing to comply with such prerequisites, such penalty will be deemed exclusive of any others." In that case, at page 570, 33 W. Va., page 38, 11 S. E., 25 Am. St. Rep. 925, Judge Snyder, after saying it is clearly not the primary purpose of the Legislature, in passing such statutes, to render the contracts and dealings of such corporations which have not complied with the requirements of the statutes void and unenforceable, says: "Hence the decided weight of authority is that, where the Legislature has not expressly declared that this result shall follow from a failure to comply

with the statute, the courts ought not to imply such a result unless this be necessary in order to attain the primary object for which the statute was enacted. Upon this ground it has been held that a contract made by a foreign corporation before it has complied with the statutory prerequisites to the right to do business will not, on that account, be held absolutely void, unless the statute expressly so declares; and if the statute imposes a penalty upon the corporation for failure to comply with such prerequisites, such penalty will be deemed exclusive of any others"—and cites *Columbus Ins. Co. v. Walsh*, 18 Mo. 229; *Ins. Co. v. Salt Co.*, 31 Mich. 346; *Hartford & Co. v. Matthews*, 102 Mass. 221; 2 *Morawetz on Corp.* § 665. Section 30, c. 54, Code 1899, provides, first, that a foreign corporation may do business in this state "upon complying with the requirements of this section, and not otherwise"; then a specific penalty upon such corporation for its failure to comply with such requirements. There is no express declaration nor apparent intention on the part of the lawmakers that such failure to comply with the requirements of the statute should render the contracts of the corporation void, but they do expressly provide that such failure shall be punishable by fine, and the provision in regard to a person practicing the business of a broker, etc., is analogous to the case of the corporation. In the case just cited (*Tie Co. v. Thomas*), Judge Snyder cites with approval *Bank v. Page*, 6 Or. 431, where it is held: "The general rule is that a contract in violation of law is void. The only exception to the rule is that when a law imposes a penalty for the prohibited act, and it clearly appears that the Legislature intended no more than to impose the penalty for the violation of the law, a contract made in violation of the statute is not void." He further says: "The authorities on this question are reviewed in *Morawetz on Corporations* (sections 662-666), and that author announces as his conclusion therefrom that, 'unless it appear affirmatively that the Legislature intended to render the forbidden act or contract absolutely void in legal contemplation, it will not be so held'; citing *Bank v. Matthews*, 98 U. S. 621-627, 25 L. Ed. 188." It follows that the court did not err in refusing to give the instructions Nos. 3, 4, and 5, as set out in bill of exceptions No. 4.

The second assignment is that the court erred in permitting to be introduced as evidence before the jury, on behalf of the plaintiff, the paper writing marked "Exhibit 3," with plaintiff Ober's testimony, purporting to be a contract or agreement between the said M. V. Ober, agent for John Stephens and A. C. Ruby, for the sale of the farm to said Ruby, which is set out in bill of exceptions No. 6, and is as follows: "This agreement, made this 19th day of September, 1901, between M. V. Ober, agent for John Stephens, of the first part, and A. C. Ruby, party of the second part, witnesseth, that the said Ober,

agent of John Stephens, has this day sold to A. C. Ruby the farm of said John Stephens, lying in Magnolia District, Wetzel County, West Virginia, being the same land purchased by John Stephens from Robert D. Leggett and D. M. Alexander, and also including a small piece of land owned by said Stephens in said District, containing 620 acres more or less, and the said Ruby agrees to pay the sum of \$25,000.00 cash for said lands upon the execution and delivery of a good and sufficient deed for the same. And the said Ruby agrees to pay, upon the execution of a contract for said sale, the sum of \$500; the remainder to be paid when the said deed is to be delivered. M. V. Ober, Agent for John Stephens. A. C. Ruby."

Plaintiff testified that on the 18th of September, 1901, he had a verbal contract with the defendant to sell his farm for him at \$25,000, for which he was to pay him \$250. It does not appear from his testimony that it was agreed just what the terms of sale should be. He says he spoke to L. M. Stephens, informing him that he had John Stephens' farm for sale at \$25,000, when Stephens remarked he had a man who would take it at that. He said John Stephens told him to go ahead and sell the farm for \$25,000, and he would give him \$250, and that Stephens mentioned something about his tenants, and that plaintiff told him they would be taken care of; that the contract to sell the land first started on September 16th, and that Stephens told him after that, about Wednesday following—he thinks about the 18th—he told him again. He was asked how long after that it was until he sold the land to Ruby. He said he considered it sold then, through Mr. L. M. Stephens, and as soon as Mr. Stephens came to town, and Ruby was there, he said they would get them together and fix things up; that he met John Stephens and told him to bring the deed down; that Mr. Ruby came to witness' office, and he went over to the Eakin House and to Mr. Stephens over there, and said, "Now, Uncle John, I have sold that farm to Mr. A. C. Ruby here; he will pay you all cash or part cash;" and Ruby said, "If I don't pay all cash, I don't want no lien retained on the land; I want the land clear; I would rather give personal security;" and Ruby said, "Yes, sir; I will pay you all cash or part cash;" and Mr. Stephens said, "Well, all cash will be acceptable." Witness further said that Stephens called L. M. Stephens out and told him he wanted to see him; that witness did not know what their conversation was about. John Stephens did not return, but L. M. Stephens returned, and told witness what was said, and witness told Ruby, "Just let it rest, then." John Stephens testified that he told L. M. Stephens that it looked to him as if Mr. Ober wanted to force him to sell his land whether he was willing to or not, and that he said, "I wouldn't let him sell anything for me now; since he has tried to force this thing, he couldn't sell a dog for me." This is given

as the conversation between John and L. M. Stephens when John called him out, and which was told to plaintiff by L. M. Stephens, who was associated with Ober in the transaction as stated by Ober. On plaintiff's cross-examination defendant offered a paper which was admitted to be a copy of a writing or power of attorney, which plaintiff presented to defendant and asked him to sign, which defendant declined to do, which is filed with and made a part of the deposition of plaintiff at instance of defendant, and which is as follows: "New Martinsville, W. Va., Sept. 18th, 1901. I hereby put my farm, consisting of six hundred and twenty acres more or less, situated and lying in Magnolia District, Wetzel County, West Virginia, and being the same land purchased by me from R. D. Leggett and D. M. Alexander, in the hands of M. V. Ober, for sale; and I hereby agree to pay the said M. V. Ober Three Hundred dollars if he succeeds in finding a purchaser or purchasers within thirty days from the date hereof, at the price of Twenty-Five Thousand Dollars (\$25,000.00.) One-third of the purchase money to be paid cash in hand, the balance to be paid on such terms as the purchaser or purchasers and I can agree on, and I hereby agree to make a deed for said land to the purchaser or purchasers, whoever they may be, on the terms mentioned above."

The contract or agreement mentioned and set out in bill of exceptions No. 6, admitted as evidence, was entered into between the plaintiff and Ruby, the alleged purchaser, without the knowledge of defendant. Plaintiff testified that the contract was written some four or five days, or possibly a week, after the plaintiff, defendant, and Ruby were together, and it was dated back to that day, and that defendant was not present when it was written, and it is not claimed that defendant knew anything about the written contract. It will be observed there is no mention made in the written contract of taking care of any tenants who might be on the land, as was understood between the plaintiff and defendant, as shown by the testimony of plaintiff himself, as well as other witnesses. In *Chapman v. Jewett* (Va.) 24 S. E. 361, the Court of Appeals of Virginia holds that "verbal authority to sell land confers no power to execute a contract to convey"; and in *Halsey v. Monteiro*, 24 S. E. 238, by the same court it is held that "a real estate broker authorized to 'list' and 'place' property on commission has no authority to sign a contract of sale." While the plaintiff testifies that the sale was made before that time, on the 18th day of September he presented a written contract to be signed by Stephens, authorizing him to sell the land on different terms from those on which the alleged sale was made, which Stephens refused to sign. Plaintiff afterwards, on the 19th of September, executed the contract with Ruby, thereby manufacturing evidence for himself. The contract in question, being executed without the authority, verbal or written, and without

the knowledge or consent of Stephens, in my view of the case, was not competent evidence, and should not have been permitted to go to the jury. Aside from this written contract, the evidence was conflicting, and it was for the jury to say whether the claim of plaintiff was sustained, and the admission of the written contract was prejudicial to the rights of the defendant; but a majority of the members of the court differ with me on this, and hold that under the rulings in *Conaway v. Sweeney*, 24 W. Va. 643; *Kennedy v. Ehlen*, 31 W. Va. 540-558, 8 S. E. 398, and cases there cited; 2 Minor, 850; 3 Minor, 153, and cases there cited; *Mechem on Agency*, §§ 88, 89—the paper was properly admitted. It is insisted by plaintiff in error that plaintiff's evidence fails to support the verdict, in that "it does not show or tend to show, nor does plaintiff undertake to prove, that the alleged purchaser was ready, willing, or able to purchase the lands either for part cash or all cash; no evidence at all of tender or pecuniary ability." It is true there is no evidence of tender or of pecuniary ability on the part of the purchaser, Ruby, to make the purchase and pay the money according to the contract; but there was an agreement to pay the price mentioned, and Ruby declared himself ready to pay all cash or part cash, and there was no question raised as to his ability. The parties, seller and buyer, were by plaintiff, Ober, brought together face to face, when the proposed purchaser expressed himself as ready to pay all cash, and his financial ability was not brought in question, so that the case does not come within the ruling in the case of *Clay v. Deskins*, 36 W. Va. 350, 15 S. E. 85, and other authorities cited and relied upon by plaintiff in error.

The fourth assignment of error is the giving of the instruction on behalf of the plaintiff, hereinbefore set out, which instruction is evidently founded upon the written contract between the plaintiff, as agent for the defendant, and the alleged purchaser, Ruby, as well as upon the oral evidence tending to prove the employment of plaintiff to make the sale, which contract in writing, being admitted as evidence, renders the instruction good, and it was properly given.

For the reasons herein stated, there is no error in the judgment, and the same must be affirmed.

NOTE BY POFFENBARGER, J. (concurring). I think the admission of the contract was not reversible error, if error at all. The issue was not whether a binding contract of sale had been made, or whether Ober had authority to execute a written contract for sale of the property. It was whether Stephens had agreed to pay him the amount he claimed for effecting a sale of the land, and the written agreement permitted to go to the jury only tended to prove that Ober had done more than he agreed to do, if his agency did not extend to the signing of a written contract of sale, and corroborated his testimony. The written contract is not manufactured evidence. It does not appear that Ober's authority ended with the successful effort to consummate the sale on the day on which he got the parties together.

(54 W. Va. 407)

FLUHARTY et al. v. FLUHARTY et al.
(Supreme Court of Appeals of West Virginia.
Dec. 12, 1903.)

DEED—CANCELLATION—JURISDICTION IN EQUITY.

1. W. and M., his wife, conveyed to their two sons, T. and E., their farm of 168 acres with general warranty, except that the grantees should pay to the grantors, within 60 days from the delivery of the deed, \$100 each, in consideration that the grantees bind themselves to provide for and take care of the grantors during their natural lives, respectively, "and to furnish them whatever necessities they may need as it regards eatables or clothing, medical aid, etc., and to furnish them a good nurse whenever they may need one and they depart this life to have them buried accordingly to the rules of civilized society"; and it was provided further that, if the grantees should fail to perform any of their several agreements "when it is possible for them to do them, then this deed is to be null and void and revert back to the said grantors with full possession. Said grantors hereby reserve possession of the above named land until the death of each of them."

Held, that a court of equity will take jurisdiction of a bill filed by the heirs of W., deceased, to set aside and cancel the conveyance for failure on part of the grantees to comply with the conditions of the conveyance.

(Syllabus by the Court.)

Appeal from Circuit Court, Marion County; John W. Mason, Judge.

Bill by Jesse Fluharty and others against Thornton Fluharty and others. Judgment for defendants, and plaintiffs appeal. Reversed.

T. N. Parks, for appellants. C. Powell and U. N. Arnett, Jr., for appellees.

McWHORTER, P. William Fluharty and his wife, Meletha Fluharty, by deed dated the 16th day of May, 1884, conveyed to Thornton Fluharty and Ellis Fluharty, in consideration that the said grantees would provide for and take care of the grantors during their respective lives, and furnish them whatever necessities they might need, as regarded eatables, clothing, medical aid, etc., and to furnish them a good nurse whenever they might need one, and at their death to have them "buried accordingly to the rules of civilized society," a tract of 168 acres of land lying on Lewellen's Fork of Flat Run, with general warranty, except that the grantees should pay to the grantors, within 60 days from the delivery of the deed, \$100 each; and a further provision was contained in the deed that if the grantees should fail to perform any of their several agreements "when it is possible for them to do them, then this deed is to be null and void and revert back to the said grantors with full possession. Said grantors hereby reserve possession of the above named land until the death of each of them."

William Fluharty died on or about the 9th day of November, 1893, intestate. On the 28th day of May, 1897, Ellis Fluharty conveyed to U. N. Arnett, Jr., and Charles Powell, in consideration of the sum of \$2,000, paid in hand, the one undivided half of said

tract of 168 acres. At the February rules, 1900, Jesse Fluharty, Michael Fluharty, and J. W. Fluharty filed their bill in equity in the clerk's office of the circuit court of Marion county against Thornton Fluharty, Ellis Fluharty, and the other heirs at law of said William Fluharty, Meletha A. Fluharty, the widow, and U. N. Arnett, Jr., and Charles Powell, alleging that at the time of making said deed by the said William Fluharty and his wife they were well advanced in years and growing feeble with age, and unable physically to till and otherwise manage said land so as to make a livelihood for themselves; that they were almost wholly dependent on said land for support for themselves, and had no investment that would bring an income, and only possessed of such personal property as was necessary for farm operations and home comforts, worth not more than a few hundred dollars; that the controlling reason for making said deed was to secure to said vendors a home and support in their old age, and for that purpose said deed contained a provision to the effect that the grantees therein, the defendants Ellis and Thornton Fluharty, agreed to provide for and take care of the grantors during their natural lives, respectively, and to make such provision for them as was set out in the deed, and within 60 days they were to pay the grantors \$100 each, and, if they failed to perform any of the agreements named in said deed when it was possible for them to do or keep them, then the land was to revert back to the grantors, with full possession thereof, and the grantors reserved possession of said land until the death of each of them. The bill further alleged failure to comply with the conditions on the part of the grantees, Thornton and Ellis Fluharty, in every particular, and also filed with their bill a contract dated May 17, 1884, signed and acknowledged by the said William Fluharty and Meletha Fluharty, his wife, reciting the conditions of the deed to be performed by the said grantees, and also further agreeing, on the part of said William Fluharty and his wife, that if for any unavoidable cause the parties of the second part should fail to perform the obligations and conditions contained in the deed, so that it should be set aside, then they agreed to make to each one of them, Thornton and Ellis, a deed for 50 acres of land; alleging that the provisions in the contract to convey 50 acres of said 168 acres of the tract on conditions therein named was null and void, and could not be enforced, for the reason that there was no consideration moving said William Fluharty to support such promise, and the further reason that said agreement to convey the 50 acres to each one of said parties was made on condition that said Thornton and Ellis fail for any unavoidable cause to perform the conditions thereof; that the failure to perform and keep the provisions of said deed and contract was not unavoidable, but was willful and without excuse in law or fact; that the land is

valuable for farming purposes, and is supposed to possess oil under the same, and is worth \$35 to \$50 per acre; that said deeds to Thornton and Ellis Fluharty and from Ellis to said Arnett and Powell were clouds on the title to said land, and that plaintiffs had a right to come into a court of equity to have the same removed, and that they were remediless in the premises save in a court of equity; and prayed that said deeds from William Fluharty and wife to Thornton and Ellis Fluharty and said agreement between the same parties be declared null and void and wholly set aside and annulled, and that said deed from said Ellis Fluharty to U. N. Arnett, Jr., and said Powell be also set aside and annulled, and the land be decreed to belong jointly to the several heirs at law of the said William Fluharty, subject to the dower interest of said Meletha A. Fluharty therein, and for general relief. The deeds and contract referred to were filed as exhibits with the bill. The defendants Thornton Fluharty and U. N. Arnett, Jr., and Charles Powell demurred to plaintiffs' bill, which demurrer was sustained, "and the plaintiffs not desiring to amend their bill it is further adjudged, ordered, and decreed that plaintiffs' bill be, and is hereby, dismissed," and further decreed for costs against plaintiffs, from which decree plaintiffs appealed.

Plaintiffs say that the court erred in sustaining the demurrer to the plaintiffs' bill and dismissing the same, and in holding that if a cause of action existed and accrued to petitioners' ancestor, William Fluharty, in his lifetime, the same did not survive his death so as to give the heirs at law the right to sue.

The only question here for consideration is whether or not the demurrer was properly sustained. The plaintiffs and appellants have filed no brief in the cause. Appellees have filed a brief, and have argued pretty elaborately in support of the decree upon the theory that the bill is one for the removal of cloud upon the title, and cite many authorities to show that one out of possession cannot maintain a bill in chancery to remove a cloud from his title against a claimant who may be in possession of the land. The bill does allege that the deed of William Fluharty and wife to Thornton and Ellis Fluharty, and the deed from Ellis to the defendants Arnett and Powell, are clouds upon the title to the said land, and that the plaintiffs have a right to come into a court of equity to have the same removed. This will be regarded as surplusage. As it casts a shadow upon the title which a cancellation of the deeds would clear away, in that sense it would be the removal of a cloud from the title; but, strictly speaking, a bill to remove cloud from title of one in possession only refers to an adverse title, and not title derived from the same source.

The prayer of the bill is for the cancellation and declaring null and void the agreement and the deeds mentioned. It is contended by appellees that this was a cause of

action personal to William Fluharty, and did not survive to his heirs. Here is an estate vested on condition to be divested on failure of vendees to comply with the conditions, and the bill alleges failure in every particular on the part of the vendees. 2 Washburn on Real Property (6th Ed.) § 940, says: "The doctrine of estates upon condition seems to have been originally derived from the feudal law, and grew out of the conditions upon which fiefs were granted. If the tenant neglected to pay or perform his services, the lord might resume his fief. It is upon this ground that conditions are held to be reserved to the grantor or his heirs only, and he and they alone can avail of the right of resuming the estate for a breach. And the grantor's remedy for such breach is by a resumption of the estate granted." And section 75, 1 Tiffany on the Modern Law of Real Property: "The right to take advantage of a condition subsequent belongs, at common law, exclusively to the grantor or lessor and his heirs, and he cannot reserve such right to others, even by express stipulation." And in note 544 to said section it is said: "The heir of the grantor is entitled to avail himself of the benefit of the condition, though he is not specially named in the reservation thereof"—citing *Bowen v. Bowen*, 18 Conn. 535; *Jackson v. Toppling*, 1 Wend. 388, 19 Am. Dec. 515. In the last-mentioned case (Syl., point 1) it is held: "Where a deed is made by a father to his son in consideration of a covenant on the part of the grantee to maintain the grantor and pay his debts on condition that if he fails to do so the grantor shall have a right of re-entry, the grantee may insist upon having the justice of an alleged debt of the grantor established before paying it; but if he refuses to pay after it has been established by a board of arbitrators there is a breach of the covenant and condition in the deed." And it is further held in the syllabus of said case: "Where the grantee has conveyed the premises to another, an action to enforce the forfeiture may be brought against the latter, who merely represents his grantor." And further: "Grantor's heir may avail himself of such covenant upon breach thereof, after his ancestor's death, though he be not expressly named." See, also, Co. Litt. 201a, Butler's note 89. So that it appears clear that either the grantor or his heirs could cancel the deed for failure to execute the conditions. After the grantor had brought suit to cancel the deed for a failure to comply with the conditions, he could not be defeated on the ground that it was a suit to remove cloud from his title. While it is a fact plaintiffs are out of possession, they cannot bring their action of ejectment because their possession is deferred by the life estate; but they may at any time bring their suit to cancel the deeds for failure of grantees to comply with the conditions of their grant. *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730, was a case where a sister conveyed a tract of land to her brother,

who agreed, by accepting the deed, to support their aged father and mother during their natural lives, and that he would bind himself thereto by a written contract after the conveyance should be made. The brother having failed to perform the conditions, the sister brought suit. It was held (Syl., point 2): "The brother, having accepted the conveyance, and having been put in possession of the land, failed and refused to support his father and mother, but made haste to sell and convey the land, and thereby to render any enforcement of his undertaking ineffectual. Held a sufficient ground to rescind the contract and set aside the deed." In *Goldsmith v. Goldsmith*, 46 W. Va. 426, 33 S. E. 286 (Syl., point 2), it is held: "A deed made in consideration of maintenance, where there has been a failure to furnish maintenance, will be set aside, more especially where it has a clause of forfeiture for such failure." Also, equity entertained jurisdiction for the purpose of setting aside a similar deed in the case of *Farnsworth v. Noffsinger*, 46 W. Va. 410, 33 S. E. 246; and *Pownal v. Taylor*, 10 Leigh, 172, 34 Am. Dec. 725, was a case in which the owner of a tract of land conveyed the same to his nephew in fee subject to the maintenance and support of the grantor and his sister. The deed contained a covenant by the grantee for such maintenance and support, and that the land was to be bound therefor into whose hands soever it might come; but the deed did not state that it was upon condition that such maintenance and support be furnished, nor was there any clause providing for a re-entry by the grantor. It was held: "The provision for maintenance and support constitutes merely a charge upon the estate which may be enforced in equity, not a condition for breach of which the grantor can re-enter as of his former legal estate"—clearly indicating that, had there been a condition for such maintenance and support, the grantor would have been entitled to a rescission and re-entry. And in *Lowman v. Crawford*, 99 Va. 688, 40 S. E. 17, it is held: "If the consideration of a conveyance be the care and support of the grantor for life, the covenant to support and maintain creates a continuing obligation on the part of the grantee, for the breach of which the remedy at law is not complete and adequate. Equity has jurisdiction to annul and set aside the conveyance, and to put the parties in the position they occupied before the conveyance. In the case in judgment, the conveyance was not upon a condition subsequent, and there was no clause of re-entry, but it was made in consideration of care and support, and the evidence justified the setting aside of the deed, and the reinstatement of the parties to their former position." This was a case in which there was no condition subsequent contained in the conveyance, nor provision for re-entry of the grantor on failure of grantee to perform; yet the court took jurisdiction in equity to render to the grantor relief which he could

not have in a court of law. In the case at bar there is a provision that on failure of the grantees to comply with the conditions the deed of conveyance shall be null and void, and the land revert back to the grantors with full possession.

The demurrer should have been overruled. It follows that the decree of the court sustaining the demurrer and dismissing the bill must be set aside and annulled, and the cause remanded for further proceedings to be had therein.

(54 W. Va. 483)

ZINN v. ZINN et al.

(Supreme Court of Appeals of West Virginia.
Dec. 16, 1903.)

OIL LEASES—ADVERSE CLAIMS TO LAND—ROYALTIES—CONVEYANCE OF TITLE—QUIETING TITLE—EQUITY—JURISDICTION.

1. If two adverse claimants thereto make independent leases to the same company for the oil and gas under a certain tract of land in consideration of oil royalties and gas rentals reserved in each of such leases, the subsequent lessor cannot sue the prior lessor in equity to recover from him the royalties and rentals received by him under his lease.

2. A claimant out of possession cannot convey his title to the holder of the adverse title in possession, and then sue the grantor of such adverse title in equity to cancel the title papers of such adverse title as a cloud on the title which he has conveyed to the holder of such adverse title.

3. Allegations of irreparable damages, which show on their face that they are mere pretexts, will not sustain a bill in equity.

Poffenbarger, J., dissenting.

(Syllabus by the Court.)

Appeal from Circuit Court, Ritchie County; M. H. Willis, Judge.

Bill by M. G. Zinn against G. P. Zinn and others. Decree for plaintiff, and defendant Zinn appeals. Reversed.

Davis & Son and G. W. Farr, for appellant. Roberts & Carter and Sherman Robinson, for appellee.

DENT, J. Granville P. Zinn appeals from a final decree of the circuit court of Ritchie county rendered on the 28th day of February, 1901, in a chancery suit therein pending, instituted by M. G. Zinn against him and others for the purpose of determining the title to one-eighth royalty in a certain tract of land, of which appellant was seised and possessed in fee simple. The suit resulted in favor of the plaintiff. Appellant assigns numerous errors. The first in importance is the overruling of the demurrer to the bill for want of equity.

The bill alleges, in substance, that Thomas P. Zinn, being the owner of a certain 24, more or less, acre tract of land, on the 21st day of March, 1896, conveyed to Preston G. Zinn the oil and gas underlying the same, by deed duly acknowledged, but not admitted to record until the 10th day of August, 1899; that on the 1st day of August, 1896, Thomas P. Zinn conveyed to the appellant

the same tract of land, without reservation of the oil and gas, by deed duly acknowledged and admitted to record on the 29th day of August, 1896; that on the 21st day of November, 1898, Granville P. Zinn, appellant, leased said land for oil and gas purposes to the Carter Oil Company, by lease duly recorded; "that afterwards, to wit, on the 8th day of November, 1899, the said Preston G. Zinn ratified and confirmed said lease for said premises for oil and gas purposes to the Carter Oil Company by an instrument in writing duly executed and acknowledged, and filed for record in the office of the clerk of the county court of Ritchie county;" that the Carter Oil Company, in pursuance of its said lease (thereby meaning the lease from appellant, then in possession of said land), began operations for oil and gas, and in August, 1900, obtained a well producing 150 barrels per day; that appellant at the time of his deed had notice of Preston G. Zinn's unrecorded deed for the oil and gas, and that he took a conveyance of the whole land without reservation with intent to deprive Preston G. Zinn of his rights to the oil and gas; that, since oil had been obtained, the appellant had been receiving the one-eighth thereof wrongfully from the Eureka Pipe Line Company, selling the same and appropriating it to his own uses, and has refused the same to plaintiff, although demanded by him by virtue of a deed therefor made to him by Preston G. Zinn on the 13th day of June, 1900; that appellant's deed is a cloud on plaintiff's title to such royalty; that other wells are about to be drilled which will produce oil in large quantities, and that plaintiff will be irreparably damaged if appellant is permitted to receive such royalties, and will be put to a multiplicity of suits to maintain his rights. He therefore prays that defendants be required to answer, that his title to the oil and gas royalties and rentals under the lease be declared paramount to the appellant's, and that the appellant be required to pay over to him the amount thereof already received, and permit plaintiff to receive the same in the future. The bill, in short, is simply a demand that appellant, by virtue of plaintiff's superior legal title, shall pay plaintiff the gas and oil royalties already received, and surrender all future claim thereto. This is a mere pecuniary demand for the rents and royalties received by the appellant, and is not maintainable under the alleged heads of equitable jurisdiction.

The title to land is not in controversy. All plaintiff received by his deed from Preston G. Zinn was an assignment of the oil royalties and gas rentals, as Preston G. Zinn had already conveyed all his interest to the oil and gas in place to the Carter Oil Company, who, having found oil and gas, were in possession thereof under and by virtue of the prior lease made by Granville P. Zinn, the adverse claimant, to them. Hence, the title to the oil and gas was completely vested in the Carter Oil Company by the adverse lease.

es. All that plaintiff has any claim to whatever is the oil royalties and gas rentals reserved in the lease of Preston G. Zinn, and all he claims by his bill is these oil royalties. This is mere pecuniary demand for the royalties already received by appellant, and is not maintainable under the alleged heads of equitable jurisdiction. As a suit to remove or cancel Granville P. Zinn's deed as a cloud on the grounds that Granville P. Zinn received his deed with notice of Preston G. Zinn's unrecorded deed, it cannot be maintained, for the reason that plaintiff has not now nor ever had any title to land, and is not now nor ever was in possession of such land. *Christian v. Vance*, 41 W. Va. 754, 24 S. E. 596; *Moore v. McNutt*, 41 W. Va. 695, 24 S. E. 682.

A bill in equity does not lie to remove a cloud on or settle the title to personal property, unless it is of peculiar value or under peculiar circumstances. *Zanhizer v. Hefner*, 47 W. Va. 418, 35 S. E. 4; *White v. Stender*, 24 W. Va. 615, 49 Am. Rep. 283; *Baker v. Rinehard*, 11 W. Va. 238. Appellant might have been held as trustee of the legal title for the benefit of the plaintiff had the plaintiff's suit been instituted before both legal and equitable title to the oil merged in the Carter Oil Company. Now the only claim that plaintiff sets up against appellant is, not the wrongful withholding of the legal title, but the wrongful withholding of the oil royalties, for which damages at law furnish a full compensation. One suit at law will settle the right to the rents and royalties as between appellant and plaintiff, and the question of multiplicity of suits is not involved, and, if it were, the right should be first determined at law. *Hogg's Equity Principles*, § 350. There is no question of irreparable damage or waste involved, as Preston G. Zinn, by his lease to the Carter Oil Company, Granville P. Zinn's lessee, then in possession, sanctioned his right to remove the oil and gas and agreed to receive a rental therefor. The case of *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566, is not applicable. In that case the right to remove the oil and gas was involved, as producing irreparable damage to real estate. *Eakin v. Hawkins*, 48 W. Va. 364, 37 S. E. 622, was a suit between those claiming a co-tenancy in the oil and gas production, and the question here involved was not raised. In the cases of *Moore v. Jennings*, 47 W. Va. 181, 34 S. E. 793, *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923, and *Trees v. Eclipse Oil Co.*, 47 W. Va. 107, 34 S. E. 933, the question of the wrongful extraction of the oil was involved, and the last case was founded on the doctrine of co-tenancy.

In the present case the plaintiff does not dispute the right of the Carter Oil Company to produce the oil and gas, and he is not trying to stop such production, but he is only claiming that after it is produced he is entitled to the royalty reserved by Granville P. Zinn, the appellant, on his lease. There is

no attempt to stay waste or prevent irreparable damage to real estate. Nor does the bill show that an equitable accounting is necessary. The lease under which the plaintiff claims the right of royalty, being from Preston G. Zinn to the Carter Oil Company, provides that the royalty oil shall be delivered in the pipe line to the credit of the lessor. The bill alleges that the Carter Oil Company has delivered such royalty into the possession of the Eureka Pipe Line Company in accordance with the above provision, and the Eureka Pipe Line Company has accounted for it to the appellant by virtue of the appellant's lease to the Carter Oil Company. The plaintiff's assignor agreed that the royalty might go into the possession of the pipe line, and to receive it from that company according to account thereof. He nowhere claims that such account has not been properly kept and rendered. He does not claim that he ever demanded his royalty either from the Eureka Pipe Line Company or the Carter Oil Company. Therefore, he has set up no grounds whatever for an accounting between himself and the Carter Oil Company or the Eureka Pipe Line Company. *Swearingen v. Steers*, 49 W. Va. 312, 38 S. E. 510. All the plaintiff seeks is that the appellant shall pay to him the royalties received by appellant from the Eureka Pipe Line Company, the amount of which is easily ascertainable from the latter company. All the equitable grounds alleged are mere pretexts for the purpose of foisting on equity a jurisdiction it does not possess. If plaintiff wants the oil in kind, and it can be identified, detinue will furnish him an ample remedy. *Hall v. Reed*, 15 B. Mon. 479. He argued that the oil should go into the pipe line, and therefore he cannot complain if it is not separated in kind so that detinue will lie. If he establishes his right, the pipe line holds it for him according to his agreement. If he wants to sue for a wrongful conversion, trover is his proper remedy. If he wants only the value thereof in money, assumpsit will give him relief. The Carter Oil Company, knowing of the existence of these two titles to the oil in place, had the right to reject the one and purchase the other, or had the right to avoid litigation and delay to purchase both, and, from the exhibits filed, this is what it did do. 6 Am. & En. En. Law (2d Ed.) 711. By so doing, unless some arrangement exists not disclosed by the record, it agreed to pay two separate royalties, one to each of the adverse claimants. The bill alleges that Preston G. Zinn "ratified and confirmed said lease for said premises for oil and gas purposes to the Carter Oil Company by an instrument in writing duly executed and acknowledged, and filed for record in the office of the clerk of the county court of Ritchie county, a duly certified copy of which is herewith filed, marked 'Exhibit D,' and made a part of this bill of complaint." An examination of the exhibit filed shows it to be a straight lease from Preston G. Zinn to the Carter Oil Company, re-

serving royalty, and makes no reference whatever to the Granville P. Zinn lease. The allegation of the bill, therefore, must mean that the legal effect of the last lease obtained by it was to ratify and confirm in the Carter Oil Company the title already held by it under the first lease. The reservation of the royalties in the two leases are separate and distinct, and there is nothing on the face of the leases to show that they were one and the same, nor does the bill contain such allegation. Hence the bill and exhibits show a double reservation of royalties, being a separate reservation to each of the lessors. Such being the case, one lessor cannot sue the other for the separate royalty received by him, for he is entitled to receive it by his separate lease, and there is no privity of contract between them. The Carter Oil Company having purchased both titles, the plaintiff, having passed everything but the royalty, has no right to sue appellant in equity for his royalty on the ground that appellant's title conveyed to the Carter Oil Company is bad. If the Carter Oil Company, which owns the title, is satisfied, no one else has the right to complain. Nor does it have the right to buy up adverse titles at will without ouster and recourse therefor on appellant. *Jones v. Richmond*, 88 Va. 231, 13 S. E. 414; *Marbury v. Thornton*, 82 Va. 702, 1 S. E. 909.

All remedies touching the oil in place as real estate as between the original claimants are extinguished by the merger of the adverse titles thereto in the Carter Oil Company. The remedies for the oil royalties and rents of both plaintiff and appellant are governed and controlled by their respective leases, and for breaches thereof they should look to the Carter Oil Company, and not to each other, unless the appellant has been guilty of an unlawful conversion of the plaintiff's royalties. The remedy in such case would be at law, and not in equity. Whether the Carter Oil Company can plead failure of consideration, etc., as to either lease, under section 5, c. 126, Code 1899, it is improper to consider at this time, as neither the facts nor the proper parties are properly impleaded before the court. In the case of *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164, the court held that a temporary injunction might issue to preserve real estate intact until the title thereto could be settled at law. But it did not hold that an injunction was necessary to prevent the delivery of oil lawfully extracted to a solvent claimant thereof until the rightful ownership thereof could be investigated. Injunction in such case is wholly unnecessary, and might be productive of much greater harm than good. If the receiver of the oil is solvent, a suit at law will furnish ample remedy and protection: If insolvent, notice to the Pipe Line Company or an action of detinue would prevent its delivery if it can be had in kind. Plaintiff does not ask this. In the present case the bill does not question

the solvency of the appellant. If the plaintiff has a good claim for these royalties either against the appellant, the Eureka Pipe Line Company, or the Carter Oil Company, his legal remedies are adequate and complete. The bill is based on mere equitable pretext, void of foundation in fact. *Hale v. White*, 47 W. Va. 700, 35 S. E. 884; *Greathouse v. Greathouse*, 46 W. Va. 21, 32 S. E. 904.

The decree complained of is reversed, and the demurrer for want of equity is sustained, and the bill is dismissed without prejudice to the plaintiff's right to maintain any proper suit he may be advised to bring.

POFFENBARGER, J. (dissenting). The bill does not contest the right of the Carter Oil Company to develop the land and take the oil and gas therefrom. The assignor of the plaintiff, by his lease, authorized this. The defendant Granville P. Zinn, the appellant here, also executed a lease granting the same right. No question of the right to the possession of the land is presented. The bill does not seek to enjoin trespass to real estate. The plaintiff shows that the royalties had been paid and are paid to Granville P. Zinn, and that he ought not to receive them because they belong to the plaintiff. It is useless to inquire or determine whether there is any liability for additional royalty on the part of the oil company, for none is claimed in the bill. It shows that the oil company is taking all the oil except the one-eighth, and its right to do so is not questioned. So the controversy is between M. G. Zinn and Granville P. Zinn, and the subject of that controversy is the royalty oil. These two parties are adverse claimants of that one-eighth. M. G. Zinn claims it under the deed executed by Thomas P. Zinn to Preston G. Zinn, bearing date March 21, 1896, conveying to Preston G. Zinn only the oil and gas under the land. Granville P. Zinn claims it under the deed executed by Thomas P. Zinn to him August 1, 1896, conveying the tract of land with covenant of general warranty to Granville P. Zinn, and without any exception or reservation of the oil and gas under it. Preston G. Zinn failed to record his deed. Granville P. Zinn claims to have had no notice of the deed made to Preston G. Zinn. M. G. Zinn, by an assignment and transfer from Preston G. Zinn, dated June 15, 1900, has acquired whatever right Preston G. Zinn had to royalty, and he insists that his title to the royalty is superior to that of Granville P. Zinn because the latter had notice of the deed executed by Thomas P. Zinn to Preston G. Zinn.

If M. G. Zinn has an adequate remedy at law, then there is no jurisdiction in equity. His bill shows that he has demanded this royalty from Granville P. Zinn, and that the latter has ignored his demand, denied that he had any title to it, taken the oil, and converted it to his own use. If the plaintiff can show that the royalty belongs to him,

and not to Granville P. Zinn, he can undoubtedly recover in an action at law. Its value is certainly ascertainable, and would be the measure of damages. "Trover, at common law, was an action on the case, whereby the owner of personal property recovered damages against a person who committed the wrong of conversion with respect to that property." 28 Am. & Eng. Enc. Law, 712. "The fact that the plaintiff might have brought his action *ex contractu* does not prevent him from suing in trover for a conversion." Id. 724. "Where the defendant has sold or otherwise disposed of the property, the plaintiff may waive the conversion and sue in *assumpsit*." Id. 792. *Assumpsit* lies to recover money received by the defendant tortiously, or under duress of the person or goods; to recover the fees of an office usurped by another; to recover the value of goods which the defendant by fraud induced the plaintiff to sell to an insolvent person, and afterwards obtained them for his own benefit; and to recover back rents tortiously received. Hogg's Pl. & Forms, 39. In such cases, the plaintiff waives the tort and sues for the value of his property.

But it occurs to me that the remedies by action at law for damages are inadequate. In order to assert it, the plaintiff must give up his property. He has a right to the specific property itself or a share in the property to be set apart to him in kind, and ought to have a remedy by which he can obtain the property instead of its mere value as damages. In the case of rent or an annuity, the thing to which the claimant has the right is money, and one kind of money is as good as another if it be of the same value. Hence, as long as he has a remedy to obtain the money, that being the only thing in question, his remedy is adequate. But here the bill demands a share of the oil, not only that which has already been produced and remains unsold, but also of that to be produced hereafter. The law clearly affords him no remedy whatever for that. He cannot sue in *detinue* so as to test the right of property for two reasons: First, because he is not entitled to the whole of the oil in question and cannot sue for the whole of it. Assuming that he has title to the one-eighth, the Carter Oil Company has title to the other seven-eighths. Treating them merely as co-tenants, each would be entitled to the possession, and one could not maintain a possessory action against the other. Second, the plaintiff being entitled to only a share in the oil, he can no more identify any particular oil which belongs to him than he could identify his 100 bushels of wheat after it had been poured into an elevator and mixed up with 1,000 bushels

of some other person's wheat. Under such circumstances, an action of *detinue* would not lie, and the right to possession of the property could not be asserted. The only right he has is to demand a share of the oil. In other words, he is entitled to partition of personal property as to the oil produced, and of an incorporeal hereditament or right as to the oil remaining in the land and undeveloped. Both of these are subjects of partition, and partition of them can be had only in a court of equity. 21 Am. & Eng. Enc. Law (2d Ed.) 1160; *Smith v. Smith*, 4 Rand. 95, 102. Brook, P., said in *Smith v. Smith*: "Supposing it to be a legal, and not an equitable, interest; no partition between tenants in common of personal estate could be made at law. A partition in kind could not be made there, each party having equal right to the possession of the whole. Whether the title was legal or equitable, therefore, in this case, a court of equity was the proper tribunal for a partition of it." Treating of concurrent equity jurisdiction where the remedy at law is inadequate, Pomeroy says, at section 185: "In the same class must be placed suits which are maintainable, under some special circumstances, for the partition of chattels, and analogous to those for the partition of land." Here it may be objected that equity has not jurisdiction because the plaintiff, who seeks to be admitted to a share in the oil, claims adversely to one of the defendants, and the only controversy is that between them over the share in the oil. Ordinarily, courts of equity, in partition suits, will not determine adverse titles, but, where the subject of partition is personal property, this rule does not apply. The obvious reason is that, as has been shown, there is no legal action or remedy by which the right of property can be determined. Under this head, Freeman on Co-Ten. & Par., at section 426, says: "This class embraced all those cases in which the plaintiff's title to the property was denied by the defendant. When real estate was the subject of partition in chancery, and the plaintiff's title was put in issue, he was required to establish it at law. But there was no method by which a co-tenant of personalty could litigate his title with another co-tenant. Therefore, when, in a partition in chancery, the defendant denied the title of demandant to personal property, and claimed such property in severalty, the demandant was not sent to law to establish his title. He was not required to attempt an impossibility."

Equity, having jurisdiction for partition, may decide all questions, even those of legal title, the determination of which is necessary as incident to the granting of the relief to which the plaintiff shows himself entitled

(54 W. Va. 221)

**SECOND NAT. BANK OF MORGANTOWN
v. RALPHSNYDER et al.**(Supreme Court of Appeals of West Virginia.
Nov. 28, 1903.)**JUDGMENT—CORRECTION—WRIT OF ERROR—
ACTION ON NOTE—DECLARATION—ANSWER
—CONTINUANCE—SURPRISE.**

1. A judgment, rendered after a demurrer has been filed by the defendant and overruled, is not one by default, and a motion to correct for judicial error, made after the close of the term at which the judgment was rendered, is properly overruled.

2. Though such motion cannot be entertained, a writ of error to the judgment may be allowed.

3. In declaring upon a written instrument, it is sufficient to set forth the promise or obligation according to its legal effect.

4. When, upon the amendment of a declaration at bar, the defendant is allowed four days, on his own motion, in which to plead, he cannot complain of the brevity of the time allowed, especially if in fact about twenty months thereafter elapsed before judgment was rendered against him.

5. Where a defendant, after the overruling of his demurrer, has failed for such length of time to plead, had two continuances, and merely procures the filing of affidavits showing illness and necessary absence, without pleading or in any way disclosing a defense, and without making a formal motion for a continuance, there is no error in failing to continue the case and rendering judgment.

6. Applications for continuances are addressed to the discretion of the trial court, and a judgment will not be reversed for the refusal of a continuance when it appears that the defendant has unreasonably delayed the disclosure of any defense, and sets up none at the time of the motion, and the facts and circumstances are such as may have satisfied the court that he is merely seeking delay.

7. Surprise grounded upon accident, mistake, or violation of agreement, not brought to the attention of the trial court before the adjournment of the term at which a judgment, after an appearance, was rendered, cannot be relied upon or noticed in the appellate court.

(Syllabus by the Court.)

**Error to Circuit Court, Monongalia County;
John W. Mason, Judge.**

Action by the Second National Bank of Morgantown against Alpha Ralphsnyder and others. Judgment for plaintiff, and defendants bring error. Affirmed.

C. M. Ralphsnyder and T. N. Parks, for plaintiffs in error. Cox & Baker, for defendant in error.

POFFENBARGER, J. On the 30th day of April, 1900, the Second National Bank of Morgantown instituted an action of debt in the circuit court of Monongalia county against Alpha Ralphsnyder, George M. Ralphsnyder, I. C. Ralphsnyder, W. M. Ralphsnyder, and N. B. Cox for the recovery of the sum of \$625 upon the joint and several promissory note executed to said bank by the said defendants, bearing date September 16, 1899, and payable in 180 days from the date thereof. At the next rules the declaration was filed and the common order entered, and at June rules the defendants, by counsel, ap-

peared and filed a demurrer to the declaration. On the 16th day of June, 1900, the plaintiff, as well as the defendants, appeared in court, and there was a joinder in the demurrer to the declaration, and each count thereof. Then, on motion of the plaintiff, the declaration was amended at bar by the insertion of the word "note," which had been inadvertently omitted from one clause of the declaration. Thereupon the demurrer was renewed, and the court overruled it. Then, on motion of the defendants, leave was granted them until the following Wednesday in which to plead. The next order was made on June 24, 1901, showing merely a continuance by consent. On the 11th day of October, 1901, the case was again continued on the application of the defendants, and at their costs. On the 20th day of February, 1902, a judgment was rendered for the sum of \$698.87. Prior to the rendition of the judgment, however, the affidavits of Mack Roby, I. C. Ralphsnyder, and George M. Ralphsnyder, purporting to show grounds for continuance, were filed; and the order so shows, but it does not show any motion for the continuance. Nor does it show an appearance or the filing of any plea at that time. No plea was ever filed at any time. The order giving judgment recites that "the defendants, being solemnly called, came not, to require a jury; and, the plaintiff requiring none, the plaintiff proved its case in open court." Nothing further was done at that term. On the 6th day of May following, an execution was issued, and on the 3d day of June, 1902, an order was made in vacation staying the execution for the hearing of a motion to quash it. On the 14th day of June, 1902, the motion was heard and overruled, and on the 16th day of the same month a motion was made to set aside the judgment and grant a new trial, for several reasons set forth in the notice. The motion was supported by several affidavits setting forth alleged grounds of defense to the action, but on the 20th day of the same month the motion was overruled. To the rulings of the court on the motion to set aside the judgment, exceptions were taken, and duly embodied in bills of exception, which were made part of the record; and on the 16th day of July, 1902, a writ of error was awarded by a judge of this court.

The motion to set aside the judgment and grant a new trial, made long after the close of the term at which the judgment was rendered, was properly overruled. That judgment was not one by default, in which a judicial error might be corrected upon motion, under section 5 of chapter 134 of the Code of 1899, as there had been an appearance by all the defendants. A judgment in a case in which there has been an appearance is not a judgment by default. *Holliday v. Myers*, 11 W. Va. 276; *Carlson's Adm'r v. Ruffner*, 12 W. Va. 297; *Smith v. Knight*, 14 W. Va. 749; *Compton v. Cline*, 5 Grat. 137; *Richard-*

son v. Jones, 12 Grat. 53; Goolsby v. Strother, 21 Grat. 107; Stringer v. Anderson, 23 W. Va. 482. In Holliday v. Myers, *supra*, the defendants appeared and pleaded to the action, and then voluntarily withdrew their plea, and suffered plaintiffs to prove their cause of action. Their mere appearance was held sufficient to make the judgment one rendered upon proof of the cause of action, and not a judgment either by default or by confession, within the meaning of the statute. This view of the judgment in this case is strengthened by the recital in the order that the plaintiff proved its case in open court. If not strictly within the definition of a judgment of *nil dicit*, it very closely resembles such a judgment, which is defined to be one rendered against a defendant who fails to put in a plea or answer to plaintiff's declaration by the day assigned. Bouv. L. Dict.; Black on Judg. § 79; 21 Am. & Eng. Enc. Law (2d Ed.) 541; Stewart v. Goode, 29 Ala. 476. In Storey v. Nichols, 22 Tex. 87, the court said: "A judgment by *nil dicit* is held by this court to possess a stronger implication in favor of the plaintiff's claim than an ordinary judgment by default. It is regarded as partaking of the nature of a judgment by confession as well as by default." Under our decisions, it would hardly be regarded as a judgment by confession. A judgment by default it could not be, because of the appearance. It is probably more than a judgment by *nil dicit*, because it is a judgment upon proof, as well as upon the failure of the defendants to say anything against the entry of the judgment. At any rate, it is a final judgment. In *chancery* causes the rule is different. After the overruling of a demurrer, and expiration of a rule to answer, a decree entered is appealable only as to matters settled by the demurrer, and is by confession as to errors committed in respect to matters subsequent to the demurrer. Watson v. Wigginton, 28 W. Va. 533. This rule does not apply to actions at law. "The language of the statute in regard to equity cases is essentially different from that in reference to actions at law. Any appearance of the defendant in the latter case prevents the judgment from being by default." Steenrod v. Railroad Co., 25 W. Va. 133, 137; McGraw v. Roller, 53 W. Va. 75, 44 S. E. 248.

Such being the character of the judgment, a long line of decisions hold that, after the adjournment of the term at which it was rendered, the court has no power or authority to disturb, alter, or set it aside, except to a very limited extent authorized by the statute. Green v. Railway, 11 W. Va. 686; Ruhl v. Ruhl, 24 W. Va. 279; Crim v. Davisson, 6 W. Va. 465; Hall v. Bank, 15 W. Va. 328; Morgan v. Railway Co., 39 W. Va. 17, 19 S. E. 588; 1 Freeman on Judg. § 696; 7 Rob. Pr. (New) 127. Section 1 of chapter 134 of the Code of 1899 provides that, on motion after reasonable notice, the court or the judge in vacation may reverse or correct a judgment

or decree for any clerical error or error in fact for which the judgment or decree may be reversed or corrected on writ of error *coram nobis*. Certain corrections of clerical mistakes may also be made under section 5 of the same chapter. But the error complained of here, if any, is one of law, not of fact, and is judicial, not clerical, as appears from the grounds for the motion as set forth in the notice, namely, that there was a just defense to the action, as shown by the affidavit filed at the time judgment was rendered; that, upon the affidavits filed, a continuance should have been allowed; that the judgment is for more than the defendants owe; that the court allowed interest after tender of the amount due; that the note was not due at the time suit was brought; that defendants' counsel, a nonresident attorney, had no notice of the bar meeting at which it had been determined to set the case for trial; and that the judgment was a surprise. At the time the judgment was rendered there was no plea denying the amount called for by the note, or any part of it, nor setting up any tender, nor showing any reason why the amount was not due, as by the terms of the note itself it appeared to be. The note bearing date September 16, 1899, was payable 180 days after date, and the suit was brought more than 7 months after the date of the note. The whole case made upon this notice is, in substance, a complaint against the action of the court in refusing a continuance. Whether, upon the showing made, the defendants were entitled to a continuance, was a question of law; and if, in disposing of it, the court erred, that error having been carried into a final judgment, not upon default, and, the term having closed, the motion to set aside or reverse for that error came too late.

If, however, the court erred in that respect, or in overruling the demurrer, relief may now be had upon the writ of error, disregarding all the proceedings in the court below upon the motion for a new trial. Ordinarily, where there is a judgment by default or after trial by jury, proceedings for error will not be entertained by this court until after a motion has been made in the court below to set the judgment aside, and there can be no good reason why the same rule should not apply in the case of a judgment such as we have here. Of course, the rule, if so applied, would cut off proceedings for error in such cases. But why should a writ of error be entertained in such case? Having come into court and demurred, the defendant refuses to do more. He refuses to plead or make any defense, and allows judgment to go without even so much as a motion made in proper time to set it aside. Why should not such negligence or obstinacy justly preclude him from further consideration by the court? But the rule seems to be that, if error be committed in passing upon the pleadings and other matters substantially distinct from the trial itself, a writ of error may be main-

tained notwithstanding no motion has been made in the trial court to set aside the judgment. Thus in *State v. Thompson*, 26 W. Va. 149, while the failure of the state to object to the overruling of its motion for a new trial prevented a reversal of the judgment for error committed in the trial, the court passed upon the motion to quash the indictment. In *Proudfoot v. Clevenger*, 33 W. Va. 287, 10 S. E. 394, a writ of error to a judgment rendered upon a demurrer to evidence was entertained, although no motion to set aside the judgment had been made in the trial court. Here the errors complained of relate to the sufficiency of the declaration and the propriety of the action of the court in refusing a continuance, and not to rulings made during the course of the trial. They are such, therefore, as may be considered in the present state of the case.

All that is urged against the declaration on demurrer is that it alleges that "the defendants, and each of them," promised to pay, etc., while the note reads, "We or either of us jointly and severally promise," etc., and the omission of the formal words, "For this, to wit, that heretofore," usually found in the declaration. It is sufficient to set forth the instrument sued upon according to its legal effect. 1 Chit. on Pl. 305, 367. This is a joint and several note, and therefore binds the defendants, and each of them, and that is the exact language in which the promise is alleged. This criticism of the declaration is therefore wholly groundless. It is useless to inquire as to whether the omission of the words, "For this, to wit, that heretofore," in the first count, renders the declaration bad, because, in the second count, which is sufficient, these words are inserted. For these reasons, the demurrer was properly overruled.

The next complaint is that only four days were allowed the defendants in which to plead. Of this they cannot complain, for the simple reason that it was granted upon their own motion, as shown by the order; and, if error was thereby committed, it was induced by the defendants themselves. A party will not be heard to complain of an error which he has invited or induced by his own conduct. 3 Cyc. 242. If this were not a sufficient answer, it could be further said that the plaintiffs in error have not been prejudiced by the shortness of the time allowed by the order, for they had from the date of that order, June 16, 1900, until the 20th day of February, 1902, a period of one year and eight months, in which they could have filed their plea, if they had desired to do so. About one year after the overruling of the demurrer a continuance was had by consent, from which it appears that neither the court nor the plaintiff unduly urged these defendants to trial. Nearly four months after that they obtained another continuance upon their own motion, and still no plea was filed. Under the statute, they are only enti-

tled to one month in which to plead. Code 1899, c. 125, § 5.

In the brief it is insisted that the demurrer stands legally as if it had not been passed upon by the court, for the reason that at the time it was overruled the judge of the court was ill and not in attendance, and Hon. John W. Mason was sitting as judge in his place, and between the date of the overruling of the demurrer and the day on which the defendants were required to plead the regular judge died. Whether the orders were signed up from day to day is not stated, but it is said that the special judge had no authority to sign the records of the previous day after the death of the regular judge. None of these facts appear in the record, but, if they did, it does not follow that the demurrer is not overruled. The rendition of judgment, in legal effect, overruled the demurrer. *State v. Hall*, 40 W. Va. 455, 21 S. E. 760; *Fleming v. Oil Co.*, 37 W. Va. 645, 17 S. E. 203; *Hood v. Maxwell*, 1 W. Va. 219.

Did the court err in refusing a continuance? The record shows no formal motion for a continuance. It discloses nothing that might be considered a request for a continuance, except the affidavits filed, in one of which the affiant George M. Ralphsnyder, attorney for the defendants, "asks the court to continue said suit until the next term of the circuit court for said Monongalia county." The letter transmitting the affidavits to Joseph Moreland simply requested him to have the case continued for the term. He was not an attorney in the case, and had no authority to file any plea or to do anything other than procure a continuance. These affidavits merely set forth the serious illness of the defendant Alpha Ralphsnyder, and the necessity for the attendance of his sons I. C. Ralphsnyder and George M. Ralphsnyder at his bedside. The only representation as to any defense is found in the affidavit of I. C. Ralphsnyder, which says on that point merely "that the defendants have a proper defense to said suit." These affidavits set forth the materiality of the testimony of the absent parties, and the impossibility of proving the same facts by any other witness; and, had they shown any effort at all on their part to prepare a defense to the action, the court below would, no doubt, have granted a continuance. But there had been long delay, and the record fails to show in any formal or legal way that they had, or claimed to have, any defense. Not only had the case stood for nearly two years without the entry of any plea, or any indication upon the record that there was any defense to the action; but the record shows that, at the time judgment was rendered, nobody appeared, for the order recites that the defendants, being solemnly called, came not. But the affidavits which had been tendered upon the preceding day were filed by the defendants. This is rather contradictory, for it is difficult to say how defendants could be both

in and out of court at the same time. It probably means that the affidavits were sent to Mr. Moreland to be filed by him for the defendants, but that he had no authority to do anything else. In other words, that he had no authority to file a plea and set up any defense to the action. From the papers filed on the motion for a new trial, this appears to have been the true situation. In passing upon the motion for a continuance, the trial court, no doubt, considered the long-continued failure of the defendants to disclose any defense, as well as the absence of anybody at that time to make such disclosure, and came to the conclusion that the defendants were making no effort to prepare for trial, but, on the contrary, were seeking delay. Where the court is satisfied that a party is merely fighting off the trial, instead of preparing for it, refusal of a continuance is held to be proper. "Applications for continuances are addressed to the discretion of the court, and much must be left to the tribunal which has the parties before it; and it must determine, from a variety of circumstances occurring in its presence, whether applications for continuance are made in good faith, or are merely intended to protract the controversy, and, even when made in good faith, a reasonable degree of diligence should be exacted." *Flott v. Commonwealth*, 12 Grat. 578. "Where the circumstances satisfy the court that the real purpose in moving for a continuance is to delay or evade a trial, and not to prepare for it, then, though the witnesses have been summoned, and the party has sworn to their materiality, and that he cannot safely go to trial without them, the continuance should be refused." *Hewitt v. Commonwealth*, 17 Grat. 827. To the same effect, see *Mendum v. Commonwealth*, 6 Rand. 704; *Harris v. Harris*, 2 Leigh, 584; *Marmet Co. v. Archibald*, 37 W. Va. 778, 17 S. E. 299. That the failure of the defendants did not consist of mere want of diligence in procuring the attendance of witnesses is not overlooked. The persons whose absence was necessitated by the illness of Alpha Ralphsnyder were defendants. Being parties, there was no necessity for process to bring them into court as witnesses. The summons commencing the action brought them in for all purposes, and the affidavits may have sufficiently accounted for their absence. Nevertheless the defendants were in default. They had failed to put upon the record as evidence of their good faith that they had any defense to the action, and had persisted in withholding their defense to a point which justified a conclusion on the part of the court that they had no defense, and were merely resorting to pretexts and subterfuges to prevent the entry of judgment against them. In *Logie v. Black*, 24 W. Va. 2, 21, Judge Green says: "It may be regarded as settled law in Virginia and in this state that where a party has obtained one or more continuances at prior terms of the court, and

the court, in the exercise of its discretion, refuses to again continue his case, even when he has apparently brought himself within the general rule which ordinarily entitles a party to a continuance, the appellate court will not reverse such case because of the refusal of the circuit court to grant such continuance, unless the party complaining makes out a very strong case, and the appellate court sees that the party has suffered from an abuse by the circuit court of its legal discretion. Some appellate courts have gone farther than ours and have held that they would not review the exercise of such discretion by the inferior court, whose opportunities of exercising its discretion in such case must greatly exceed that of the appellate court. We have, however, determined that the exercise of such discretion is reviewable, but under such circumstances the leaning of the court will be strong to support the action of the circuit court." Under the circumstances, it cannot be said that the circuit court has abused the discretion vested in it concerning continuances. If, upon the application of parties who have been so long in default and so grossly negligent of their interests, and apparently so unwilling to assert their defense and come to an issue, an appellate court will reverse a judgment founded upon such negligence and apparent obstinacy, the trial courts will be compelled in the future to proceed with great caution in forcing unwilling litigants to submit their cases.

Apprehending and forestalling the possible assumption on the part of counsel of the oversight by the court of the representation contained in the affidavits filed on the motion for a new trial concerning an alleged pending compromise as the reason for the failure to file a plea, it is noted here that no pending compromise or any other matter by way of excuse for failure to file the plea was brought to the attention of the court at the time it refused the continuance. On the ground of surprise, the pendency of a compromise might have been urged even at that late day as ground for continuance, but it was not; and it was too late after the adjournment of the term to make it available for a continuance or the setting aside of the judgment, and it cannot be urged here, for the reason that, in order to be available here, it must have been in the record at the time the court below took the action complained of, so as to make that action erroneous. This court cannot grant relief upon matter sought to be introduced into the record long after the judgment had been rendered, and the record of the cause in the court below had been so thoroughly completed and made final that it could not there be altered. This court has no original jurisdiction of bills in equity for relief against judgments on the ground of surprise, accident, or mistake. If a compromise was pending, it was known to the defendants, and they were bound to bring

it to the attention of the court in order to make it available. In the same connection, it is urged that, by reason of the ignorance of the attorney for the defendants of the bar meeting at which the case was set for hearing, defendants were surprised and misled. No such claim was made in either of the three affidavits filed in support of the alleged motion for a continuance, nor even now are the rules presented in violation of which it is said the case was set for hearing. Clearly, there is nothing in these contentions.

The action of the court in overruling the motion to quash the execution was excepted to, and assigned as a ground of error in the petition for the writ of error; but nothing is said on that subject in the brief, from which it may be inferred that these assignments have been abandoned. However, nothing indicating any error in this connection appears in the record. The execution is dated May 6, 1902, more than 60 days after judgment, with interest thereon from the date thereof, and for the costs which the clerk, taxed at \$43.30. The costs were properly inserted, because the judgment gave costs, leaving the taxation thereof to the clerk, which is usual and proper.

For the reasons aforesaid, the judgments complained of are affirmed.

(54 W. Va. 467)

McCLUNG et al. v. SIEG et al.

(Supreme Court of Appeals of West Virginia.
March 22, 1902.)

DESCENT AND DISTRIBUTION—LIABILITY OF DISTRIBUTEES—SUBSEQUENT PAYMENT OF DEBT—CONTRIBUTION—PROPERTY SUBJECT—ATTACHMENT—AFFIDAVIT—ORDER OF PUBLICATION.

1. Where an administrator, having no notice of a debt against the estate of his intestate, makes distribution of the estate, and is afterwards compelled to pay the debt, and there is no fraud or improper conduct imputable to him respecting either creditor or the distributees, he may, in equity, compel the distributees to refund to him the amount of the debt, interest, and costs which he has been compelled to pay, and his expenses in the defense of the suit, although he has taken no refunding bond.

2. When the principal administrator of an estate has been appointed and resides in another state, and an ancillary administrator has been appointed in this state, and such ancillary administrator has, in ignorance of a debt against the estate of his intestate, turned the assets over to the principal administrator, and the principal administrator has made complete or partial distribution thereof, and the ancillary administrator is compelled to pay such debt out of his own funds, and is not guilty of any fraud or improper conduct, he is entitled to reimbursement by the distributees, and he is not compelled to go to the foreign jurisdiction to obtain such relief, if any of the distributees have property within this state sufficient to reimburse him, and he may proceed by foreign attachment against such property, but his recovery against the distributee will be limited to the amount which the distributee has received from the estate.

¶ 1. See *Executors and Administrators*, vol. 22, Cent. Dig. §§ 1319, 1320, 1323.

3. While it is necessary, when all of the distributees are within the jurisdiction of the court in which the administrator is entitled to proceed for such relief, that all of them shall be made parties, to the end that they shall contribute ratably, and that it may not be in the power of the administrator to throw the whole liability upon one of them in the first instance, yet, when they are not all within the jurisdiction of the court, he may sue such of them as are within the reach of the court's process, and, if they are all nonresidents and any of them have property within reach of such process, it may be subjected by attachment in a suit in equity.

4. The administrator's right to reimbursement is not limited to payment out of the specific money or property received from the estate by the distributee, and any property belonging to the distributee, which is liable for his debts generally, may be subjected, but not for a larger amount than he has received from the estate.

5. Where the affidavit for attachment and other papers in the cause show that the defendants are nonresidents, and no order of publication has been taken on the return day of the process, the plaintiff is entitled to a reasonable time in which to perfect his suit by order of publication, and the suit does not abate immediately upon the return of the process and failure to take the order of publication.

6. A general appearance by any of the non-resident defendants renders an order of publication unnecessary as to such of them as appear.

(Syllabus by the Court.)

Appeal from Circuit Court, Pendleton County; R. W. Dailey, Jr., Judge.

Bill by D. G. McClung, administrator of James M. Sieg, against John S. McNulty and others. Decree for plaintiff, and certain defendants appeal. Affirmed.

Flournoy, Price & Smith, for appellants.
B. B. Heiner and Reynolds & Forman, for appellees.

POFFENBARGER, J. This is a suit in equity brought in the circuit court of Pendleton county by D. G. McClung, administrator of James M. Sieg, deceased, whose domicile was in Virginia at the time of his death, against John S. McNulty, the Virginia administrator of said Sieg, as such administrator and in his own right, the widow and heirs at law of said Sieg, and S. B. McClung, for the purpose of compelling Frances V. Sieg to refund to the West Virginia administrator out of her distributive share the sum of \$1,028.62, the amount of a judgment and cost of defending the suit, for a debt of which the administrator had no notice at the time he made distribution, or, to be more accurate, permitted the Virginia administrator to collect the assets in West Virginia and make the distribution, if, legally speaking, distribution has been made. It is claimed by McClung that the fund which he has attached in the hands of S. B. McClung is a part of the uncollected assets of the estate of his intestate, although the Virginia administrator had, long before the bringing of this suit, turned that fund over to Frances V. Sieg, the widow, as part of her distribu-

tive share, and released S. B. McClung, the debtor, and McClung had executed a new note for the amount payable to Frances V. Sieg. So the debt which S. B. McClung owed to James M. Sieg, plaintiff's intestate, remained in the hands of McClung at the time this suit was brought, but was claimed by Frances V. Sieg. Mrs. Sieg had received from the domiciliary administrator in all \$2,551 up to February 1, 1895, and there yet remained due her, on account of her distributive share as shown by the record, \$873.88 at that time; but, of the amount so received by her, \$1,101 was the amount in the hands of S. B. McClung, which he did not collect, but for which she took his note. McClung owed her, on account of some transaction between them, \$100, with interest from June 8, 1896. This last sum seems not to have been any part of the estate of James M. Sieg. Mrs. Sieg, McNulty, and the heirs of James M. Sieg being nonresidents, an order of publication was taken against them, and Mrs. Sieg appeared and filed her separate demurrer and answer to the bill, but there was no appearance for any of the other parties, except S. B. McClung, who filed his answer as garnishee in the attachment proceeding. From his answer and the pleadings and evidence in the case, the court found that there was due from him to Frances V. Sieg the sum of \$1,103.17, with interest from the — day of —, 1891, subject to a credit of \$300 as of February 9, 1894; \$100, December 18, 1894; \$300, February 2, 1896; \$100, January 5, 1895; \$300, February 10, 1896; and that he was also indebted to her in the further sum of \$100, with interest thereon from June 8, 1896, and on the 10th day of November, 1899, made a decree requiring S. B. McClung to pay over to D. G. McClung, the plaintiff, the amount due from him to Frances V. Sieg as assets of the estate of James M. Sieg, deceased, subject to the payment of any debts against said estate. It is from said decree that this appeal was taken.

It seems that the facts in reference to the debt paid by D. G. McClung, administrator, after the funds belonging to the estate of his intestate, except those in the hands of S. B. McClung, had by his consent been collected and taken out of the state by the Virginia administrator, and the money in S. B. McClung's hands had been turned over to Mrs. Sieg as part of her distributive share, are such as would entitle the plaintiff, upon proper proceedings in a court of equity, with the necessary parties in court, to compel reimbursement by the distributees and heirs, although no refunding bond was taken from them. McClung was appointed as administrator in 1876, and there was a large amount of money in the state of West Virginia due to his intestate which he might have collected; but, as it appeared that there were no debts of any consequence due from him to persons residing in this state, McClung per-

mitted C. P. Jones, who had been the law partner of Mr. Sieg in his lifetime, and who was familiar with his business, to collect, as attorney for plaintiff, nearly \$6,000, and pay it to McNulty. After this had been done, and the McClung debt had been turned over to Mrs. Sieg, a judgment was rendered against D. G. McClung, administrator, in the circuit court of Pocahontas county, in June, 1893, for the sum of \$712.15, with interest from the 20th day of October, 1892, for a debt due from the estate of his intestate. In April, 1897, a decree was entered in a chancery suit in Pendleton county requiring said McClung to pay the said judgment, then amounting to \$904.07, out of his own funds. This was satisfied by him on the 5th day of May, 1897, and, with the interest and costs, then amounted to \$945.17. In addition to that, he had been compelled to pay out \$83.45 in defending these suits, making his total outlay \$1,028.62.

The debt which McClung was compelled to pay seems to have been stubbornly contested on his part, and there is no evidence of any fraud or improper conduct imputable to him in that connection, and the debt did not appear until after the assets had passed out of his hands. Under such circumstances legatees may be compelled to refund, and the same rule is, of course, applicable to distributees of an intestate's estate. *Jones v. Williams*, 2 Call, 103; *Burnley v. Lambert*, 1 Wash. 312; *Gallego's Ex'r v. Lambert*, 3 Leigh, 465; 1 Tuck. Com. 425; *Robertson v. Archer*, 5 Rand. 319, where, although the court refused a decree for refunding because the claim was too old, the principle is admitted and the legatees were compelled to give refunding bonds for the benefit of the executors as to claims of any other creditors that might exist; *Bower's Ex'r v. Glendenning*, 4 Munf. 219. Here the court holds that "if, without fraud or collusion, a decree be rendered by a court of competent jurisdiction against an executor, he may bring his suit in equity against the legatees for contribution to satisfy such decree." This court announces the same doctrine in *McEndree v. Morgan*, 31 W. Va. 521, 8 S. E. 285.

But it is seriously contended that, in order to compel reimbursement, the executor or administrator must sue all the distributees or legatees, so that the burden of refunding will fall upon them in proportion to what they have received from the estate, and that the suit cannot be maintained against Mrs. Sieg alone, she being the only one of the distributees who has appeared. The others are all nonresidents, and, if Mrs. Sieg cannot be held in this suit, the administrator will be compelled to go to a foreign jurisdiction to enforce his claim. In Virginia he might be able to make them all defendants in one suit, but he insists that this court will not compel him to go out of the state for that purpose. It is undoubtedly true that, ordinarily, all the legatees or

distributees should be parties. "The creditors have a double remedy: First, against the executors at law, in which case the executors have their remedy in equity against the legatees to compel them to refund; or secondly, the creditors may in equity pursue the estate in the hands of the legatees; and, in either case, all the legatees must be made parties, that the charge may not fall upon one, but may be equally borne by the whole. But if this direct mode against a particular legatee was permitted, it would put it in the power of the creditor to mark out the person in the first instance to sustain the whole weight." *Burnley v. Lambert*, 1 Wash. 313; *Scott v. Halliday*, 5 Munf. 103; *Sampson v. Bryce*, Id. 175; *Lewis v. Overby's Adm'r*, 31 Grat. 601. But the circumstances of this case are unusual and extraordinary in this, that Mrs. Sieg is the only distributee (assuming that the legal title to the fund in McClung's hands was held by her when it was attached) who had any property in this state that could be subjected to the claim of the administrator. But for that circumstance, he would have had no remedy against her here. Had they all been residents of the state of West Virginia, or all had property within the jurisdiction of the court, it would have been the duty of McClung to sue them all and make them contribute ratably to his reimbursement. As it is clear that for want of means to bring any of them except Mrs. Sieg within the jurisdiction of the court plaintiff can proceed against her only, shall it be said that he is deprived of his remedy against her because jurisdiction of the balance of the distributees cannot be obtained? If that be true, and the distributees were domiciled in different states, he could not obtain relief against any of them. Such is not the tendency of the decisions nor the spirit of the law. In *Ryan's Adm'r v. McLeod*, 32 Grat. 367, where it was sought to subject real estate in the hands of heirs to the payment of their ancestor's debts, one of them had sold his portion to a bona fide purchaser and had become insolvent, and the portions of the other heirs were subjected to the payment of the whole of the debts. The same principle is applied in *Lewis v. Overby's Adm'r*, 31 Grat. 601. Although these cases are not exactly in point, they show that, where it is impossible to make the heirs contribute ratably, the portion which cannot be collected from one of them because of his insolvency may be charged against the others. The case is analogous to that of a joint demand, as to which it is necessary that all the obligors be made parties. In those cases the nonresidence of part of them does not preclude judgment as to such of them as can be legally served with process. Nor is it any objection to proceeding by attachment as to any of them who may happen to have property within the jurisdiction of the court. "Where, in an action or suit against two or

more defendants, the process is served upon part of them, the plaintiff may proceed to judgment as to any so served, and either discontinue it as to the others, or from time to time, as the process is served as to such others, proceed to judgment as to them until judgments be obtained against all." Code 1899, c. 125, § 52. If Mrs. Sieg is compelled to pay the whole of this judgment, she will be entitled to contribution from the other distributees of the estate. "Legatees are liable to refund, even at the suit of other legatees, in some cases. As where the assets were originally deficient, and all are bound to abate in proportion; there, if the executor pays one in preference to the rest, they may exhibit their bill and compel him to refund." Tuck. Com. 425; Toll. 341. "In all cases legatees are liable to refund at the suit of creditors if there is a deficiency of assets." Tuck. Com. 425. The same principle that makes it necessary to make all the distributees parties, where the administrator is entitled to be reimbursed, and all can be made parties, entitles one legatee, who is compelled to refund the whole amount to the personal representative, to have contribution from all the others. Manifestly, it is a hardship upon Mrs. Sieg to compel her to refund the whole of this debt to the administrator. But as she may compel the other distributees to contribute and relieve her of all of it except what she is equitably bound to pay, it would be a much greater hardship upon the administrator to deny him relief, for in that event he has no remedy. Although it is claimed that he should have gone to the state of Virginia to have instituted this suit, where he could have brought all the distributees in to answer his bill, that contention is not in conformity with the principles of law. Where a plaintiff may resort to either of two different forums in the same jurisdiction, the one to which he does go will not turn him away simply because he may obtain relief elsewhere. This being true, it will be difficult to find a satisfactory reason for the refusal of a court, having power and authority to give relief, to entertain the plaintiff's bill on the ground that he may obtain relief in a foreign jurisdiction. No precedent for such action has been cited or found.

These views are strengthened by the following legal propositions: "Each independent sovereignty considers itself competent to confer, whenever there is occasion, a probate authority, whether by letters testamentary or of administration, which shall operate exclusively and universally within its own sovereign jurisdiction, there being property of the deceased person, or lawful debts owing, within reach of its own mandate and judicial process." *Schouler's Ex. & Adm'r*, § 165. One of the main purposes of the appointment of an ancillary administrator is the subjection of the assets of the decedent to the payment of his debts due the citizens of the local sovereignty. "In

practice, the local sovereignty, state or national, permits letters to issue upon the estates of deceased nonresidents, mainly for the purpose of conveniently subjecting such assets to the claims of creditors entitled to sue in the local courts, and for appropriating whatever balance may remain to the state or sovereign, by way of distribution, in default of known legatees or kindred." *Id.* § 166. While, by comity, the courts of the jurisdiction in which the property is found will recognize the rights of nonresident legatees and heirs, and will permit any surplus, after paying the local indebtedness, to be paid over to the domiciliary administrator or executor, it is only done in a spirit of comity and as a matter of judicial discretion. The local sovereignty may compel them to come into its own jurisdiction to receive what belongs to them. "The rule to thus pay over is not, however, absolute; on the contrary, the transfer will not be made if deemed, under the circumstances, improper; and legislative policy is to secure the rights of its creditors and citizens at all hazards. * * * For the spirit of comity does not require that citizens shall be put to the inconvenience and expense of proving and collecting their claims abroad when there are assets at hand." *Id.* § 174. Another matter worthy of consideration in this connection is that the West Virginia administrator could not, as such, sue in the courts of Virginia, if at all, without making settlement there of his administration accounts, and it may be doubted whether he could sue at all in Virginia, where there is another administrator of the same intestate, except as a creditor. If not actual obstacles, there are inconveniences standing in the way of this plaintiff if he should be turned out of the courts of this state and compelled to go to Virginia to enforce reimbursement.

Another contention is that the fund in the hands of S. B. McClung cannot be treated as assets of the estate of plaintiff's intestate because it has been turned over to Mrs. Sieg. If it were uncollected and unadministered assets, there is no ground upon which this suit could be resisted. But it is claimed that it has been collected, with the consent of the plaintiff, by the Virginia administrator, and distributed by him, and that, in consequence thereof, the West Virginia administrator, not having paid it to Mrs. Sieg, cannot be reimbursed out of that fund. Under the principles of law governing the relations of ancillary and domiciliary administrators, the collection and distribution of the West Virginia assets by the Virginia administrator, with the consent of the West Virginia administrator, is equivalent to such collection and distribution by the West Virginia administrator. The Virginia administrator could make no collections here, except with the consent of McClung. *Schouler's Ex. & Adm'r*, § 173.

But it is contended further that the greater

part of the money in the hands of S. B. McClung and claimed by Mrs. Sieg never was the property of plaintiff's intestate, but that it belonged to Mrs. Sieg herself. She is the sister of S. B. McClung, and, on the partition of the real estate of their father in 1867, there became due to her from her brother \$250 as owelty of partition. Her husband loaned McClung some additional money, and took his note payable to himself for his own money and the money due his wife. The \$100 hereinbefore mentioned is money that Mrs. Sieg loaned her brother, S. B. McClung. Granting, for the purpose of discussion, that all this money belonged to Mrs. Sieg and never was a part of the assets of James M. Sieg, it is liable to be subjected to the payment of plaintiff's claim. Her liability to refund is contractual in its nature, and not only the specific fund or property which she received for her distributive share, but any other property belonging to her and found in the state of West Virginia, which, by its nature, may be subjected to the payment of her debts generally, is liable. The only limitation is that she shall not be compelled to pay back more than she has received from the estate. There is no possibility of her being compelled to do that in this case, for the reason that she does not deny having received from the estate \$2,551, while the plaintiff here only claims \$1,028.62. There is certainly no rule which limits the recovery so as to make it payable only out of the specific funds or property received by the distributee. No authority for any such limitation is offered.

Upon the authority of *Steele v. Harkness*, 9 W. Va. 13, it is claimed that the suit had abated and the court lost jurisdiction, because an order of publication was not taken upon return of the process but was subsequently taken. The case of *Steele v. Harkness* does not apply here, for the reason that it does appear here, as it did not appear there, by affidavit, that the defendants, except S. B. McClung, were nonresidents. At any rate, the case of *Brown v. Gorsuch*, 40 S. E. 376, decided at the last term of this court, settles this question, for it is there held that in such case the plaintiff shall have a reasonable time in which to perfect his proceedings by order of publication. Moreover, this record shows that the original summons was returnable on the first Monday in June, 1897, and that a copy of it was delivered to a member of Mrs. Sieg's family on the 20th day of May, 1897. But that service was probably not good, for the reason that the return does not show in what county the service was made. On the 8th day of June, 1897, which was the return day of the first summons, a second summons was sued out, and a copy of that was, on the 12th day of June, 1897, delivered to Mrs. Sieg at her residence in Highland county, Va. This was equivalent to an order of publication. At some time in the year 1898 Mrs. Sieg ap-

peared and filed her demurrer, for it appears that on the 20th day of June, 1898, the demurrer was overruled. In the printed record there is a paper called a separate demurrer and answer of Mrs. Sieg, but there is no order filing her answer. Her appearance gives the court jurisdiction as to her. *Lumber Co. v. Lance*, 41 S. E. 128, decided at this term. But in overruling the demurrer the court referred the case to a commissioner, without giving a day to answer. This is assigned as error. According to *Neely v. Jones*, 16 W. Va. 625, 37 Am. Rep. 794, and *Goff v. McBee*, 47 W. Va. 153, 34 S. E. 745, it was error. But it cannot possibly be prejudicial, for that order was interlocutory, and did not affect the merits, and Mrs. Sieg had more than a year after that in which to file her answer before final decree. In the two cases referred to, final decree was made immediately upon filing the answers. This case, in respect to that order of reference and the answer, is like the case of *Foley v. Ruley*, 43 W. Va. 513, 27 S. E. 268, where it is held that mere order of reference, deciding nothing, may be made without answer. Manifestly, it was not the duty of the plaintiff to compel Mrs. Sieg to answer, and, while the court made no order giving her time, the record shows that she did have more than a year after her appearance in which to file her answer. Hence she cannot complain of her own failure to answer.

The decree of the 10th day of November, 1899, requiring S. B. McClung to pay over the money to D. G. McClung, administrator, was erroneous, for the reason that at that time the court had not judicially determined how much the plaintiff was entitled to require Mrs. Sieg to refund. It was not a suit to recover unadministered assets, but one to compel reimbursement, and she could not be required to pay over to him more than was necessary to reimburse him. By that decree the report of the commissioner, formerly made in the cause, was recommitted without confirmation. However, on the 9th day of April, 1900, after the commissioner had again reported, the court confirmed his report, and found that, after applying on the claim of the plaintiff all of the money which had been paid to him by S. B. McClung under the former decree, there yet remained due him and unpaid \$421.98. The appeal and supersedeas were not obtained until the 9th day of April, 1900. Thus, before the erroneous decree was appealed from, the court had determined the amount to which the plaintiff was entitled, and applied the fund in controversy to its satisfaction. Hence the error in the decree of November 10, 1899, was substantially corrected by another decree before the appeal was taken. At any rate, it is made certain by said subsequent decree that the error in the former one was not prejudicial. To warrant a reversal, the error complained of must be prejudicial. *Clark v. Johnston*, 15 W. Va. 804.

There being no error in the decree, it is to be affirmed.

On Rehearing.

(Dec. 16, 1903.)

This case was decided, and the foregoing opinion filed, on March 22, 1902. A rehearing was allowed, on petition of appellant, because of a doubt as to whether she ought to be held for more than a ratable proportion of the debt, to be determined by the ratio which the amount received by her from the estate bears to the whole amount distributed. This question was extensively discussed on the reargument, and a number of cases cited in support of the contentions of the parties, respectively, but no case expressly deciding the point has been produced. *Clark v. Williams*, 70 N. C. 679, seems to support, to some extent, the argument of counsel for appellant, and will be noticed later on. It is everywhere held that a suit for reimbursement by the personal representative, or by a creditor against the distributees, for the payment of his debt, must be in equity, and that all the distributees must be made parties, and that the decree should be against each distributee for his ratable proportion of the debt. From this it is argued that such ratable proportion is the limit of the liability of each distributee, and that he cannot be held for more. An equally strong argument, based upon the same premise, might be made for the contrary of the proposition. If the liability is not joint but several, each distributee being required to pay no more in any event than such share, why the necessity for suing all? Upon a joint and several contract the parties to it may be sued jointly, or each may be sued separately. Where the undertaking is joint, they must all be sued together, and the decree is against them all for the whole amount, and, if necessary, one of them may be required to pay the entire amount. If the liability of the distributee is limited to a ratable proportion of the debt, why may he not be sued separately? Why the necessity for suing all together? To this it was answered that a settlement of the administration account and proof of the debt against the personal representative are prerequisites to a decree. This is true, but it is not the reason assigned by the courts; for they say all the distributees must be made parties, in order to prevent the burden of the whole debt from falling upon one, or such of them as the creditor may elect to proceed against. This is forbidden, because it is inequitable, and it does not indicate the limitation of liability contended for. On the contrary, when the courts say all the distributees and legatees shall be made parties, in order to prevent the creditor from requiring the payment of an undue amount from one of the parties, they indicate that there is no limit of liability, short of the amount received, except the equitable principle of contribu-

tion, which here concerns the remedy more than the right. They treat the amount received by the distributees as a fund belonging to the estate and liable to the payment of the debt, and the distributees are brought in as the joint holders of that fund, or as being liable for the payment of the debt, by reason of their having received from the estate money or property which ought to have been applied to the payment of the debt. Then the court, having them all before it, in order to settle and determine the rights of all the parties by a single decree, ascertains how much each should pay, to the end that the equities between the distributees themselves may be adjusted and settled, as well as the equity between the creditor or personal representative on the one side and all the distributees on the other. It makes two settlements by a single decree, and ends all controversies.

This principle is adverted to by Judge Staples in *Ryan's Adm'r v. McLeod*, 32 Grat. 367, 374. He says: "Our attention has been called, however, to an opinion of Judge Tucker, found on page 113, vol. 2, of his commentaries, in which he states, 'There is much reason and some authority for the doctrine that each heir should be held responsible only for his portion of the debts.' And he cites as authority the cases of *Mason's Devisees v. Peter's Adm'rs*, 1 Munf. 437; *Foster & Wife et al. v. Crenshaw's Ex'rs*, 3 Munf. 514; *Hopkirk v. Dennis et al.*, 2 Munf. 326. It will be found, upon examination, the first two cases only decide that the lands of all the devisees should bear their ratable proportion of the debts in the first instance, instead of decreeing against one and turning him around upon the others for contribution—a principle universally conceded and repeatedly acted upon by this court. The last case, that of *Hopkirk v. Dennis*, holds the very reverse of what Judge Tucker supposes. There it was conceded that one of the devisees had wasted his portion of the estate, and was insolvent. The court held that the chancery court erred in not decreeing that the other devisees should pay the insolvent devisee's portion, in due and ratable proportions, to the extent of the lands devised."

The case just quoted from was cited in the former opinion as affirming the proposition decided in *Hopkirk v. Dennis*. Some other cases were there cited to the same effect, and it is argued that they do not apply because the proceedings were against the heirs in respect to real estate descended and devised, instead of legatees and distributees to whom the personal estate had been paid over, leaving debts unpaid. And it is said that each heir is liable for the whole amount because the statute expressly makes him liable. But it is to be noted here that, notwithstanding the liability of each heir to the extent of the value of the land which descended or was devised to him, all the heirs must be made parties, so that the principle

of contribution may be enforced and applied in such suit, and the liability placed where the court can see that it ultimately belongs, so that the rights of all the parties may be settled once for all, and not by piecemeal. As some of the judges say, a court of equity always puts the saddle on the right horse in the first instance. This illustration shows that there is nothing in the argument of limited liability, founded upon the requirement that all the distributees shall be made parties and contribute ratably to the payment of the debt. It is true that at common law the real estate of a decedent was liable in the hands of heirs for record and specialty debts only, and that the statute now makes the real estate liable for all debts. It makes it assets for the payment of debts in case of a deficiency of personal property. The effect is merely to place real estate on the same footing as personal property respecting the debts of the decedent after the personal estate has been exhausted, and proceedings to enforce payment of a debt out of real estate in the hands of the heirs are conducted upon the same principle as that which governs the enforcement of payment out of the personal property in the hands of legatees or distributees.

Another argument is based upon the statute authorizing personal representatives to require the execution, by distributees and legatees, of bonds with security, conditioned to refund due proportions of any debts or demands which may afterwards appear against the decedent and of the costs attending their recovery. Adopting the same line of argument, the court, in *Clark v. Williams*, 70 N. C. 679, reaches the conclusion that, where refunding bonds have not been taken and one distributee has become insolvent, the others are not required to make up his portion of the debt. This is exactly the opposite of what the Virginia court holds respecting real estate in the hands of the heirs. The reason assigned for the decision is faulty. What is the effect of this statute when the personal representative puts it in force? It lays upon each distributee the same burden that a court of equity would ultimately put upon him, and makes him give security for the payment of the amount. It goes to the end of any possible future assertion of a demand against the distributees by suit in equity, and requires each one to give bond with security to do that which a decree, settling the rights of all parties in respect to any outstanding and unpaid debts against the estate, would require him to do. It in no way indicates or determines the nature or extent of the primary liability of a distributee, or his liability when no bond has been given. As a bond with security is exacted by this statute, the case stands upon an entirely different footing. The statute does not limit the liability without requiring bond with security. This argues, if anything, that, in the absence of security for his due proportion of the debt,

the liability of the distributee would be greater, otherwise the outstanding debt might not be paid. It would not be, in case of the subsequent insolvency of any one or more of the distributees, if each is only liable ratably. Security by each for the payment of his share is a provision against such contingency.

The view adopted by this court seems to be supported by authorities as well as reason. In *Sanders v. Godley*, 23 Ala. 479, the court said: "The chancellor will render a decree in favor of complainant against the respective parties for their several portions as aforesaid, and allow them some short delay for the payment of the same, and shall further decree that, if the whole amount be not paid by such time, execution may issue against any or either of said parties defendants, to the extent of the property respectively received by them, until the whole is paid." The Virginia court makes no distinction between the legatees and heirs in respect to the payment of the debt of a decedent. "Where legatees are called upon to refund at the suit of a creditor, the general principle is that all must be before the court, and the burden apportioned among them, if it can be done, without material delay or injury to the creditor. But if some of the legatees are insolvent, the others will be required to make good the deficiency to the extent of what they have received." *Leake's Ex'r v. Leake et al.*, 75 Va. 792 (Syl. point 9). The South Carolina court clearly affirms the same principle. *Lanier v. Griffin*, 11 S. C. 565, holds: "The demand of a creditor of testator against the legatee, who has received his legacy, leaving a debt of the testator unpaid, without available assets for its payment, is, in equity, in the nature of an action for money had and received. * * * Held, further, that the legatees and devisees were liable to the ward to the extent of assets received, but that no personal liability attached to the executors. Held, further, that the legacies were liable to respond before the lands specially devised could be applied, and that the decree should have established the liability of all the legatees and devisees inter sese to contribution."

The authorities fully sustain the proposition that the liability of the distributees rests upon the theory of assets of the decedent's estate in their hands as a trust fund. That being true, each one is primarily liable to the extent of the amount of the fund held by him. "That a creditor may follow assets in the hands of the legatees, to whom they have been delivered in ignorance of the creditor's demand, has been an established principle of this court from the earliest period of the decisions in which we have any traces." Lord Cottenham, in *March v. Russell*, 3 Myl. & Cr. 81. "If a creditor does not come in till after the executor has paid away the residue, he is not without remedy, though he is barred the benefit of that decree. If he has a mind

to sue the legatees to bring back the fund, he may do so." Lord Eldon, in *Gillisple v. Alexander*, 8 Russ. 136. "But the legatees and distributees, although there was an original deficiency of assets, are not at law suable by the creditor. Yet he has a clear right in equity, in such a case, to follow the assets of the testator into their hands as a trust fund for the payment of his debt. The legatees and distributees are in equity treated as trustees for this purpose; for they are not entitled to anything, except the surplus of the assets after all the debts are paid. Besides, they, in the case put, being ultimately responsible to pay the debt to the executor out of such assets, if the executor should be compelled to pay it to the creditor by a suit at law, may be made immediately liable to the creditor in equity." Story's Eq. Jur. § 1251. "In the course of the administration of estates, executors and administrators often pay debts and legacies upon the entire confidence that the assets are sufficient for all purposes. It may turn out, from unexpected occurrences, or from debts and claims made known at a subsequent time, that there is a deficiency of assets. Under such circumstances they may be entitled to no relief at law. But in a court of equity, if they have acted with good faith and with due caution, they will be clearly entitled to it upon the ground that otherwise they will be innocently subject to an unjust loss from what the law itself deems an accident." *Id.* § 90.

It is urged that, conceding the jurisdiction and power of the courts of this state to subject, to the payment of this debt, the fund received by Mrs. Sieg, it ought not to be done, because it is inequitable, and the plaintiff ought to be required to go into another jurisdiction in which the remedy is more complete. This phase of the case has been discussed in the former opinion. It is true that in *Dickinson v. Hoomes' Adm'r*, 8 Grat. 353, 416, Judge Moncure says: "But cases may sometimes occur in which, all things considered, it may be more convenient to turn over the parties to a foreign jurisdiction;" but the plaintiff here is proceeding in the courts of the state in which he was appointed administrator, and the process of whose courts was used for the collection of the assets which formed the trust fund for the payment of this debt. In this state his accounts are to be settled according to the law of this state. To turn him around to a foreign jurisdiction may be as inconvenient and as inequitable as to require this distributee to pay the debt here. Even in *Dickinson v. Hoomes*, heirs residing in Virginia were made to account for the value of lands in the state of Kentucky which had descended to them.

We do not believe there is anything in this case which, on equitable principles, requires the courts to decline to take jurisdiction of it. Hence the decree should be affirmed.

(54 W. Va. 395)

THOMAS v. WHEELING ELECTRICAL CO.(Supreme Court of Appeals of West Virginia.
Dec. 12, 1903.)**PLEADING—SURPLUSAGE—NEGLIGENCE—QUESTION FOR JURY—ELECTRIC LIGHT COMPANIES—DEFECTIVE INSULATION—CONTRIBUTORY NEGLIGENCE—WRONGFUL DEATH—DAMAGES.**

1. It is only necessary to state facts, and never is it necessary to aver matter of law, in a declaration. Hogg's Plead. & Forms, 59.

2. Surplusage in pleading does not vitiate. Hogg's Plead. & Forms, 59.

3. Where there is no controversy as to the facts or inferences that may be fairly drawn from them, the question of negligence is one of law for the court. Where such is not the case, the question is for the jury.

4. It is the duty of electric companies to use very great care to keep the insulation of its dangerous wires perfect at places where people have a right to go for work, for business, or for pleasure.

5. When injury to a person comes from contact with a live electric wire from bad insulation at a place where there ought to be good, safe insulation for safety to persons, it is a case of negligence on the part of the electrical corporation, rendering it *prima facie* liable.

6. If one take hold of an electric wire at a place where it ought to be safely insulated for safety to persons, and is injured by reason of defective insulation, he not knowing its defect, he is not, from so doing, guilty of contributory negligence forbidding recovery of damages.

7. One coming in contact with a live electric wire in discharge of duty will not, on account of so coming in contact, be guilty of contributory negligence, if it was the duty of the corporation to properly insulate the wire at the place of injury, and it has neglected to do so, and the person knows not the defect of insulation.

8. In places where electric wires should be insulated for safety to persons, one may assume that they are so insulated, if he knew not to the contrary.

9. A corporation or person operating a plant for electric lighting must anticipate injury as likely to happen to persons from contact with its wires by reason of defective insulation at places where the law requires such insulation.

10. The verdict of a jury in an action for death from wrongful act cannot be set aside for excessiveness in an amount under \$10,000, their assessment being final, unless the verdict be the result of passion, prejudice, partiality, or corruption on the part of the jury.

11. The refusal of a court to permit a witness to answer a question will not be considered in the appellate court when it is not stated or shown what it was expected the answer would be, unless the question very clearly imports what such answer must be.

(Syllabus by the Court.)

Error to Circuit Court, Ohio County; H. C. Hervey, Judge.

Action by W. F. Thomas, administrator, against the Wheeling Electrical Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Caldwell & Caldwell and J. A. Howard, for plaintiff in error. J. J. Coniff, for defendant in error.

BRANNON, J. On the front of the Grand Opera House, on the corner of Market and

Twelfth streets, in the city of Wheeling, is a balcony 8 feet long, 3 feet wide, 30 inches high, with a rail 8 inches wide. Out from the building at the street curb stood a pole, and from it two wires conveying electricity for light, belonging to the Wheeling Electrical Company, extended by a sharp angle to a bracket on the north wall of the opera house. These wires passed close to the rail of the balcony, 18 or 20 inches from it, one 6 inches above the other. The balcony is used for people to go out upon through a window of the opera house opening upon it. There had been a converter or transformer on this balcony from which two wires ran to the main wires just mentioned; but the transformer was removed, and the two wires connecting it with the wires outside the balcony were cut away at the point of their union with the two wires outside the balcony, and in doing so the defendant left the ends of the wires stick out, and did not properly wrap them, and did not cover them with tape, and the old insulating material did not cover the point, and was worn and dangerous. It was clearly shown that the wires in this condition were extremely dangerous; this was not a disputed fact, the officers of the company stating on the stand that they were so dangerous that contact with them would kill. They remained in such condition a long time, without inspection. An opera company which had leased the building for a term had been performing in it, and had tacked advertising banners on the balcony, and, when about to close its performance there, employed Earl J. Thomas, 21 years of age, 5 feet 11 inches high, to gather these banners on Market street, and he went out upon this balcony to untack from the balcony some banners which had been tacked upon it, one of them on the north end of the balcony by which the wires ran, the banner being tacked on the top rail and on the lower part of the balcony. While engaged in this work, between 7 and 8 o'clock of the night of 2d November, he came in contact with one of the electric wires. He was seen grasping the wire with his left hand, his right hand on the left wrist, leaning against the corner of the brick wall at the junction of balcony and wall, apparently fastened or transfixed by the shock, and when jerked away by a person who went to his rescue fell lifeless to the balcony floor. He was apparently dead while standing against the wall with the wire in his hand. Whether he took hold of the wire to steady himself when intending to reach down to loose the lower corner of the banner, or how or why he took hold of it, does not appear. He was simply seen grasping it, fastened to it. The upper corner of the banner had been loosed by him. His administrator brought an action against the company to recover damages for his death, and by the verdict of a jury recovered

\$7,500, on which judgment was rendered. The company brings the case here, assigning 43 errors.

Complaint is made that the second count states the duty resting on the defendant as too high and stringent. That is mere allegation of law, and immaterial. Pleadings should state facts, not law. Facts only are necessary to be stated, not arguments and inferences. Where a declaration, after stating facts, alleges that it thereupon became the duty, etc., the allegation is to be understood as a mere legal liability supposed to result from the facts, and as an assertion that the defendant became bound in law to a legal liability, and not as a substantive allegation. The allegation of duty is superfluous where the facts show a legal liability, and is useless where they do not. 1 Chitty, Plead. 236; 2 Chitty, Plead. 476. It is not claimed that the facts stated in this count do not raise a duty. The matter complained of is surplusage. It would not vary or prescribe the proof. "It is only necessary to state facts, and never is it necessary to aver matters of law in a declaration." "Surplusage never vitiates a declaration, and is treated as if it had never been inserted therein." Hogg's Plead. & Forms, 59; Andrews' Stephens' Plead. 411.

The defendant complains of the following instruction given for the plaintiff: "The court instructs the jury that it was the duty of the defendant to not only protect any portion or portions of its wires in close proximity to the north end of the balcony, mentioned in evidence, that may be exposed, by proper insulation, so that persons coming in contact therewith in the performance of their work would not be injured, but it was also the duty of the defendant, by proper inspection from time to time, to see that said insulation was kept in a proper condition." It is said that this instruction takes for granted that the wire was exposed and not properly insulated. I do not think so. It simply states a legal proposition, and does not intimate an opinion on the facts. Other instructions told the jury that it must pass on those facts on the evidence.

It is further argued that the instruction misleads. It is claimed that it should have incorporated the principles of instruction 12 in *Snyder v. Wheeling Electrical Co.*, 43 W. Va. 672, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922, that it should have submitted the question whether the defendant was bound to anticipate injury to any one from the position of the wire, or that persons would come in contact with it in performing any work. As we said in the *Snyder Case*, an electrical company, using a dangerous power, is required to use very great care and diligence to avoid danger. It is bound to anticipate danger and properly insulate its wires, and inspect and keep them so, at certain places, but not everywhere. It is bound

to expect certain accidents in certain ways or from certain causes, but not all accidents from every cause. Whether a place is such, under the evidence, as to require insulation, is generally a question for the jury. Whether, if such a place, the accident is such that might have been anticipated, is a question of fact for the jury. But sometimes negligence is a question of law for the court. "Where there is no controversy in regard to the facts or inferences that may be fairly drawn from them, the question of negligence is one of law for the court." *Woolwine's Adm'r v. G. & O. R. Co.*, 36 W. Va. 329, 15 S. E. 81, 16 L. R. A. 271, 32 Am. St. Rep. 859; *Johnson v. Railroad Co.*, 25 W. Va. 570; *Ketterman v. Railroad Co.*, 48 W. Va. 606, 37 S. E. 683. It is undisputed that the balcony was for persons to go upon, and that they did go upon it, and that the wire was distant only 20 inches from its railing; and was thus in close proximity to the balcony. "A company maintaining electrical wires over which a high voltage of electricity is conveyed, rendering them highly dangerous to others, is under the duty of using the necessary care and prudence at places where others may have the right to go, either for work, business, or pleasure, to prevent injury. It is the duty of the company, under such conditions, to keep the wires perfectly insulated, and it must exercise the utmost care to maintain them in this condition at such places." *Joyce on Electric Law*, § 445; 1 *Thompson on Negligence*, § 800; *Brown v. Edison (Md.)*, 45 Atl. 182, 46 L. R. A. 745, 78 Am. St. Rep. 442; *Perham v. Portland Co. (Or.)*, 53 Pac. 14, 24, 40 L. R. A. 799, 72 Am. St. Rep. 730; *Clements v. Louisiana Co. (La. Ann.)*, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348; *W. U. Co. v. State (Md.)*, 33 Atl. 763, 31 L. R. A. 572, 51 Am. St. Rep. 464; *Snyder v. Elec. Co.*, 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922. Persons on the balcony might thoughtlessly lean over or stretch out the arm and come in contact with the wire. A workman repairing the balcony or painting it, or hanging show banners on it or removing them from it, might come in contact with it. These considerations tell us that the court did not err in telling the jury in this instruction that insulation was, at this balcony, a duty imposed by law upon the defendant. It took from the jury only one question, that is, whether the defendant was under duty, at the balcony, to insulate its wires, and inspect them and keep them insulated. It does not intimate that the defendant was bound to anticipate the particular accident. It is argued that the instruction implies that the defendant must anticipate accident. It does not do this. I think that where the place is one that demands insulation of wires, there the company is held to anticipate contact with the wires; for it is the fact that persons may there come into

such contact that imposes the duty of the insulation. When injury to a person is received at such a place from want of proper insulation, the company using the wires is prima facie liable, unless there be contributory negligence. It is a clear duty to insulate in such places. It is true that sometimes, I may say generally, one is only bound to anticipate such combination of circumstances and accidents and injuries as he may reasonably forecast as likely to happen, taking into account his own past experience and the practice of others in similar circumstances, together with what is inherently probable in the condition of the instrument (wires in this case) as it relates to the conduct of the business. So we said in *Snyder v. Electrical Co.*, 43 W. Va. 672, 28 S. E. 733, 39 L. R. A. 490, 64 Am. St. Rep. 922. But where law requires a particular precaution for safety, and if damage flow from its omission makes it a cause of liability, the above rule does not apply. In other words, the law demands insulation, and if damage arise from its want the law gives action for its omission. Therefore, when the defendant failed to insulate, it was bound to anticipate accident from that failure. It must foresee that it is likely to happen. The accident is the result of the neglect—the probable from it. These views sustain the court in giving plaintiff's instruction 1, and refusing defendant's 14 and 15. The former says that though the defendant did fail to insulate and inspect, yet that if injury by contact with the wire under the circumstances of the case was not, and could not be, foreseen by an ordinarily prudent and careful man as reasonably likely to flow from failure to insulate and inspect, then the injury was not the proximate cause of such failure, and the jury should find for the defendant. The other instruction is substantially the same. Notice in instruction 12 in the *Snyder Case* the words "together with what is inherently probable in the condition of the wires as they relate to the conduct of its business." Even under this the defendant would, in this case, be bound to anticipate accident. Would it not, in the conduct of its business, be bound to look for accident from known defect of wires, from an omission of a plain duty imposed upon it by law?

The plaintiff's instruction 2 is contested. "The court instructs the jury that if they believe from the evidence that Earl Thomas was attempting to release the banner on the north side of the balcony mentioned in evidence, and leaned over the balcony in such a way that he was brought in close proximity to the wire of the defendant, and that by some accident his hand came in contact with said wire, and that said wire at the point of contact was improperly insulated, and that he thereby received from said wire the shock of electricity which caused his death, and further believe that he received such shock of electricity by reason of the failure of the

defendant to properly insulate its wires at the point where Earl Thomas came in contact therewith, then the jury should find a verdict for the plaintiff." It is said there was no evidence that by accident the hand of Thomas came in touch with the wire. Whether he purposely did so, or his hand unintentionally came in contact, or whether he did so to steady himself, or to save himself from falling, were questions for the jury on the evidence. It is said that it took from the jury the question whether he received his death from "the" shock of electricity, instead of "a" shock. This is too refined a criticism. The words "if they believe from the evidence" applied to this cause, and left it to the jury to say whether death came from the shock of electricity.

Instruction 3 seems proper—"The court instructs the jury that if they believe from the evidence that one of the wires of the defendant, in close proximity to the north end of the balcony mentioned in evidence, was not properly insulated, and that Earl Thomas was attempting to release the banner on the north end of said balcony, and leaned over said balcony, and, without negligence on his part, was thereby brought in contact with said wire where it was improperly insulated, and by reason of such contact received a shock of electricity from said wire which caused his death, then the jury should find a verdict for the plaintiff."

Instruction 4: "The court instructs the jury that even if they believe from the evidence that Earl Thomas knew of the presence of the wire of the defendant company near the balcony mentioned in evidence, and further believe that when in the act of releasing or attempting to release the banner on the north end of said balcony he was brought in such close proximity to such wire that he took hold of the same to support himself, this fact will not excuse the defendant from liability if the jury believe from the evidence that Earl Thomas did not know that it was dangerous to touch said wire, and that he, in taking hold of said wire, received such a shock of electricity by coming in contact therewith that his death was caused thereby, and provided further that the jury believe such shock was caused by defective or improper insulation of said wire at the point where Thomas came in contact with it." It is said there was no evidence going to show that Thomas took hold of the wire to support himself, and there was no need for him doing so, the rail of the balcony being in front of him, and he would not seize a wire 30 inches away. Now, the jury had from evidence and the nature and circumstances to say how Thomas came to take hold of the wire, to form a conclusion upon that question, by inference from the circumstances, and this objection cannot be held good. It is also said that the jury could not find that he did not know it was dangerous to take hold of the wire, he having had experience in

working with electric wires. If a wire is insulated, there is little or no danger in taking hold of it, as all persons of experience know. Hence the courts have said that, as it may be presumed that in places where there should be there is such insulation, a person is not guilty of contributory negligence in taking hold of one, if the person do not know of defective insulation. It was dark at the time of the occurrence. *Griffin v. United Elec. Co.*, 164 Mass. 492, 41 N. E. 675, 32 L. R. A. 400, 49 Am. St. Rep. 477; *Clements v. La. Elec. L. Co. (La.)* 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348; *Brown v. Elec. Co. (Md.)* 45 Atl. 182, 46 L. R. A. 745, 78 Am. St. Rep. 442; *Joyce on Electric Law*, § 445. It is said the last part of the instruction does not tell the jury that it must find from the evidence as to insulation. The instruction opens with the requirement that they find facts from evidence, not from guess; such is the purport of the instruction. Can we surmise that the jury did not know this?

Plaintiff's instruction 5: "The court instructs the jury that if they find for the plaintiff they shall assess such damage as they think fair and just, not exceeding ten thousand dollars." This is in the language of section 6, c. 103, Code 1899. Certainly there can be no error in an instruction in the words of the law. It seems to be urged that the instruction should not have been given in this form, but that the court should have instructed that the jury must give only compensative damages for pecuniary loss, and not for solace or consolation, to the father, who gets the recovery as sole distributee, and it does not appear that the deceased contributed to the father's support. In connection with the instruction it is urged that the construction given this statute in *Turner v. Railroad*, 40 W. Va. 675, 22 S. E. 83, and *Sample v. Light*, 50 W. Va. 474, 40 S. E. 597, 694, 57 L. R. A. 186, is not the proper construction. Those cases hold that in actions for death under the statute no damages found by the jury can be deemed excessive to set aside the verdict, its determination being absolute and exclusive as to what amount is fair and just, unless the verdict evinces passion, prejudice, partiality or corruption in the jury. Authorities are cited from other states to show that in them the statute only contemplates actual, pecuniary loss. The construction given a statute similar to ours in two Virginia cases cited by Judge Dent in the *Turner Case* agrees with that case. As shown in the Virginia cases, and by Judge Snyder in *Searle v. Railroad Co.*, 32 W. Va. 377, 9 S. E. 251, our statute differs from the English act and the acts of other states in that those acts give damages for "pecuniary injuries resulting," whereas our statute omits those words, limiting recovery to compensation for "pecuniary injuries," and says that "in every such action the jury may give such damages as they shall deem fair and just, not exceeding ten

thousand dollars." Code 1887, c. 103, § 6. Observe, the statute is broad. It says, "whenever the death of a person shall be caused by a wrongful act, neglect or default, * * * the person who, or the corporation which, * * * shall be liable." Id. § 5. It applies to persons and corporations, making them equally liable, and the power given the jury applies to both. There is no discrimination. We are cited to *Ricketts v. Ches. & O. R. Co.*, 33 W. Va. 433, 10 S. E. 801, 7 L. R. A. 354, 25 Am. St. Rep. 901, holding that corporations are not liable to punitive damages for wrongs, but only compensatory damages, even where the act is wanton, willful, and malicious on the part of those acting for the corporation, unless the act is expressly or impliedly authorized or ratified by it. Such seems to be the better rule, though there are cases to the contrary. *Lake Shore Co. v. Prentice*, 47 U. S. 101, 13 Sup. Ct. 261, 87 L. Ed. 97; *Spellman v. Richmond R. Co. (S. C.)* 14 S. E. 947, 28 Am. St. Rep. 858, 876; *Warner v. Southern Pacific Co. (Cal.)* 45 Pac. 187, 54 Am. St. Rep. 327; *B. & O. R. Co. v. Barger (Md.)* 45 Am. St. Rep. 319, and note; 1 Sedgw. on Dam. § 380. This is because corporations act only through agents, and are held to be incapable of malice and wantonness. Many cases, however, hold that as they act only by agents, if not held as individuals for their acts, they would enjoy an immunity above others by that rule, and might do great wrong without the ability in courts to deter others by making an example of them. However the Legislature has power to subject them to punitive damages, and we think that it has done so in this act. It is an exception to the general rule. Moreover, the jury in this case was not confined to damages at once ensuing to the father of Thomas. It could include probable pecuniary damages that might ensue in future; for the father was a workingman, and might come to great age and want, might be a paralytic. So we cannot say this verdict is clearly punitive for smart money. *Searle v. Railway Co.*, 32 W. Va. 377, 9 S. E. 248. We cannot overrule the *Turner case*. We regard it sound law under the statute. But it is said that even under that case we ought to set aside the verdict, because its amount shows it to be the child of passion, prejudice, or partiality. It may be a hard, severe verdict in amount; but if the jury has almost unlimited discretion, we hardly see our way to interfere. There is nothing de hors the record to show such passion, nothing but the circumstances of the case; and the case being one of death, we do not see our way, in view of the power of the jury under the *Turner Case*, to set aside its actions. That would seem generally to render the meaning given the statute in these cases nugatory. Rare must be the cases where the court can interfere for passion, prejudice, or partiality. The power of juries under this statute being so wide, it is not improper to address to them the admonition

tion to be cautious, fair, just, and reasonable in fixing damages.

Exception is made to the action of the court in refusing instructions asked by the defendant. It asked 22, and was granted 10. A number of those refused presented the theory of contributory negligence by Thomas as a defense. In the first place, the court gave four instructions fairly and sufficiently presenting this defense, and others touching it were merely repetitive. In the next place, contributory negligence was not admissible really in the case; at any rate, upon writ of error we can see that we ought not to reverse on that ground, because it was not an adequate defense, and, if the jury had found for it, the verdict would have been wrong. The evidence clearly shows, even the evidence of the defense, that the defendant left the wire uninsulated, and the original insulation had become old and dangerous. Thomas was at work on the balcony removing banners put there, by consent of the lessee of the theater, to advertise a show exhibiting in the opera house, and thus Thomas was there of right. He did not know of the defective insulation. It was dark, between 7 and 8 o'clock in a November night. There was some light in the street, and a little light at the theater window, not its main entrance, not enough to detect the bad insulation. Thomas had some experience with electric wires, but that told him that wires were usually covered and safe, and, under the law given above, he had a right so to assume. Add to this decisions of courts that to touch a wire, ignorant of defective insulation, is not negligence. How, then, can we attribute negligence to Thomas to atone for the gross, long-continued neglect of a company at this public place to use the ordinary care of protecting the wire? One touching a wire where the insulating material is worn off is not guilty of contributory negligence if he did not know its condition. *Griffen v. United Elec. Co. (Mass.)* 41 N. E. 675, 32 L. R. A. 400, 49 Am. St. Rep. 477. One taking hold of an electric wire badly insulated, ignorant of it, not denied recovery. *Giraudi v. Elec. Co. (Cal.)* 40 Pac. 108, 28 L. R. A. 506, 48 Am. St. Rep. 114. Contributory negligence is not imputed to one who fails to look out for danger when there is no reason on his part to apprehend it. Every one has a right to presume that another, owing a special duty to guard against danger, has performed it. *Engel v. Smith (Mich.)* 46 N. W. 21, 21 Am. St. Rep. 549. I consider this law sound, and very apt in this case. "One coming in contact with an electric wire in the necessary discharge of duty will not on that account be guilty of contributory negligence, if it was the duty of the corporation owning such wire to keep it insulated, and it has neglected this duty, and there was nothing in the appearance of the wire to indicate to the person injured such neglect, though he had been cautioned to be careful of the wires and to keep away from

them." *Clements v. La. Elec. L. Co. (La.)* 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348. "Nor will contributory negligence be ascribed to an innocent person because he failed to suspect that a corporation exposing dangerous wires on a side of a building would neglect properly to insulate them." 1 *Thompson on Negligence*, §§ 190, 800. This is a very late and fine work of high authority on an important subject. "In many situations a man is justified in law in acting on the presumption that other men have acted lawfully, rightly, carefully, and properly, until he is in some way admonished to the contrary. For example, a workman employed to load, ride on, and unload an elevator is not necessarily negligent in assuming that the elevator is safe." 1 *Thompson on Negligence*, § 180. Of course, under these principles, there is no error in refusing an instruction requiring the jury to find for the defendant.

The defendant makes many exceptions to the refusal to allow certain questions to be answered, some of which seem not to be much relied upon. Seeing that there was a very full presentation of both sides in the evidence to the jury, and as the case is not to be retried, and they involve no important or new principles, we shall not discuss them to any extent. It is complained that the court ought not to have allowed *Feinler, Richardson, and Wilson* to testify that they knew of no inspection of the wires by the company. They were about the building, and had opportunity for investigation. It was proper to go to the jury for what it was worth.

It is complained that the court would not allow questions to be answered as to whether banners had not previously been often safely put on and taken from the balcony. I do not see that this is admissible. Certainly not sufficient in materiality for reversal. It only tends to show negligence in Thomas, and, as we have seen, that defense cannot prevail. In fact, evidence to prove this was before the jury. As to many questions we may guess the expected answer, and what was intended to be proven, but it is not shown. Unless a question necessarily imports an answer, we must be told what it was proposed to prove, else we cannot say that the witness could give any answer, or what answer would have come, and cannot tell of its materiality. We could not be asked to reverse under such circumstances. *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575; *Greever v. Bank*, 99 Va. 547, 39 S. E. 159. The question specified in assignment 15 was answered, and the answer was not excluded. This objection applies to assignments 10, 11, 12, 16, 17, 18, 19, 20, 21, 22, 23, 24. But I may remark, as to the claim that some of the questions aimed likely to show that the damage came from the wire of another company, that the evidence is clear and unanswerable that Thomas was seen with his hand on defendant's wire, and that this killed him, as he was leaning against the wall just there, and when he was pulled

away dropped dead, and the defendant's wire was incontestably bad. What else could have killed him? Such proposed evidence would have been without force before the jury, and its rejection is without materiality on writ of error. We can see this plainly. The theory, too, that deceased might have been injured by having a stick, ironed at ends, and thus produced the injury, is utterly without force.

For these reasons, with some reluctance as to the amount of the judgment, we affirm it.

(54 W. Va. 101)

OLD DOMINION BUILDING & LOAN ASS'N v. SOHN.

(Supreme Court of Appeals of West Virginia. Nov. 14, 1903.)

TAX SALES—SEPARATE PART OF LOT—VALIDITY—DEED—CONSTRUCTION OF STATUTE—RIGHT TO OFFICE—NOTARY—JUDGE—ACKNOWLEDGMENT.

1. A separate part of a city, village, or town lot cannot be sold under the provisions of chapter 31 of the Code of 1899. As to such lot, the sale must be of the whole lot or of an undivided interest therein.

2. Where the sale, as to such lot, is described in the memorandum of sale as " $\frac{1}{2}$ of lot 35x120," and in the report of sale as " $\frac{1}{2}$ lot," the quantity sold is an undivided one-half of the lot.

3. In such case the purchaser must cause a survey and report to be made by the county surveyor before obtaining a deed; but the provision of section 17, c. 31, of the Code of 1899, requiring division of the land, is not applicable. It applies only to purchasers of separate quantities or parts of tracts of land, other than city, village, or town lots.

4. Power to sell real estate for nonpayment of taxes must be expressly conferred by law.

5. If the sense of a statute be doubtful, such construction should be given, if possible, as will not conflict with general principles of law.

6. Of two constructions of a statute, either of which is warranted by the words of an amendment, that is to be preferred which best harmonizes with the general tenor and spirit of the act.

7. In construing a statute every word in it must be given its full effect, if that can be done consistently; but, if full effect cannot be given, it must be made effective as far as possible.

8. A statute may be construed contrary to its literal meaning, when a literal construction would result in an absurdity or inconsistency, and the words are susceptible of another construction which will carry out the manifest intention of the Legislature.

9. Words in different parts of a statute must be referred to their proper connections, giving each in its place its proper force.

10. The offices of notary public and judge of a criminal court are incompatible.

11. One who forfeits his right to an office of which he is the incumbent, by accepting another which is incompatible with it, and afterwards performs the functions of the office forfeited, is an officer de facto, and his acts, done before removal from such office, are valid as to persons other than himself.

12. A certificate of acknowledgment, made by a notary public who had accepted the office of judge of a criminal court, is valid.

(Syllabus by the Court.)

Appeal from Circuit Court, Mercer County; J. M. Sanders, Judge.

Bill by the Old Dominion Building & Loan Association against Nathan Sohn. Decree for plaintiff, and defendant appeals. Reversed.

H. A. Ritz and J. M. McGrath, for appellant. W. Walter McClaugherty, for appellee.

POFFENBARGER, J. On the 12th day of December, 1899, Nathan Sohn purchased a lot in the city of Bluefield, as delinquent for the nonpayment of the taxes thereon, at a sale made by the sheriff of Mercer county. In the memorandum and receipt given to him by the sheriff, and in the sheriff's report of sale, said lot is described as having been sold in the name of Irene Cooper for the nonpayment of the taxes thereon for the year 1897, as being 35 by 120 feet in size, and situated in Bluefield. In the memorandum and receipt the quantity of land sold is designated as "1-2 of lot 35x120 Bluefield," and in the report of sale as "1-2 lot." On the 22d day of December, 1900, J. W. Bailey, deputy for E. W. Bailey, surveyor of lands for said county, made a report to the clerk of the county court, which was admitted to record, describing the lot by its location and bounds and record evidence of title, and further showing that there is a house situated on it, that it is impossible to lay off, to said Sohn, the interest purchased by him, without running through said house, and that he, the surveyor, had made no division of said lot. On the 20th day of February, 1901, the clerk of the county court of said county made a deed to Sohn, reciting the delinquency and sale of the land, the purchase by Sohn of "an undivided one-half interest" in said lot, the lapse of more than one year since the time of said purchase, the nonredemption of said lot, and the report made by the surveyor.

This suit was brought by the Old Dominion Building & Loan Association to set aside said deed as illegal and void for the following reasons: First, that, under his purchase, Sohn was not entitled to have a deed for an undivided one-half of the lot, but only for one-half of the lot according to area, not value, and so laid off as not to include the improvements, if practicable; second, that Hugh G. Woods, before whom the deed was acknowledged as a notary public, had, before the date of said acknowledgment, vacated his office by accepting the office of judge of the criminal court of said county, and had no authority to take the acknowledgment; third, that in fact said lot was not delinquent for nonpayment of taxes for the year 1897, as all taxes thereon for said year had been paid.

There was a demurrer to the bill, which the court overruled, and then the defendant answered, and depositions were taken, and upon the hearing the plaintiff tendered the amount of taxes, interest, and costs which

the defendant had paid to the sheriff, with interest at 12 per cent. per annum on the aggregate, and offered to pay any additional costs or charges to which the defendant might be entitled, which tender and offer the defendant declined, and thereupon the court entered a decree setting aside the deed, from which decree the defendant has appealed.

In determining whether the purchaser was entitled to a deed for an undivided one-half of the lot, it is necessary to consider the statute governing the sales of delinquent town lots and the execution of deeds therefor. As they now stand sections 8, 17, 19, and 24 of chapter 31 of the Code of 1899, relating to these subjects, are inconsistent and contradictory. To be more explicit, it may be said that section 17 is contradictory of the other sections named. Section 8, prescribing what shall be sold, says: "The sale shall be of each tract of land, or city, village, or town lot, or of such separate quantities or parts of such tract, or of such undivided interest in such lot as shall be sufficient to satisfy the whole of the taxes." This statute separates real estate into two classes—tracts of land and lots. Tracts may be sold in their entirety, or separate quantities, or parts thereof, may be sold. City, village, or town lots may be sold in their entirety, or undivided interests therein may be sold, but there is no provision for the sale of separate quantities or parts of town lots.

Past legislation on this subject makes this interpretation of the statute clear. Section 6 of chapter 37 of the Code of 1860 of Virginia (Code 1868, W. Va. c. 31, § 8) reads as follows: "The sale of tracts of land shall be of each tract separately, or of such quantity or part thereof, as shall be sufficient to satisfy the taxes thereon, with interest and commission as aforesaid, and its proportion of said expense; and the sale of town lots, shall be of each lot separately, or of such undivided interest therein as shall be sufficient to satisfy the taxes thereon, with such interest, commission, and proportion of expense." This section was amended by chapter 206, p. 258, of the Acts of 1871, and made to read in part as follows: "The sale shall be of such tract of land, or town lot, or of such separate quantities or parts of such tract or undivided interest in such lot as shall be sufficient to satisfy," etc. Chapter 117, p. 312, of the Acts of 1872-73 re-enacted said section as found in the Acts of 1871, in so far as it relates to the sale; and chapter 130, p. 391, of the Acts of 1882 amended and re-enacted said section 8, and made it read as it now stands in the Code. That section, read in the light of said previous legislation, and the history of legislation concerning the mode of making sale of delinquent lands and lots, as well as by its terms, clearly means that each town lot shall be sold as a whole or an undivided interest therein shall be sold, and gives no

authority for selling a separate quantity or part thereof.

Section 19 of chapter 31 of the Code of 1899 prescribes the form of the deed to be made by the clerk of the county court to the purchaser in the case of a sale of a tract of land or a part thereof. The final clause of that section says: "If the purchase was of a city, town or village lot, or a part thereof, or an undivided interest therein, the above form must be varied according to the facts."

Section 24 says that a deed may be made for an undivided interest in a town lot. The first part of that section reads as follows: "Where two or more tracts or parts of tracts, or city, town or village lots, charged to the same person, or persons, with taxes, for the same year, or years, shall have been sold for taxes and purchased by the same person at such sale, the purchaser thereof, or his heirs, devisees or assigns may obtain from the clerk of the county court several deeds for each tract or part of a tract, and city, town, or village lot, or undivided interest therein, or for any number of them less than the whole, or he may obtain one deed for the whole of them as he may prefer; but every such deed shall describe each tract and part of a tract, and each lot and undivided interest in a lot separately; and such deed when so made for several tracts and parts of tracts, and several lots and undivided interests in several lots, shall be as valid and as effectual to pass to the grantee therein the title, legal and equitable to every such tract, and part of a tract, and to every such lot and undivided interest in a lot, as a separate deed for each would have been if such separate deed had been made to such grantee."

The form of deed prescribed by section 19, applicable to tracts of land, provides for the conveyance to the purchaser of "a tract of land (or ——— acres, part of a tract of land, or the undivided ——— part of a tract of land, as the case may be)," etc.

It will be observed here that although no sale of an undivided interest in a tract of land is authorized, the form of deed provides for the conveyance thereof; and that, although there is no authority given by section 8 for the sale of a part of a town lot, section 19 speaks of a purchase of a part of a town lot. It will be further observed that this confusion and contradiction of section 8 found in section 19 is not carried into section 24. That section harmonizes with section 8.

But the confusion does not stop here. Section 17 says: "The purchaser of a part, or an undivided interest of any tract or city, town or village lot of land, so sold and not redeemed within one year as aforesaid, his heirs or assigns, before obtaining a deed therefor shall, at his or their expense, have the quantity or undivided interest so purchased, surveyed and laid off at his or their expense; the said quantity so laid off to be

bounded in part by either or any of the lines of the tract, at the option of the purchaser, his heirs or assigns, so as not to include the improvements on the same (if it can be avoided), and to be in one body, the length whereof shall not be more than double the breadth, where that is practicable. A plat and description thereof shall be returned to the clerk of the county court of the county in which the sale was made, and said clerk shall record the same in the deed book along with the deed to the purchaser, his heirs or assigns, if one be made." This proceeds upon the theory that there can be a sale of a part of a city, town or village lot of land. Moreover, it must be determined whether it means that, in the case of a purchase of an undivided interest, the purchaser can have a deed therefor until he shall have had the same laid off—that is, partition made by the surveyor—although the form of deed in section 19, as well as the express provision of section 24, provides for a conveyance of an undivided interest. A surveyor might with great propriety be authorized to lay off so many acres of a tract, but there could be no reason for the assumption that he is especially fitted or qualified for the division of the tract of land according to quantity, quality, and value, as would be necessary in the case of laying off to the purchaser an undivided interest.

Prior to the act of 1882, the sections concerning the survey, report, and deed were in perfect harmony with the section authorizing the sale. Section 17 of chapter 117, p. 317, of the Acts of 1872-73 provided that the purchaser of a part of any tract of land sold and not redeemed within one year, his heirs or assigns, should have the quantity purchased laid off at his or their expense, and that when the entire tract of land was sold, and not redeemed, the purchaser, his heirs or assigns, should have a report made by the surveyor. No survey or report was required in the case of the purchase of a town lot or an undivided interest therein. As to such a purchase, section 19 provided as follows: "If the sale be of a town lot, or of an undivided interest in such lot, and a report be made by a surveyor describing the same, and such report be ordered by the clerk of the county court to be recorded, the deed shall refer to the said report. But when, in case of a sale of a town lot, or of an undivided interest in such lot, there is no such report, the clerk of the county court shall, nevertheless, execute a deed therefor to the purchaser, if he desires the same."

In determining what Sohn purchased, if anything, at the sale at which he claims to have purchased an undivided one-half of the lot, the statute as it now stands, together with the prior statutes in pari materia, must be considered, and by the principles governing the construction of the statute it must be ascertained what the sheriff had power to sell. Did the Legislature intend, by the

changes made in the statute by the act of 1882, to confer upon him authority to sell a part of a town lot? If so, does the statute as it now stands effectuate that intent? A comparison of section 8 of the Acts of 1882 with the same section of the Acts of 1872-73 shows that the former not only re-enacted the latter, but amended it also. Several changes were made in it, but the language determining what should be sold was not altered. Section 24 of the present statute was made up by consolidating, amending, and re-enacting part of section 23 of the act of 1872-73 and the whole of section 24 of that act; and the language above quoted from said section 24 of the present statute, carefully distinguishing between tracts of land and town lots, is entirely new and not found in the old statute. This careful preservation of the language, conferring authority to sell and prescribing the mode of sale, which had been carried in the statutes of Virginia from a date so remote as 1832, when sales by the sheriff for delinquency were first authorized, and in those of this state to the present time, strongly argues that there has been no intention to depart from it or to alter. But the language used in sections 17 and 19 militates against this view, and indicates that the Legislature had a contrary intention, for those sections assume that purchases of parts of town lots can be made. But do they authorize such a sale? They do not do so in express terms. Section 17 says the purchaser of a tract or undivided interest of any tract or city, town, or village lot of land shall have the same laid off. This assumes that there may have been a sale of a part of a town lot. Section 19 says, if the purchase was of a city, town, or village lot, or a part thereof, or an undivided interest therein, the form of the deed shall be varied according to the facts. This is likewise an assumption or supposition only. The most that could be said for this language is that it gives implied authority to sell part of a town lot.

Can such a power arise by implication? Statutes authorizing tax sales are always strictly construed. "Where summary proceedings are authorized by statute, the effect of which is to divest or affect rights of property, the rule holds good that they are to be strictly construed. The power conferred must be exercised precisely as it is given, and any departure will vitiate the whole proceeding. It is, indeed, a general rule that all statutes conferring special ministerial authority by which any man's estate may be affected must be strictly pursued." Sedg. Stat. Con. 302. In this work, on page 303, it is said that the validity of statutes authorizing sales of land for nonpayment of taxes was at first seriously questioned on the ground of their being in conflict with the constitutional provision which in most, if not all, the states, guarantees to every citizen "the protection of the law of the land," and

that, while this objection has been overruled and the power sustained on the grounds of immemorial usage and state necessity, it has been held in all cases that it must be strictly pursued, and that its exercise will be vigilantly watched. Such being the nature of the power of sale of lands for nonpayment of taxes, and the rule of construction applicable to statutes conferring it, it seems clear that it cannot arise by mere implication, but must be expressly conferred. This view is supported by Blackwell on Tax Titles, § 551, where it is said: "The officer who executes the power of selling land for taxes can exercise no implied power whatever. He acts in hostility to the owner of the estate, and not as his agent, and he must pursue his authority literally." Section 125 of the same work says, in part: "It is a naked power, which in this instance may be defined to be a power operating upon an estate, in which the officer who executes it has no manner of interest, and over which he has no control other than that which the law has expressly delegated to him. It is a statutory power, depending alone upon the will of the sovereign, and not upon the consent of the owner. The statute creates the power, selects the agent to execute it, and prescribes the formalities which shall attend its execution."

To sustain such a power on the theory of implication would violate another well-settled rule of construction. The statute is inconsistent in its terms. In such case "regard must be had to all the parts of a statute, and to the other concurrent legislation in pari materia, and the whole should, if possible, be made to harmonize; and, if the sense be doubtful, such construction should be given, if it can be, as will not conflict with the general principles of law, which it may be assumed the Legislature would not intend to disregard or change." Suth. Stat. Con. § 287. The reason for withholding the power to sell a part of a town lot is obvious. The purchaser may select the part he buys. His selection is only limited to the extent that it must be bounded in part by either or any lines of the tract, and not be more than twice as long as it is wide, where that is practicable, and not include the improvements, if that can be avoided. Under this, the front only of a valuable lot might be so taken as to render the residue practically valueless, or a valuable building may be cut into. These are the considerations upon which the section of the statute authorizing the sale and prescribing the mode thereof has withheld from the sheriff the power to sell a part of a town lot. For 70 years this authority has been withheld, and such construction should not be given the statute as to contravene so important a principle of statutory law, when another can be given without it, and one of two different constructions must be adopted. While gross negligence is not to be imputed to the Legislature (Sedg. Stat. Con. 366), no rule of law prevents the court from attribut-

ing an inconsistency to the accidental or inadvertent misuse of words in a statute. This conclusion is adverse to the theory advanced by counsel for the appellee. The purchaser took an undivided interest in the lot, if anything.

It will be observed that his purchase is not described in the memorandum and receipt and report of sale as an undivided one-half of the lot. These papers say the purchase was for one-half of the lot. As has been shown, the power of sale must be strictly pursued. It cannot be departed from in any material respect. Is the omission of the word "undivided" material? Is it fatal to the sale and the deed? To say that it is would be to restrict the language, and make it mean less than its terms import. One-half of the lot means the one-half of the lot according to quantity and value, not merely according to its area. If the word "undivided" had been prefixed, it could have meant only that one-half of the lot had been sold, but that the lot had not been severed so as to give sole possession and enjoyment of the one-half to the purchaser thereof. It would have neither enlarged nor restricted the meaning of the words "one-half of lot." While the selling officer can exercise no implied power, it is to be observed that he had express power and authority to sell an undivided interest. Having such power, there is a presumption in favor of his having properly exercised it. "In *Ives v. Lynn* [7 Conn. 505], where it did not appear affirmatively in the deed or return of sale that no more land was sold than was necessary to raise the amount of taxes due upon the entire tract offered, the court held that it was a presumption of law that the collector performed his duty, and conducted the auction fairly and properly; and in the absence of proof rebutting this presumption the sale was sustained as far as this point was concerned." Blackwell on Tax Titles, § 542. The presumption of a sale of an undivided one-half is aided by the failure of the statute to give power to sell anything but an undivided interest in a town lot, and the further consideration that nothing is laid off prior to the sale for any purchase. The severance from the whole tract of a part of a tract purchased at a tax sale is made long after the sale. Upon these considerations, the conclusion that an undivided interest was sold is irresistible.

An undivided one-half of the lot having been purchased, was it essential to the procurement of the deed to have this laid off as prescribed by section 17 of chapter 31? That section says the purchaser of a part or an undivided interest of any tract or city, town, or village lot of land shall have the same surveyed and laid off in the manner therein prescribed before obtaining a deed therefor, and section 18 says if the purchase be of an entire city, village, or town lot, no survey or report thereof need be made. If sections 17 and 18 are to be literally applied.

there must be a partition in the case of the purchase of an undivided interest—partition to be made by the surveyor. These sections import that there shall be no conveyance of an undivided interest. But it has been seen that section 24 contemplates and authorizes a deed for an undivided interest, as does also the form of deed prescribed by section 19. Here is a flat contradiction and irreconcilable inconsistency, upon a consideration of the letter of the statute alone. Such a condition of the statute calls upon the court for construction. One part of it says there shall be partition. Other parts say there need not be partition. There cannot be partition in the manner prescribed by this statute without a violent innovation upon the general law of partition—an innovation which does violence to the principles underlying that law. Compulsory partition is the exercise of judicial power and functions. Obedience to the letter of this statute makes it a mere ministerial function. It authorizes the county surveyor to make the partition without any inquiry as to his fitness and capacity for the performance of such duty, and without any judicial supervision of his action. Where there is inconsistency and the sense of the statute is doubtful, a construction should not be given that is in conflict with the general principles of law. It may be assumed that the Legislature did not intend to disregard or change them. *Suth. on Stat. Con. § 287.* The statute must be construed as a whole, and all parts thereof given effect, if possible. Every word must have some effect, if possible, but words may be restrained and limited to an effect less than that which they literally import. "A construction which must necessarily occasion great public and private mischief must never be preferred to a construction which will occasion neither, or not in so great a degree, unless the terms of the instrument absolutely require such preference. Of two constructions, either of which is warranted by the words of the amendment of a public act, that is to be preferred which best harmonizes the amendment with the general tenor and spirit of the act amended. A statute may be construed contrary to its literal meaning, when a literal construction would result in an absurdity or inconsistency, and the words are susceptible of another construction which will carry out the manifest intention." *Suth. Stat. Con. § 323.*

There is another principle or rule of construction which, applied to this statute, enables the court to give some effect to the language of sections 17 and 18, without carrying that effect to the extent of requiring partition in the case of a purchase of an "undivided interest." General words, when the sense requires it, and the intention will be furthered thereby, may be taken distributively. A part of a tract may be laid off according to the mode prescribed by section 17. A town lot in which an undivided interest has been purchased may be surveyed, and

a report made, giving a description of the whole lot to be followed by the deed. Thus, in either case the surveyor may perform a function without going to the extreme of making a partition, and it must be held that this is the meaning of that statute, and that the Legislature intended no more than that. "Survey" and "report," as found in these two sections, are applicable to purchases of whole tracts and undivided interests in town lots. "Laid off" must be limited and held to refer only to purchases of parts of tracts of land. "Words in different parts of a statute must be referred to their proper connections, giving each in its place its proper force." *Suth. Stat. Con. § 282.* Upon this construction of the statute, no partition was necessary, and there was power in the clerk to make the deed conveying an undivided interest, notwithstanding there was no division of the lot. Before such deed could be made, a report of the surveyor was necessary, and such report was made.

The contention that the land was improperly returned and sold because the taxes had been paid thereon is wholly unsupported by the evidence. The description of the land in the memorandum of sale and report of sale has been already set out in a former part of this opinion. The description found in the tax receipts exhibited with the bill, the only evidence of payment offered, does not correspond with it. In one of these receipts the property is described in it, not as a town lot, but as being "acres of land." In the other its character is not indicated further than that it is real estate. The valuation in these two receipts corresponds, thus indicating that it is the same property. One receipt is from the sheriff and the other from the city sergeant, and both are for the year 1897. Nor does the amount of tax in the sheriff's receipt, relied upon as evidence of payment of the tax, correspond with that found in the memorandum of sale and the report of sale. In the receipt the total amount of taxes for state, county, and district purposes is two dollars. In the memorandum and report, the taxes, including interest thereon, which could not possibly be large, the time being only two years, amount to \$9.46.

It remains now to inquire whether the deed is void because acknowledged before one who had vacated his office of notary public by accepting the office of judge of the criminal court. The two offices are clearly incompatible. "No judge, during his term of office, shall practice the profession of law or hold any other office, appointment or public trust, under this or any other government, and the acceptance thereof shall vacate his judicial office. Nor shall he, during his continuance therein, be eligible to any political office." Section 16, art. 8, *Const. W. Va.* While this does not say in terms that an office held by a person at the time he qualifies as a judge shall be thereby vacated, it does forbid the holding of any other office

while acting as judge. This inhibition is express, and, to make the language effective, it must be held that the acceptance of the office of judge vacates the other office. It is a rule of common law that, where a person holding one office accepts another incompatible office under the same government, his right to the former is, by such acceptance, ended and nullified. *Rodman v. Harcourt*, 4 B. Mon. (Ky.) 224. The offices of notary public and judge may be incompatible under article 5 of the Constitution, declaring that the legislative, executive, and judicial departments shall be separate and distinct, and that no person shall exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the Legislature, but the decision of this question is unnecessary. Woods forfeited the office of notary public by qualifying as judge of the criminal court. Does it follow that the certificate of acknowledgment is void?

In the brief of counsel for appellant, Maupin on Title of Real Estate, p. 59, is quoted, as showing that if a person taking an acknowledgment and making a certificate thereof assumed to act in an official capacity in doing so, and had color of title to the office, the certificate would be held good in a collateral proceeding on the ground that the taking of the acknowledgment is the act of a *de facto* officer, and cannot be questioned in such proceeding. The work referred to is not in the library, but the proposition is well supported by authority. Indeed, it goes further than that. Such acts will be sustained in any proceeding, collateral or direct, in the interest of third parties or the public. They are only invalid as against the public and as to the *de facto* officer himself. He cannot set them up in his own favor or against the public. "The act of an officer *de facto*, where it is for his own benefit, is void, because he shall not take advantage of his own want of title which he must be cognizant of; but where it is for the benefit of strangers or the public, who are presumed to be ignorant of such defect of title, it is good." *Rodman v. Harcourt*, 4 B. Mon. (Ky.) 224, 233. To the same effect see *McGregor v. Balch*, 14 Vt. 423, 39 Am. Dec. 231; *Hoglan v. Carpenter*, 4 Bush (Ky.) 89; *Attorney General v. Marston*, 66 N. H. 485, 22 Atl. 560, 13 L. R. A. 670; *Green v. Wardwell*, 17 Ill. 273, 63 Am. Dec. 366; *Woodside v. Wagg*, 71 Me. 207; *Johnson v. McGinly*, 76 Me. 432; *Petersilea v. Stone*, 119 Mass. 465, 20 Am. Rep. 335; *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409; *Pooler v. Reed*, 73 Me. 129; *Brown v. Lunt*, 37 Me. 423; *Belfast v. Morrill*, 65 Me. 580.

This line of cases has been selected, not only to show the extent to which the acts of *de facto* officers are held valid, but to show, as well, that a person who forfeits an office by the acceptance of another incompatible one, and then exercises the functions

of the office forfeited, is held to be an officer *de facto*, and that his acts are held valid as to third parties until the office so forfeited has been adjudged and declared vacant. Thus, in *Hoglan v. Carpenter*, a postmaster accepted the office of county judge, and continued to hold the office of postmaster. As he held one office under the federal government, which the state courts had no power to declare vacant, it was held that he was a judge *de facto*, and not *de jure*, the state court having power to declare the office of judge vacant, but that his acts were binding and valid as to third parties in all proceedings. In *Woodside v. Wagg*, the judge of the municipal court accepted a seat in the Legislature, by which action he ended his office of judge, but continued to perform its functions, and his acts were held valid, although it was said he might be removed upon information filed against him in behalf of the state. In *Johnson v. McGinly*, the disclosure of a poor debtor was held valid, in an action on a poor debtor's bond, although one of the persons selected to hear it had, subsequent to the date of his qualification as a trial justice, accepted, and was holding, the incompatible office of constable. In *Commonwealth v. Kirby*, 2 Cush. 577, on an indictment for assault and battery and resistance to an officer, it was held to be no defense that the officer acted under a warrant issued by a justice who had disqualified himself by accepting an incompatible office. In *Sheehan's Case*, 122 Mass. 445, 23 Am. Rep. 374, the court refused to discharge, on a writ of habeas corpus, a person who had been committed to jail on a conviction of larceny by a judge who had forfeited his office of judge of the police court by accepting a seat in the general court. In *Pooler v. Reed*, 73 Me. 129, an action of trespass for an illegal arrest, the defendant was not permitted to justify for the reason that he made the arrest as constable, which office he had held, but had forfeited by accepting the office of justice of the peace. The court said that as to the public and third persons his act was valid, but, as the action was against him for his illegal act, he could not justify, and thereby take the benefit of it.

An authority binding upon this court as to the general proposition is *Maddox v. Ewell*, 2 Va. Cas. 59, the syllabus in which reads, in part, as follows: "Quere: If a justice of the peace accept the office and commission of a coroner, is that a forfeiture of his office of justice? But if it does, yet such acceptance does not vacate such of his subsequent acts as justice, as may have been done before his disqualification is established by some proper judicial proceeding for that purpose instituted." In exact alignment with this is the doctrine announced in *Adam v. Mengel* (Pa.) 8 Atl. 606; *Keyser v. McKissam*, 2 Rawle, 140; *County v. Trimmer*, 95 Pa. 97. *Adam v. Mengel* decides a proposition very nearly like the one here under consideration. A justice of the peace accepted the incompatible

office of clerk of the courts of oyer and terminer and quarter sessions of his county, and afterwards took the acknowledgment of a mortgagor, and the acknowledgment was held good. To the same effect is *Davidson v. State*, 135 Ind. 254, 34 N. E. 972, where, on a trial for murder, a deed was offered in evidence, the acknowledgment of which had been taken before a notary public who was then filling the office of deputy recorder, and the court said: "The notary was at least an officer de facto, and his acts, as to third parties, were valid"—citing *Leech v. State*, 78 Ind. 570, and *Baker v. Wambaugh*, 99 Ind. 312. To the cases herein referred to, holding that a notary public is an officer, within the meaning of this rule, may be added *Governor v. Gordon*, 15 Ala. 72, and *People v. Rathbone*, 145 N. Y. 434, 40 N. E. 395, 23 L. R. A. 384. Both solemnly deciding that a notary public is an officer.

While this court has never ruled upon the exact point raised here, it has declared the general principle asserted in the cases above cited. *Knight v. West Union*, 45 W. Va. 194, 32 S. E. 163; *State v. Carter*, 49 W. Va. 709, 39 S. E. 611. Moreover, this general principle of the common law has been declared by statute. "All judgments given and all acts done by any person, by authority or color of any office, or the deputation thereof, under the restored government of Virginia or of this state, before his removal therefrom, shall be valid, though it may afterwards be decided or adjudged that he was not lawfully elected or appointed or was disqualified to hold the office, or that the same had been forfeited or vacated." Section 15, c. 7, Code 1899.

Are the former owner and grantee of a tract of land, sold and conveyed for nonpayment of taxes thereon, "third parties," within the meaning of this proposition of law? The former owner is no party to the deed. That instrument is adverse to him. It takes up and passes his title to another, and cuts off his equity of redemption under the statute. The recordation of it is intended to bind him by constructive notice, just as that of other deeds binds purchasers for value without notice and creditors; and it goes further, binding him whether he has notice or not. One of its peculiar purposes is to give him notice that the deed has been made in the second year after the sale, and that the right of redemption is forever gone. The grantee is a party to the deed, and, as claimant thereunder, it is to his interest to uphold it. His situation is similar to that of any other purchaser. But this is not the test. "Third parties," as used by the courts in the cases cited, means persons other than the de facto officer. His acts are invalid as to him, but valid as to all other persons. Such is the language of the judges and the result of the decisions, and our statute has, at least, as much breadth and force.

The statute does not expressly require a

tax deed to be acknowledged. It does require the recordation of such deed, and that may, by implication, make acknowledgment necessary to its validity. But it is unnecessary to decide this question. If acknowledgment is not essential, the deed is good. If it is essential, the acknowledgment is good under the principles above noted, and, as there is no other valid objection to the deed, it is good.

The law being adverse to the appellee upon all the questions presented, the decree is erroneous, and must be reversed, and the bill dismissed, with costs.

(54 W. Va. 289)

STATE v. DODDS.

(Supreme Court of Appeals of West Virginia.
Dec. 5, 1903.)

CRIMINAL LAW—TRIAL—INSTRUCTIONS.

1. It is the object and office of instructions to define for the jury, and to direct their attention to, the legal principles which apply to and govern the facts proved or presumed in the case. The instructions should simply develop the rules of law governing the particular facts—all the facts, not a part only, which the evidence tends to establish; and they are to be interpreted and judged of not in any abstract way, but with reference to those facts.

2. The instructions given to the jury must be taken together, and it is not necessary to insert in each separate instruction all the exceptions, limitations, and conditions which are inserted in the instructions as a whole.

3. An instruction which singles out and gives undue prominence to certain facts, ignoring other facts proved and of equal importance in a proper determination of the case, is improper.

(Syllabus by the Court.)

Error to Circuit Court, Mercer County; J. M. Sanders, Judge.

Matt Dodds was convicted of murder, and brings error. Affirmed.

Hale & Pendleton and R. C. & B. McClaugherty, for plaintiff in error. The Attorney General and J. M. Anderson, for the State.

MILLER, J. At the January term, 1903, of the criminal court of Mercer county, Matt Dodds, the plaintiff in error, was indicted for the murder of one Lee Palmer. At the same term he demurred to the indictment, and the demurrer was overruled. He then entered his plea of not guilty, upon which issue was joined. The indictment is in the form prescribed by section 1 of chapter 144 of the Code of 1899, and is sufficient upon demurrer or motion to quash. *State v. Douglass*, 41 W. Va. 537, 23 S. E. 724. At the following April term the defendant was tried, found guilty of murder in the second degree, and sentenced to be confined in the penitentiary for eight years. To this judgment and sentence the defendant was refused a writ of error by the circuit court of the county aforesaid. Defendant then applied for, and was by this court allowed, a writ of error. On the

trial certain instructions were given to the jury at the instance of the state to which defendant objected, and certain other instructions were given at his instance, and others offered by him were refused, to which refusal he excepted. All of the rulings of the court, the instructions given as well as those refused, and the evidence introduced by both the state and defendant, are certified in a bill of exceptions, and made part of the record.

Plaintiff in error insists that the verdict of the jury was and is contrary to the law and evidence, and should have been set aside; that the court erred in giving to the jury the instructions for the state, and in refusing to give instructions Nos. 4, 5, and 6 asked for by him. The evidence proves: That both defendant, Dodds, and the deceased, Lee Palmer, were machinists, and at the time of the homicide were employed by the Norfolk & Western Railway Company in its roundhouse in Bluefield, in said county. That on the 18th day of December, 1902, about 2:30 p. m., the defendant and one Mike Sullivan came to said roundhouse together. That at the time Palmer was in the cab of an engine, repairing it. That one J. R. Tillson was his helper, and engaged in aiding Palmer in making the repairs. That a helper is one who does the heavy work of a machinist, but is not himself a machinist. That when Dodds and Sullivan came up to where said engine was Sullivan passed on and did not say anything, but Dodds stopped, and asked Tillson what he was doing machinist work for, and Tillson replied that he was doing what Palmer had told him to do. Dodds then said, "Just wait and see what I will say to him," and about that time Palmer came out of the cab from his work. Dodds then said to him, "What are you letting your helper do machinist work for?" Palmer replied that he was not letting his helper do machinist work, and Dodds replied, "The hell you ain't," or something to that effect. Dodds and Palmer then began to dispute, and Dodds struck Palmer. That several licks were then struck by the parties, and then Dodds struck Palmer on the head with his pistol. They then became separated about eight feet. That both of them appeared to be angry and excited. That Palmer then with clenched fist, and the appearance of being angry, came towards Dodds, and Dodds advanced toward Palmer. That when they got together witness thought Palmer rather fell up against Dodds, and that Dodds had his pistol in his hand, and put it up against Palmer's breast, and the pistol fired. Palmer fell to the ground, and died in a few minutes, and Dodds walked away. Witness says that when Dodds and Palmer were striking at each other he saw Dodds take his pistol out of his overcoat pocket and strike Palmer once on the head with it; that he saw nothing in Palmer's hands, during the fight, except what appeared to be a pipe. After the shooting Palmer's tools were on the steam chest, where he

had had them about his work. Another witness says that Palmer, during the fight, had nothing in his hands except a pipe. It is also shown that the two men were about the same size.

The defendant testified that he was a member of the organization known as the "Machinists' Union"; that he was a member of the committee of the organization whose duty it was to see that the rules and regulations of the organization were not violated by any of its members; that on the day Palmer was killed he was in the city of Bluefield, in Corvin's pool room, where he had gone to see some acquaintances; that while he was there Mike Sullivan asked him to go over to the machine shops and roundhouse with him; that Sullivan stated that he wanted to see a man there by the name of Thomas, on business; that he went along simply at Sullivan's request; that he saw a man working on an engine, doing machinist work; that he asked him whether he was a machinist or a helper; that the person replied that he was a helper, and doing the work that Palmer had directed him to do; that Palmer came out of the cab of the engine about that time, when defendant asked him what he was letting his helper do his work for; that Palmer replied, "He is not doing my work; he is doing just what I told him to do." Defendant then said, "The hell he ain't," and Palmer replied, "It is none of your damned business," and defendant said to Palmer that it was his business; that he was a member of the committee of the Machinists' Union whose duty it was to see that a helper did not perform a machinist's work; that Palmer then went to his tool chest on the engine, and defendant thought he got a cold chisel (which is a piece of iron a foot or a foot and a half long), and that they then advanced toward each other. Defendant also testified that during the fight he received a wound on the back of his left hand and on the wrist of his left arm. He stated, among other things, that the night before the shooting he had stayed at a house of ill fame in Bluefield, and that on the day of the occurrence he had taken two or three drinks of whisky. He also gave considerable other testimony, not of a very convincing character, the object of which was to mitigate and reduce the grade of the offense charged.

The instructions given by the court at the instance of the state are in the words following:

"No. 1. The court instructs the jury that under the law a person is presumed to intend that which he does, or which is the immediate and necessary consequences of his acts; and if the jury believe from the evidence in this case that the prisoner, Matt Dodds, with a deadly weapon, without any or upon slight provocation, intentionally shot and killed Lee Palmer in Mercer county, then the prisoner, under the law, is presumed to be guilty of murder in the first degree.

"No. 2. The court instructs the jury that in considering all the evidence in this case they may consider the evidence of the prisoner, and how far, if at all, his interest in the case might bias his testimony, and to give his evidence and all other evidence in the case just such weight as they may think it entitled to.

"No. 3. The court instructs the jury that in the indictment in this case there is charged murder of the first degree, murder of the second degree, voluntary manslaughter, involuntary manslaughter, and assault and battery. Murder of the first degree is punished in this state by death or confinement in the penitentiary for life. Murder of the second degree is punished by confinement in the penitentiary not less than five nor more than eighteen years. Voluntary manslaughter is punished by confinement in the penitentiary not less than one nor more than five years. Involuntary manslaughter and assault and battery are misdemeanors, and punished by confinement in jail, or fine, or both.

"No. 4. The court instructs the jury that a reasonable doubt, such as is contemplated in law, is not a mere fanciful or imaginary doubt, but is a fair and substantial doubt, based on the evidence or lack of evidence in the case, and one for which a man who entertains such doubt should be able to give a good and substantial reason arising from the evidence or a lack of evidence in the case."

The court also gave to the jury, on request of the defendant, the following instructions:

"No. 1. The court instructs the jury that they have no right to arbitrarily disbelieve the testimony of the prisoner, but that they should weigh and consider his testimony the same as any other witness in the case, giving to it such weight as they think it is entitled to.

"No. 2. The court instructs the jury that accidental killing is not such a matter of defense as throws upon the prisoner the burden of proving it by a preponderance of the evidence; that it is the duty of the state to allege and prove in this case that the prisoner killed Lee Palmer intentionally or willfully; and, if the evidence in the case, taken all together, raises in the minds of the jury a reasonable doubt as to whether the prisoner killed Lee Palmer intentionally or accidentally, they should not find the prisoner guilty of anything higher than involuntary manslaughter, or assault and battery.

"No. 3. The court tells the jury that if they believe from the evidence in the case that on the day that Lee Palmer was killed, and before he was killed, the prisoner and one Mike Sullivan went to the machine shops referred to in the evidence, and that the prisoner went there at the request of the said Sullivan, as detailed in his evidence, and that after the prisoner got to the said machine shops he became engaged in a quarrel with the said Palmer, which resulted

in a fight between them, and that while engaged in said quarrel and fight the said Palmer and the prisoner were excited, angry, and that their passions were aroused, and that in said fight, while the prisoner was excited, angry, and his passions aroused, he shot and killed the said Palmer, they cannot find the prisoner guilty of anything higher than voluntary manslaughter."

But the court refused to give, at the instance of the defendant, the following:

"No. 4. The court instructs the jury that there is charged in the indictment in this case voluntary manslaughter and murder in the second degree, and if they believe from the evidence in the case that the prisoner is guilty of one of said offenses, and they have a reasonable doubt as to which of said two offenses he is guilty of, they should give to him the benefit of said doubt, and find him guilty of voluntary manslaughter.

"No. 5. The court instructs the jury that there is charged in the indictment in this case assault and battery and voluntary manslaughter, and if they believe, from the evidence in the case, that the prisoner is guilty of one of said offenses, and they have a reasonable doubt as to which of said two offenses he is guilty, they should give to him the benefit of said doubt, and find him guilty of assault and battery.

"No. 6. The court instructs the jury that among the other offenses charged in the indictment in this case there is charged murder in the second degree and voluntary manslaughter, and that if they believe from the evidence in this case that the prisoner is guilty of one of the said offenses of murder in the second degree or voluntary manslaughter, and they have reasonable doubt as to which of two said offenses the prisoner is guilty, then they should find him guilty of voluntary manslaughter."

It is contended for plaintiff in error that upon the facts and circumstances disclosed by the record he is not guilty of a higher grade of offense than voluntary manslaughter. It is argued that instruction No. 1 given at the instance of the state does not propound the law correctly. The instruction seems to have been taken from *Cain's Case*, 20 W. Va. 681, and *Welch's Case*, 36 W. Va. 690, 15 S. E. 419, but it does not contain the words, "and the necessity rests upon him of showing extenuating circumstances; and, unless he proves such extenuating circumstances, or they appear from the case made by the state, he is guilty of murder in the first degree," found in point 6 of the syllabus of the last-mentioned case. It is pointed out that the instruction is otherwise faulty, because it uses the words, "presumed to be guilty of murder" in the first degree, instead of the words, "is prima facie guilty of murder" in the first degree. It is argued that the latter part of the instruction in *Welch's Case*, above quoted, is necessary to call the attention of the jury to the *prima facie* effect

of the recited facts if proved to the satisfaction of the jury, and the proof whereby that prima facie effect may be overcome by the defendant; that by the instruction as given the attention of the jury was called to the legal presumption, arising from the facts recited, and which the jury were supposed to believe from the evidence, but that no intimation is given in the instruction as to how this presumption may be rebutted by the accused; that the effect of the instruction is to tell the jury that under the facts set out in the instruction the law presumes the prisoner to be guilty of murder in the first degree; and that they must find the killing to be willful, deliberate, and premeditated. It is the object and office of instructions to define for the jury, and to direct their attention to, the legal principles which apply to and govern the facts, proved or presumed, in the case. "The charge should simply develop the rules of law governing the particular facts—all the facts, not a part only, which the evidence tends to establish; and it is to be interpreted and judged of, not in any abstract way, but with reference to those facts." *Blah. Crim. Proc.* § 978. "A charge to the jury must be taken together, and it is not necessary to insert in each separate instruction all the exceptions, limitations, and conditions which are inserted in the charge as a whole." *Sackett's Instructions*, 24; *People v. Cleveland*, 49 Cal. 578. "Murder by poison, lying in wait, imprisonment, starving, or any willful, deliberate, and premeditated killing, or in the commission of or attempt to commit arson, rape, robbery, or burglary, is murder of the first degree. All other murder is murder of the second degree." *Code 1899*, c. 144, § 1. By instruction No. 3 given at the instance of the state the court informed the jury that in the indictment there was charged (against the defendant) murder of the first and murder of the second degree, voluntary and involuntary manslaughter, and assault and battery; and defined the punishment and penalty which might be imposed upon conviction for any one of the offenses named. In No. 1 the court instructed the jury that if they believed, from the evidence in the case, that the prisoner, Matt Dodds, with a deadly weapon, without any or upon slight provocation, intentionally shot and killed Lee Palmer in Mercer county, then the prisoner, under the law, is presumed to be guilty of murder in the first degree. What is meant by the statement that "the prisoner, under the law, is presumed to be guilty of murder in the first degree?" A "presumption" is a rule of law that courts or juries shall or may draw a particular inference from a particular fact or from particular evidence, unless and until the truth of such inference is disproved. A presumption of law is a rule of law that a particular inference shall be drawn by a court or jury from a particular circumstance. A presumption of fact is a rule of law that

a fact otherwise doubtful may be inferred from a fact which is proved. A presumption is an inference as to the existence of a fact, not actually known, arising from its usual or necessary connections with others which are known. Presumptions of fact are but inferences drawn from other facts and circumstances in the case, and should be made upon common principles of induction. Presumptions of fact are at best but mere arguments, and are to be judged by the common and received tests of the truth of propositions and the validity of arguments. Presumption is allowed to prove facts, even in criminal cases; and one of the highest modes of proof is to show the existence of circumstances, which could not have existed if the fact proved had not existed. Juries have the right to infer what a man intends to do and what he actually does from his conduct, beyond the positive testimony in the case. *Lawson on Presump.* Ev. 639, 640.

From the foregoing definitions we may say that the presumption stated in the instruction under consideration is one of fact, dependent for its force and effect upon the belief of the jury from the evidence in the case, that the defendant, Matt Dodds, with a deadly weapon without any or upon slight provocation intentionally shot and killed Lee Palmer. Under our statute every homicide is prima facie murder in the second degree. Where a homicide is proved, the presumption is that it is murder in the second degree. It is prima facie attended with malice, which enters into murder as one of its ingredients. If the state would elevate it to murder in the first degree, she must establish the characteristics of that crime; and, if the prisoner would reduce it to manslaughter, the burden of proof is upon him. *Hill's Case*, 2 Grat. 595; *Cain's Case*, 20 W. Va. 679; *Welch's Case*, 36 W. Va. 690, 15 S. E. 419. By the statute above cited the willful, deliberate, and premeditated killing of a person is defined to be murder in the first degree. He who does an act willfully does it on purpose; and he who does an act on purpose does it willfully. The next ingredient of the crime is that it must be deliberate. To deliberate is to reflect, with a view to make a choice. If a person reflects, though but for a moment before he acts, it is unquestionably a sufficient deliberation within the meaning of the statute. The last requisite is that the killing must be premeditated. To premeditate is to think of a matter before it is executed. The word "premeditated" would seem to imply something more than "deliberate," and may mean that the party not only deliberated, but had formed in his mind the plan of destruction. *Smith's Trial*, pp. 230, 321; *King v. Com.*, 2 Va. Cas. 88, note. The defendant with his pistol, unlawfully shot and killed Palmer. From that fact alone he is presumed to be guilty of murder in the second degree. A man shall be taken to intend that which he does, or which is the immediate or necessary consequence of his act. There-

fore Dodds is *prima facie* taken to have intentionally, and therefore willfully and purposefully, killed the deceased.

The general definition of the statute does not touch the common-law distinction between murder and manslaughter. It simply divides murder into two classes; murder with specific, deliberate intent to take life being murder in the first degree; murder without such an intent to take life being murder in the second degree. Whart. *Hom.* § 177. In all of the enumerated cases in section 1 of chapter 144 of the Code of 1890, *supra*, "the Legislature has declared the law that the perpetrator shall be held guilty of murder in the first degree, without further proof that the death was the ultimate result, which the will, deliberation, and premeditation of the party accused sought. And the same authority has declared the law that any other kind of killing which is sought by the will, deliberation, and premeditation of the party accused shall also be murder in the first degree; but that, as to this other kind of killing, proof must be adduced to satisfy the mind that the death of the party slain was the ultimate result which the concurring will, deliberation, and premeditation of the party accused sought. But to this general rule the same authority adds an exception, which is that any death consequent upon the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary shall be deemed murder in the first degree, and all other murder at common law shall be deemed murder in the second degree. So that the cases within the exception, as now put, and the cases enumerated as first mentioned, are in fact placed upon the same principle: There is no necessity of proof in either to establish the fact that a homicide was intended. And it follows, of course, that all other homicide which was murder at common law is now murder in the second degree, except when it shall be proved that the homicide was the result of a 'willful, deliberate, and premeditated killing'; and it also follows of necessity that, when by the proof the mind is satisfied that the killing was willful, deliberate, and premeditated, such killing must be taken and held to be murder in the first degree. This construction of the act of assembly is consistent with, and supported by the decisions of this court in *Burgess' Case*, 2 Va. Cas. 493, and *Whiteford's Case*, 6 Rand. 721, 18 Am. Dec. 771." *Jones' Case*, 1 Leigh, 611, 612. "By the general concurrence of each of the states in which this distinction has been the subject of examination, the practical working of the statutes has been to divide murder, as limited by the common law, into two classes, leaving the original boundaries between murder and manslaughter unaltered. The statutes, it has been held, in requiring murder in the first degree to be deliberate, do not change the common-law doctrine in that respect with regard to murder; the degree of deliberation requisite in both degrees being the same. The distinctive peculiarity attached by the statutes to murder in

the first degree, however, is that it must necessarily be accompanied with a premeditated intention to take life. The 'killing' must be premeditated." Wherever, then, in cases of deliberate homicide, there is a specific intention to take life, the offense, if consummated, is murder in the first degree; if there is not a specific intention to take life, it is murder in the second degree. "To constitute murder of the first degree, the intent of the party killing must have been to take life; whereas, by the common law, if the mortal blow is malicious, and death ensues, the perpetrator is guilty of murder, whether such an intention does or does not appear to have existed in his mind. The injury being malicious, the common law holds the offender responsible for all the consequences following his unlawful act." Whart. *Hom.* § 177.

By the evidence, no positive intent on the part of the defendant to take the life of Palmer is shown. Such intent could only be proved by Dodds himself, but he could not be compelled to testify against himself. Hence, under the law, the jury had the right to infer or presume that fact from the manner, means, and circumstances of the homicide, as shown by the evidence. The defendant had the right to introduce evidence, if he could produce such, to rebut or overthrow that inference or presumption. If not overturned by the defendant, or by the evidence and circumstances given by the state, the presumption aforesaid may be taken as sufficient evidence of specific intent to kill. The language used in the instruction is, in purport and effect, the same as the words, "*prima facie* guilty," employed in the *Cain Case*, *supra*. A *prima facie* case is one which is established by sufficient evidence, and can be overturned only by rebutting evidence adduced on the other side. "*Prima facie* evidence of a fact is such evidence as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose." *Kelly v. Morris*, 6 Pet. 622, 8 L. Ed. 523. The instruction, therefore, is not bad because of the phraseology thereof. The jury evidently did not presume the specific intent of the defendant to kill the deceased, because they found the defendant not guilty of murder in the first, but guilty of murder in the second degree. But admitting the instruction to be faulty, the defendant was not prejudiced thereby. *State v. Morrison*, 49 W. Va. 210, 38 S. E. 481.

Instruction No. 3, given on behalf of the defendant, does explain to the jury how the grade of the alleged offense may be reduced and found by them to be voluntary manslaughter; and No. 2 states facts which, if proved to the satisfaction of the jury, would justify a finding by them for involuntary manslaughter, or assault and battery. Reading together instructions No. 1 given on motion of the state and Nos. 2 and 3 for the defendant, we find no error therein. Although an instruction, considered by itself, is too general, yet, if it is properly limited by others given

on the other side, so that it is not probable it could have misled the jury, judgment will not be reversed on account of such instruction. Sackett's Instr. § 23. The other instructions, given by the court, state the law correctly, and were properly allowed.

Instructions Nos. 4, 5, and 6, offered by the defendant and refused by the court, each single out and give undue prominence to particular offenses, and ignore others charged in the indictment. This question has been so often passed upon and such instructions have been so repeatedly condemned by this court that it is scarcely necessary to here again decide it. Price v. C. & O. R. R. Co., 46 W. Va. 538, 33 S. E. 255, and cases there cited. "An instruction which singles out and gives undue prominence to certain facts, ignoring other facts proved and of equal importance in a proper determination of the case, is improper." Sackett's Instr. § 13. In rejecting said instructions 4, 5, and 6 offered by the defendant the court did not err.

We think the facts and circumstances of the case warrant the verdict of the jury and judgment of the court thereon. We find no error in the record to the prejudice of the defendant. The judgment of the criminal court therefore must be affirmed.

(54 W. Va. 171)

CHEUVRONT v. CHEUVRONT et al.

(Supreme Court of Appeals of West Virginia.
Nov. 21, 1903.)

HUSBAND AND WIFE—CONTRACT FOR SEPARATION—SUIT TO ANNUL—DEPOSITIONS—OBJECTIONS TO CERTIFICATE—REVIEW ON APPEAL—BURDEN OF PROOF.

1. While it is a general rule that, where a party seeks to cancel a contract for fraud in its procurement, the plaintiff must allege and show himself eager, ready, and willing to place the other party to the contract in statu quo, yet, in case of a wife who sues to annul a contract of separation, and settling property rights between her husband and herself, where it is alleged that the execution of the contract was procured from her by false and fraudulent representations of defendant and his agent, falsely representing that it was the purpose of the defendant to live with and support the wife, and the object of the contract to reconcile and restore their marital relations, and it sufficiently appears from said bill that plaintiff is not able to repay the money given her by the defendant to induce her to execute the contract, held not error to overrule the demurrer to the bill.

2. In order to have the advantage in the appellate court of objections to depositions being read in a cause, for want of proper authentication or proper certification by the officer taking the same, the objections to the reading of the depositions must be made in the court below, and the defective authentication or certificate, with the objection, copied into and made part of the record, as provided in section 3, c. 135, Code 1899.

3. In a suit brought by a wife against the husband to set aside and cancel a deed or contract between them for fraud in its procurement, by which contract the husband obtained an advantage over her, the burden of proof is on the husband to show that the wife was fully

informed as to the effects of the transaction, and also the utmost fairness thereof.

(Syllabus by the Court.)

Appeal from Circuit Court, Harrison County; John W. Mason, Judge.

Suit by Elizabeth Cheuvront against Joseph Cheuvront and W. S. Stuart. Decree for plaintiff, and defendants appeal. Affirmed.

W. S. Stuart, for appellants. D. H. Leonard, for appellee.

McWHORTER, P. This is a suit brought by Elizabeth Cheuvront against Joseph Cheuvront, her husband, and W. S. Stuart, trustee, to set aside a deed or contract entered into between them, dated the 30th day of October, 1899, because the same was procured to be signed and executed by her by fraud and misrepresentations. It appears from the allegations of the bill: That said plaintiff and defendant Joseph Cheuvront were married on the 22d day of November, 1897. At the time of their marriage, plaintiff was a widow, having four children at home with her; the youngest being about 12 years of age. Plaintiff was living in Parkersburg, W. Va., carrying on the grocery business, and where she continued to live until the 9th of January, 1898, when she removed to West Union, in Doddridge county, to live with her husband, a part of the time keeping hotel in what was known as the "Grant Hotel," until April, 1898. That defendant treated plaintiff so cruelly that she returned to Parkersburg and rented a house and commenced keeping boarders for the purpose of maintaining herself and children. That the defendant failed to contribute to her support, and she was compelled to support herself and family without any assistance from her husband. That she brought suit against her husband in the circuit court of Doddridge county in October, 1898, for divorce and alimony, charging cruel and inhuman treatment, and charging defendant with being guilty of open and notorious acts of adultery and fornication with numerous females, and praying for money to pay her counsel fees and for alimony pendente lite. That, while she was so conducting her boarding house, W. J. Horner and his wife, Maggie Horner, on the 31st day of October, 1899, came to plaintiff's house with a deed or contract already prepared, and represented to plaintiff that defendant Joseph Cheuvront was very anxious to become reconciled to plaintiff, and that if plaintiff would sign said contract, and agree to dismiss her suit which was then pending in Doddridge county for divorce and alimony, defendant Cheuvront would immediately come to Parkersburg, and would reside with and take care of plaintiff, and would treat her kindly and be a good husband to her. That said Cheuvront was rich, owned a large amount of property, and was well able to support plaintiff, who was wearing her life out at hard work and drudgery in and about

her boarding house, and earning money for the support of herself and her four children, who were living with her. That Horner claimed to be representing her husband as his agent, and offered to pay plaintiff \$400 if she would sign said contract and become reconciled to her husband, Joseph Cheuvront. That at the time plaintiff was sick and nervous, and had a great desire to have a home, and be reconciled and reunited to said Cheuvront, if he would live and cohabit with her, and treat her kindly and be a husband to her, and that, without consulting any one—not even her attorneys in said suit—and without properly understanding the contract, with the assurance that said defendant would immediately go to Parkersburg on the same night, and with a promise that said Horner would at once telephone for him to come, plaintiff accepted the \$400, and signed the contract. That plaintiff afterwards learned that Cheuvront had employed Horner as his agent, and had given him \$750 to pay to the said plaintiff, providing she would sign the contract, and that Cheuvront had no intention of coming to live with plaintiff, but that said contract was gotten up and prepared for the purpose of defrauding the plaintiff out of her marital rights as his wife, and that Horner made said promises for and on behalf of Cheuvront as his agent, which were false, and which he knew to be false at the time, and that Cheuvront had no intention whatever of carrying out said promises. That Horner brought a notary public to plaintiff's house, and had her acknowledge, after signing, said contract. That she would not have signed it, had she understood it, and that she was induced to sign the same through the fraudulent misrepresentations of Horner and his wife, agents of said Cheuvront. That said contract was gotten up with a great deal of skill by an attorney learned in the law, and purporting to be between plaintiff and W. S. Stuart, trustee of said Cheuvront, and was made for the express purpose of defrauding plaintiff out of her rights of support and dower in the large estate of said Cheuvront. That plaintiff had no knowledge of the true intent, effect, and meaning of the said contract, and was much surprised when she ascertained that her husband refused to come to Parkersburg and live with her, and was surprised to find that by said contract she had released defendant from all claim for support or dower in all or any part of his property, which property was carefully described and set up in said contract. That, according to the expectancy of life, her dower rights in said property would be quite valuable. That she had no separate property of her own, and had to rely upon her own labor and exertions to maintain herself and children. That it was represented to her that it was a contract for the purpose of dismissing her said suit for divorce and alimony, and that, as soon as she signed said contract and gave

an order to dismiss the suit, said Cheuvront would come and reside with her, and maintain and support her, and treat her as he should treat a faithful and deserving wife. That, after defendant had so fraudulently procured the dismissal of said suit, he wrote affectionate letters to plaintiff, asking her to meet him at Pennsboro, in the county of Ritchie, where plaintiff did meet him about the 19th or 20th of November, 1899, where they roomed and cohabited together, sleeping in the same bed at a hotel from Saturday until Monday morning, which said Joseph Cheuvront did in furtherance of the fraud so practiced upon her after the contract was obtained from her, and by him placed upon record, for the purpose and with the intention of preventing plaintiff from bringing another suit for divorce and alimony against him. And praying that the contract might be canceled, annulled, and held for naught, and that she be entitled to her marital rights, as though said contract had never been signed by her, and for general relief. The defendants filed their demurrer and separate answers to the bill, denying the material allegations thereof, and especially denying all fraud in the procurement of the contract sought to be set aside. The defendant W. S. Stuart's answer alleged that he was applied to by W. J. Horner, on behalf of plaintiff, for the purpose of settling and compromising the divorce suit mentioned, in Doddridge county, in which respondent was counsel for Joseph Cheuvront; that he brought the matter to the attention of Cheuvront, who consented to such compromise, if it could be done on certain terms and conditions before that time offered to plaintiff through respondent, his attorney, at Parkersburg, and directing respondent to carefully prepare such papers as would be binding between them, and that would forever settle the matters in difference between them, which respondent did to the best of his skill and ability, the original of which contract was filed as an exhibit with the answer of Joseph Cheuvront in this cause; that Cheuvront paid over to Horner for plaintiff the sum of \$750 in respondent's presence, and took Horner's receipt for the same, which receipt was filed as an exhibit with Cheuvront's answer; that respondent says he knew nothing personally about what took place or was said between the plaintiff and Joseph Cheuvront, or between Horner and his wife and the plaintiff, but denied that the deed or contract was prepared for the purpose of taking advantage of the plaintiff, or for the express purpose of defrauding her out of her rights of support and dower in the large estate of Cheuvront, as alleged in the bill, so far as he knew or had any information, and alleged that there was such an antenuptial contract between the plaintiff and defendant as recited in the deed, and denied each and every material allegation in the bill not admitted in the answer to be true.

Depositions were taken and filed in the cause, and the same was heard on the 23d day of May, 1901, upon the bill and exhibits, and upon the demurrer, which was argued and overruled, and upon the exceptions and answers of the defendants, and general replications thereto, and upon the proofs filed by the plaintiff and the defendant, on consideration of which the court was of opinion that the plaintiff was entitled to have the contract or deed of the 30th of October, 1899, and recorded in the clerk's office of the county court of Doddridge county, canceled, annulled, set aside, and held for naught, and so decreed accordingly, and gave decree for costs in favor of plaintiff against the defendant Joseph Cheuvront, and provided that "this decree is without any prejudice or passing on any of the rights of the parties under any other contract, if any such exists." The defendants appealed from said decree, and assigned as errors the overruling of the demurrer of the defendants to the bill of complaint, and not sustaining the said demurrer and dismissing the said bill of complaint, and in canceling and annulling and setting aside the deed of trust or contract dated the 30th day of October, 1899, and decreeing costs against the defendant Cheuvront.

Appellants insist that the old maxim, "That he who seeks equity must first do equity," applies to this case, and that the plaintiff cannot maintain her suit to set aside the contract without placing the appellant in statu quo; that she must allege that she had tendered or was ready to refund to him the \$400 he paid to her at the execution of the contract; and that the failure to allege such tender in her bill, or to make offer of payment thereof, was fatal to the bill, and for that reason the demurrer should have been sustained; and they cite Hogg's Equity Principles, § 60, p. 100, where this principle is laid down, and also cite *Worthington v. Collins*, 39 W. Va. 406, 19 S. E. 527 (Syl., point 1), where it is held, "Where an agreement is rescinded, the general rule is that it must be rescinded entirely, and the parties be placed, as near as may be, in statu quo;" and also *Christian v. Vance*, 41 W. Va. 754, 24 S. E. 596 (Syl., point 1), "A party who seeks to cancel a contract of sale because of mutual mistake must allege and show himself prompt, eager, ready, and willing to place the other party to such contract in statu quo." As a general proposition of law, this is correct. It is the general rule, where the transaction is purely of a commercial nature, or solely applies to property rights, that a party proposing to rescind a contract should place his adversary in statu quo. Appellants also cite Hogg's Equity Procedure, § 904, where the form of bill is given for the cancellation or rescission of a contract on ground of fraud, showing that one of the requirements is to bring into court, for the purpose of having the same delivered to the defendant, the money received by the plaintiff from the defendant,

so as to place him in the position he was in before the contract sought to be rescinded was made. This form of contract, and the cases upon which it is based, are all of the nature of the sale of property, where no other questions are involved than those of money and property rights. This doctrine has been carried so far, and properly, perhaps, that even where the plaintiff is unable to restore that which he had received under the contract, from misfortune or otherwise, a court of equity will refuse to grant him relief; but the contract or deed sought to be canceled in case at bar is of a very different character. It is a contract made between parties sustaining the most sacred and confidential relations to each other known to our civilization. It sufficiently appears from the bill that the plaintiff was unable to restore to the defendant the \$400 received by her upon the execution of the contract. The relations of the parties were such that it was the duty of the defendant to assist the plaintiff, and it clearly appears that he was amply able to perform his whole duty in that regard, and to require the plaintiff to return to the defendant the \$400, before she could be heard upon her complaint to set aside the alleged fraudulent contract, would be simply a denial of justice to her. In treating of this class of cases, Mr. Story, in his first volume on Equity Jurisprudence, § 218, says: "But by far the most comprehensive class of cases of undue concealment arises from some peculiar relation or fiduciary character between the parties. Among this class of cases are to be found those which arise from the relation of * * * husband and wife. * * * In these and the like cases, the law, in order to prevent undue advantage from the unlimited confidence, affection, or sense of duty which the relation naturally creates, requires the utmost degree of good faith (*uberrima fides*) in all transactions between the parties. If there is any misrepresentation or any concealment of a material fact, or any just suspicion of artifice or undue influence, courts of equity will interpose, and pronounce the transaction void, and, as far as possible, restore the parties to their original rights." Also, in section 307, Mr. Story, in speaking of constructive frauds which arise from some peculiar confidence or fiduciary relation between the parties, says: "In this class of cases there is often to be found some intermixture of deceit, imposition, overreaching, unconscionable advantage, or other mark of direct and positive fraud. But the principle on which courts of equity act in regard thereto stands independent of any such ingredients, upon a motive of general public policy; and it is designed in some degree as a protection to the parties against the effects of overweening confidence and self-delusion, and the infirmities of hasty and precipitate judgment. Courts will therefore often interfere in such cases, where but for such a peculiar relation they would either abstain wholly

from granting relief, or would grant it in a very modified and abstemious manner." See, also, 2 Pom. Eq. Jur. §§ 955, 956, in the latter of which sections it is said: "Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed." In *Darlington's Appeal*, 86 Pa. St. 512, the rule was applied to a deed made by a married woman shortly after marriage whereby she conveyed her real estate to her husband. It was held: "That a confidential relation exists between man and wife; that, where there are transactions between them, courts will apply the same rules which govern dealings between attorney and client, principal and agent, guardian and ward, trustee and cestui que trust, and will require, when the husband claims the benefit arising from any such dealings, that it be shown affirmatively that he acted in perfect good faith, and took no advantage of his influence or knowledge, and that whatever contracts he made were fair, adequate, and equitable. If no such proof is established, courts of equity will avoid the contracts on the ground of constructive fraud." The court did not err in overruling the demurrer.

Appellants contend that the depositions filed on behalf of the appellee, commencing on page 65 and ending on page 121 of the record, were improperly made a part of the record because of certain irregularities mentioned, and that the same were not properly authenticated; that "the certificate thereto appended is an essential part of it, and must be made by the officer who took the depositions." And they cite in support of this exception *Hogg's Eq. Pr.* 567, § 490, and chapter 130, § 33, of the Code of 1899. It does not appear that any exceptions were taken in the court below to the reading of the depositions on account of the irregularities mentioned, and the objection cannot be raised for the first time in the appellate court. Section 6, c. 135, Code 1899, giving directions how records shall be made up in chancery causes appealed to the Supreme Court of Appeals, provides that "notices to take depositions, the captions of such depositions, and certificates of their having been sworn to, except so far as may be necessary to the decision of the exceptions taken to the reading of the exceptions," shall not be copied into the record.

The assignment that the court erred in canceling and annulling and setting aside the said deed of trust or contract dated October 30, 1899, and decreeing costs against the defendant Cheuvront. The action of the court in thus ruling is based upon the proofs going

to the merits of the case. Plaintiff testified that Horner and his wife came to her with some papers, and requested her to sign them, with the assurance that the defendant Cheuvront would come to Parkersburg and live with her, and take her out of the boarding house, and maintain her; that Horner had some money in his hand; that they made her believe that Cheuvront wanted to come and live with her, and said he wanted to have the suit dismissed before he came to her; that Horner said that Scott Stuart and Charles Cheuvront were always dunning him for money, and he wanted to get away from them and come to Parkersburg, where he would be free from these two parties; that Scott Stuart was building a new house, and always wanted money from him, and Charles Cheuvront always wanted money from him; that Horner had a paper that he said he had made out himself; nobody knew anything about it but he and Mr. Cheuvront. Mr. Horner went out "and came back with the notary public, and they talked on to me, and persuaded me to sign that certain paper; said it did not amount to anything. I did not read it, and did not know anything it contained. Mr. Horner pretended to read it, but I don't think he read more than two or three pages, and read so low I did not hear it." And she states that she did not know the contents of the paper until about the 1st of December; that she signed the paper, and Horner gave her \$400. She states that she did not know that Cheuvront had given Horner \$750 to give to her until she met defendant at Pennsboro about the 19th or 20th of November, when defendant told her what he had given him. James H. Leonard, the notary public who took the acknowledgment of Mrs. Cheuvront to said contract, says that on the 31st of October, 1899, Horner told him he wanted him to take an acknowledgment. He asked where the party and papers were, and he said they were not ready for some time yet. Witness was just about to eat his supper, which he did, and came back down, when Horner said he would go after the party, when witness said he had an engagement at his office at 7 o'clock, and did not know how long it would take him to get through. That Mrs. Horner spoke up and said, "I will give you more than you can make," and laughed; and she said, "I will give you \$5 if you will take the acknowledgment." That witness went down, and came back a little before 8 o'clock, and met Mr. Horner. They went down to Mrs. Cheuvront's, and went into the parlor. Mr. Horner and Mrs. Horner were there, and Horner introduced him, saying he was an attorney. Witness said he was not an attorney, but a notary public. That Horner had been telling him something about the case, but mentioned no names; calling them a woman and an old man who were separated, and they were trying to get them back together. He says, "Here's the paper," and handed it to me and

says, "You read it over, and see if you think it is doing her any harm to sign it." Witness says he read it over, and told her he was not an attorney, but, from what they said they were after (to get them back together), he thought it was the best thing to do (to get them together), "not to fight divorce cases as there was no pay in it." "She did not know whether to sign it or not, and Mr. Horner introduced the subject, and commenced laughing, and said the last words the old man said was, if it was fixed up, he would come in right away to live with her, and made some remark about getting peace, or something like that, and everybody laughed; and she said she did not know whether to sign it or not. I took my hat and says: 'Well, use your own judgment about signing it. I says I am here to take the acknowledgment if you want to sign it.' And she said: 'Mr. Horner, do you think he will be here?' And he says: 'Yes; as soon as you sign the paper I will go right down and telephone, and he will come in on the first train.' She signed the paper after a little discussion. Horner asked me what my fees were, and I said, 'What you promised me, \$5,' and they handed it to me, and that was all that occurred at that time." Witness was asked what, if anything, was said by Horner and Mrs. Cheuvront about Joseph Cheuvront coming in to live with her. He answered that Horner had some papers, which he held up and showed to her, claiming that her lawyers had been false to her, and had not been fair with her, and that it was worrying the old man, and that he would have been in long before but for her lawyers, and that he had been crying around in the store and calling her his lovey love, and that he had got tired of it, and wanted to get them fixed up, and that he would come, and had promised to come in as soon as the papers were signed. That she asked Horner if he was coming in to live with her, and he said "Uncle Joe" had been telling all along about his troubles, and that he was coming in to live with her. That several weeks afterwards witness saw Joseph Cheuvront at the train, which was about a half hour late that evening. He said as soon as he got things fixed up he would come in. "And he commenced crying, and said for me not to believe all that Bill Horner said; that he was always talking; that he had always been true to Mrs. Cheuvront; that he had heard reports, but didn't believe them; and Horner came up then and commenced running down some lawyers out there that Mrs. Cheuvront had employed, and commenced telling him about the time they would have Christmas and during holidays; that he would be here at the time, or something to that effect."

It was proved by John F. Laird, prosecuting attorney of Wood county: That Horner procured himself and his wife to be summoned before the grand jury of Wood county in January, 1900, and by J. M. Thayer that Hor-

ner sent him to Mrs. Cheuvront's to tell her that he and his wife were summoned before the grand jury, and, if she did not withdraw some suit at once between her and some man (he believes he was Mr. Cheuvront), that he would have to indict her; if she would withdraw the suit, he would not go before the grand jury to indict her. That he had the summonses with him, and left them with Mrs. Cheuvront. These were the summonses served on Horner and his wife to appear before the grand jury, and filed with plaintiff's depositions. Witness stated that he was in the employ of Horner at the time, and that Horner sent her word by him that he would indict her unless she dismissed that suit; that Horner gave him the copy of the subpoena for himself and his wife, and said, "Maybe she won't believe you, and think we are working up a scheme." Says Horner told him he got \$500 for making a compromise that was made between them, and that Joseph Cheuvront paid it to him. Plaintiff filed with her own depositions a copy of the original receipt, as follows: "Received of Joseph Cheuvront, by the hands of W. S. Stuart, the sum of Seven Hundred and Fifty Dollars, (\$750.00) to be used by me in a compromise between said Joseph Cheuvront, and to be paid to Mrs. Elizabeth Cheuvront in case she signs a certain deed, prepared by the said Stuart, which sum I guarantee to be returned to the said Cheuvront in case same should be lost or any accident to same, if not paid to the said Elizabeth Cheuvront, upon said compromise upon her executing said deed. This October 31st, 1899. W. J. Horner." Which copy of receipt she received inclosed in a letter from her husband dated December 1st. Much of the correspondence between the parties before and after the making of said contract of October 30, 1899, is filed as exhibits with depositions. Nearly all of said letters contain expressions of affection and love for each other. On the 22d day of November, 1899, about the next day after they parted at Pennsboro, defendant wrote quite a lengthy letter, closing by saying that he never ate an apple but he thought of her, and how they enjoyed themselves together at Pennsboro; that it was almost a heaven on earth for him to be with her, and to get along so pleasantly together; that he wanted no other company while there "but you and you only my dear wife I wish I could see you this evening but cannot, so good bye, God bless and pray for me that we may call to die be fully prepared to meet one another. I ever remain your husband affectionately, J. C." All of defendant's letters to the plaintiff, until the last one or two, in December, were calculated to inspire the plaintiff with the hope that defendant would be reconciled to her, and that they would again be reunited; and all her letters to him that are filed with his depositions indicate that she thought they were to again live together. He files one letter from plaintiff

to himself, dated November 26, 1899, nearly a month after the contract was made, addressed, "My dear Husband," and closing with: "Your last letter was so nice, it was so comforting for me to be called your dear wife, it makes me feel like I was in heaven to be loved again by the only one I love on earth. * * * I will not worry you by writing any more now. I hope you will come to see me soon, 'papa.' Your affectionate wife, L. C."

The depositions giving the conversations between Horner et al. in the absence of the defendant in getting the paper signed are objected to because of the absence of the defendant, but the evidence strongly tends to establish the fact that Horner was the agent of the defendant in making the compromise and procuring the execution of the deed or contract by the plaintiff, and the court was warranted in so holding. A very strong element of proof that plaintiff did not know, as positively stated by her in her testimony, the contents of the paper which she signed, was the fact that she accepted the \$400, and said nothing about the \$750, when, if she had read or examined the contract, as it was claimed she did, she must have known that she was getting but little over half of the amount for which she was acknowledging receipt. In *Way v. Life Ins. Co.*, 89 S. E. 742 (Syl., point 1), the Supreme Court of South Carolina holds: "Where a husband entered into a contract with his wife by which he or his estate obtained an advantage over her, the burden of proof is on the husband, or the representatives of the husband, to show that the wife was fully informed as to the effects of the transaction, and also the utmost fairness therein."

The question on the merits of the case resting, as it does, wholly upon the evidence, and the circuit court having found that the allegations of the bill were sustained by the proofs, and the evidence appearing sufficient to warrant the decree, the same will not be disturbed, and the decree must be affirmed.

(54 W. Va. 210)

FOREST COAL CO. et al. v. DOOLITTLE,
Judge, et al.

(Supreme Court of Appeals of West Virginia.
Nov. 28, 1908.)

**PROHIBITION—DISQUALIFICATION OF JUDGE—
INTEREST—JUDGMENT—APPLICATION FOR
WRIT—DISMISSAL OF CAUSE—AUTHORITY OF
ATTORNEY.**

1. The writ of prohibition lies to restrain a judge from proceeding in a cause in which he is disqualified by reason of interest in the subject-matter thereof, although the court over which he presides has jurisdiction of the cause.

2. Where a judge of an inferior court, who is disqualified by reason of interest, is permitted to proceed to final judgment or decree, his interest is ground of error, for which reversal may be had in the appellate court, and renders the judgment or decree voidable; but he may be restrained, before judgment or final decree, at any stage of the case, by the writ of prohibition, and his disqualification may be made to

appear upon the motion for the writ, without its having been first pleaded in the court below, passed upon adversely there, and then established in the Supreme Court on appeal or writ of error.

3. In order to disqualify, the interest of the judge must be in the subject-matter of the cause, and not merely in a legal question involved in it.

4. In determining whether such disqualification exists, the superior court will ascertain what rights and interests are involved in the case, and may be subjects of adjudication therein; and, if it be found that the judge has such interest as renders it impossible for him to adjudicate upon all the rights involved, without affecting his own, the writ will be awarded, without inquiry as to whether the parties will or will not call for an adjudication upon the particular matter as to which the disqualification exists.

5. An order dismissing the cause, or part of a cause, in which a judge is so interested as to disqualify him in respect thereto, entered or allowed by him, on motion of the parties by counsel, without special authority given to said counsel for that purpose, is voidable; and the party having the right to prosecute the cause so dismissed, in whole or in part, is entitled to an adjudication in the same cause by a qualified judge upon the question of his right to have the cause, or so much thereof as has been so dismissed, reinstated under section 11 of chapter 127 of the Code of 1899.

6. The general authority of an attorney does not include power to voluntarily enter or cause to be entered an order that perpetually bars the right of his client, such as a retraxit. Such act can be done only by the party in person, or by his attorney in pursuance of special authority conferred upon him for the purpose.

7. The judge of a court obtains a disqualifying interest by taking a lease, together with other persons, upon part of a tract of land against which a suit instituted by the state for the sale thereof as school land, and petitions filed by a claimant of the title of the land for the redemption thereof, are pending; and his disqualification is not removed by the dismissal, as to the part on which the lease is, of the bill and amended bills, upon the motion of counsel for the state, founded solely upon his admission that such part of the tract is not subject to sale, and the dismissal of the claimant's petition and amended petition upon his motion, by counsel, founded upon a written renunciation and disclaimer signed by his counsel.

(Syllabus by the Court.)

Action by the Forest Coal Company and others for writ of prohibition to Edward S. Doolittle, Judge of the circuit court, and others. Writ awarded.

Campbell, Holt & Duncan, Brown, Jackson & Knight, Lyon, Sheppard & Goodykoontz, Hubbard & Hubbard, and Vinson & Thompson, for petitioners. M. S. Stiles and Mollohan, McClintic & Mathews, for respondents.

POFFENBARGER, J. A writ of prohibition has been applied for by the Forest Coal Company and others to prevent the Honorable Edward S. Doolittle, judge of the circuit court of Cabell county, from sitting further in a chancery cause pending in said court, on the ground that he is disqualified as to that

¶ 6. See Attorney and Client, vol. 5, Cent. Dig. § 163.

case by reason of his interest in the subject-matter thereof. This raises two questions, the first of which is whether, if such disqualification exists, the writ lies; and the other, whether the judge has any disqualifying interest.

The authorities almost uniformly hold that when a judge of an inferior court is recused before judgment in a case in which he has an interest, such as disqualifies him, and a prohibition is applied for to restrain him from further sitting in the cause, it will be granted, if, upon the application therefor, it appears that he is disqualified. "Prohibition is the proper remedy to prevent action by a judge who is disqualified by interest or otherwise." *Works on Courts and their Jurisdiction*, 638. "A writ of prohibition will lie to restrain a judge from proceeding in an action in which he is disqualified by reason of interest, although the court over which he presides may have jurisdiction of the cause." 23 Am. & Eng. Enc. Law (2d Ed.) 223. The following cases, fully supporting the text, are cited: *Gravel Mining Co. v. Keyser*, 58 Cal. 315; *Gravel Mining Co. v. Keyser*, 58 Cal. 328; *Milton Mining Co. v. Keyser*, 58 Cal. 328; *South Feather Co. v. Keyser*, 58 Cal. 329; *Blue Tent Co. v. Keyser*, 58 Cal. 329; *People v. District Court*, 26 Colo. 226, 56 Pac. 1115; *State v. Wear*, 129 Mo. 619, 31 S. W. 608; *State v. Board of Education*, 19 Wash. 8, 52 Pac. 317, 40 L. R. A. 317, 67 Am. St. Rep. 706.

These cases were decided in states in which statutes had been passed prohibiting judges from sitting in causes in which they are interested. Where such statutes exist, judgments rendered by interested judges are generally held to be void. Where the disqualification is not statutory, but rests upon the common law, such judgments are voidable only. *Findley v. Smith*, 42 W. Va. 299, 26 S. E. 370; *Black on Judgments*, §§ 174, 266; *Cooley's Const. Lim.* 509; *State v. Castleberry*, 23 Ala. 85; *Heydenfeldt v. Towns*, 27 Ala. 423; *Dimes v. Canal Co.*, 3 H. L. 759.

It was strongly insisted for the respondents upon the argument that as in this state there is no statute prohibiting a judge from sitting in a case in which he is interested, and a judgment rendered in such case is voidable only, there is no want of jurisdiction, in consequence of which prohibition does not lie. There is jurisdiction in the court. The want of power is in the judge only. It is personal to him. His interest is a collateral matter which arises in the cause over which the court has full jurisdiction, and renders the judge powerless to further act. This argument is answered by the judges of the English courts in their reply to questions propounded by the House of Lords in *Dimes v. Canal Co.*, 3 H. L. 759, 784, in which they said a judgment or decree rendered by an interested judge or chancellor was voidable only, for reasons of public policy, but that the writ of prohibition did lie,

nevertheless, to the judge of an inferior court, to prevent him from sitting in the case. As to the character of the judgment, and reason for holding it not void, they said: "It would create great confusion and inconvenience if it was. The objection might be one of which the parties acting under these orders might be totally ignorant till the moment of the trial of an action of trespass for the act done." As to the use of the writ of prohibition in such cases, they said: "If this had been a proceeding in an inferior court—one to which a prohibition might go from a court in Westminster Hall—such a prohibition would be granted, pending the proceedings, upon an allegation that the presiding judge of the court was interested in the suit. * * * If no prohibition should be applied for, * * * the proper mode of taking the objection to the interest of the judge would be, in courts of common law, by bringing a writ of error, for error in fact, and assigning that interest as cause of error. The former course was stated to be proper in the case of *Brookes v. Earl of Rivers*, it being suggested that the Earl of Derby, who was chamberlain of Chester, had an interest in the suit; and the court held that, where the judge had an interest, neither he nor his deputy can determine a cause or sit in court, and, if he does, a prohibition lies." "A suit was surmised to be before the Lord President of the Marches, for an office, between the grantee of the Lord President and a stranger, wherein the only question would be whether the grant of that office belonged to the Lord President. And because in this case he would be as it were both judge and party, a prohibition was granted." 8 Bac. Abr. 231.

To the authorities just cited, it might be objected that the expressions of opinion as to the applicability of the writ of prohibition in such case are obiter dicta, for the reason that, in the case quoted from, it was conceded not applicable, because the decisions then under consideration had been made by the Lord Chancellor and the Vice Chancellor, against whom the writ cannot go because the court over which they preside is of equal dignity with the superior courts of law. In *Brookes v. Earl of Rivers*, Hardress, 503, the writ was refused because it was found that the Earl of Derby was not disqualified; and it was not absolutely necessary to say the writ would have been awarded, had it been otherwise. However, these opinions were delivered by judges of the highest courts of that country from which we have inherited the common law, and they may well be supposed to have been thoroughly familiar with its principles and the practice under it. A quotation from Bacon's Abridgment has been given, in which a precedent is cited. In *Gravel Mining Co. v. Keyser*, 58 Cal. 315, 326, Sharpstein, J., does not base authority to grant the writ upon the character of the judgment. He said: "And it

may be—although the decisions are conflicting upon the question—that the judgment, if one should be entered in the action, would not be void by reason of the disqualification of the judge to sit in it. All agree that it would be voidable, at least. But if the judge is interested in the action, he has no right to sit or act in it. * * * His sitting or acting in an action in which the law declares he shall not sit or act would seem to be without jurisdiction. * * * Now, a judge who is interested in an action not only has no authority to hear and determine it, but he is expressly prohibited from doing so. * * * The bare fact of a judge sitting in an action in which he is interested is sufficient ground for the reversal of any judgment or order that he may make in that cause. That would seem to indicate that a judge so interested would act without or in excess of his jurisdiction.” That it is an act in excess of jurisdiction clearly appears if we suppose a case in which a judge has rendered judgment in a case in which he was interested, and his decision is in absolute conformity with the law, and, if rendered by a disinterested judge, could not possibly be reversed. Yet, because of the interest of the judge who rendered it, that judgment would have to be reversed. For what would it be reversed? Not because it is not such a judgment as the law pronounces upon the case made by the pleadings in the evidence, but simply because the judge was interested. Is it not perfectly clear that the only reason for reversing in such a case is want of power in the judge to act? Want of judicial power is want of jurisdiction. There is no reason for any distinction between the cases in which a statute declares that an interested judge shall not sit, and those in which he is inhibited by the common law from sitting. A statute is of no higher dignity nor any more efficacious than the common law, and no statute has more emphatically and unequivocally negated the power of a judge to sit in his own cause than does the maxim of the common law, “*Nemo debet esse judex in propria causa.*” Such was its force that Lord Coke said even an act of Parliament could not vest power in a man to sit as judge in his own cause, “for, when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such an act to be void.” *Bonham's Case*, 8 Co. 114, 118. *Cooley's Constitutional Limitations*, speaking of legislative power to do away with this principle of natural justice, says: “To empower one party to a controversy to decide it for himself is not within the legislative authority, because it is not the establishment of any rule of action or decision, but is a placing of the other party, so far as that controversy is concerned, out of the protection of the law.” So reprehensible, in the opinion of the sages of the law, was the act of a judge

sitting in his own cause, that in early cases attachments went against him, and imprisonment was inflicted upon him. *Anon.*, *Salk*, 396; *Wright v. Crump*, *Ld. Ryd.* 768.

Before entering upon the next inquiry, namely, whether Judge Doolittle has a disqualifying interest in the subject-matter of the cause, it is due to him to say that no member of this court doubts that he sincerely believes himself to be disinterested and qualified to sit in the case. He says in his answer “that he has no interest in the subject-matter of said suit, or in the success or failure of any contention therein; that, while the labor and responsibilities incident to the hearing and determination of the many questions that have arisen and that will arise therein from time to time are such as a judge might well wish to be relieved from, they pertain, just as in other cases, to the judicial duties that respondent assumed with his assumption of office, and which he is not permitted to evade or transfer to another from personal wish, nor upon the wish of a party, except for legally sufficient cause.” It is merely a question of the application of the law on the subject of disqualifying interest to the peculiar and complicated situation of the case, and the conclusion of this court, whatever it may be, will not carry with it any reflection upon the honor of Judge Doolittle, nor in the slightest degree impugn the motives which have impelled him to decline to absent himself from the bench during the further progress of the case in which it is claimed he has no right to sit. Whether a judge has such an interest as disqualifies him is sometimes a question of much nicety and great intricacy. In some instances they have been compelled to sit where they believed themselves to be disqualified and had refused to act. In others, they have been prohibited from acting in cases in which they believed themselves qualified.

In 1894 the state of West Virginia instituted a suit in chancery in the circuit court of Wyoming county against Henry O. King and others for the purpose of subjecting to sale for the benefit of the school fund so much of a tract of 500,000 acres of land, patented in 1795 to Robert Morris, and now claimed by said King, as lies in the state of West Virginia. The portion sought to be subjected is supposed to contain about 327,000 acres. In 1896 King appeared in said cause, and filed his petition and answer, alleging that he was the owner in fee of the tract, denying that the same or any part thereof had become forfeited for nonentry or nonpayment of taxes, and prayed that, in the event it should be held to have been forfeited, he might be permitted to redeem the same. Such further proceedings were had that on the 30th day of September, 1897, a decree was entered permitting a redemption, from which an appeal was taken, and the decree was reversed and the cause remanded.

See *State v. King*, 47 W. Va. 437, 35 S. E. 30, where much of the history of the case will be found. The decree thus reversed permitted the redemption of 10,000 acres on the payment of \$3,090.08, but the 10,000 acres was not identified or located by any description. It was supposed to be all the land within the whole tract that was not claimed by any person other than King. It authorized King to select and locate the land thus redeemed at any place or places within the whole survey where he could do so without conflicting with the rights of other claimants. After the cause was remanded, the state filed a fifth amended bill, making some 400 claimants under junior patents and otherwise new parties, and the cause was removed to the circuit court of Logan county, and still later to the circuit court of Cabell county. After the removal of the cause to Cabell county, King filed an amended petition, particularly describing several portions of the Morris grant, upon which he offered to pay the taxes and interest; excluding from said grant some five or six hundred junior patents within its bounds, as to which he asked to be relieved from payment of taxes thereon. Thereupon a decree was prepared and entered, over the objection of counsel for King, finding and adjudicating "that the state of West Virginia has no title or estate in or to or right to sell said tracts, pieces, or parcels of land, or either of them, saving such, if any, as may have been forfeited by reason of failure to enter the same on the landbooks, or for nonpayment of taxes thereon by the present owners or the former owners thereof, being the grantees above named of the said tracts, pieces, or parcels of land, or those claiming under them." Thus a number of tracts claimed by persons as against King went out of the case. Some of the claimants under junior patents within the Morris grant filed answers, claiming parts of the land, and contesting King's right to redeem the same; and there was a reference to a commissioner to report as to the title of the parties, including the new parties, and as to the boundary of the Robert Morris patent, and other matters necessary to a decision of the issues raised. On the 31st day of March, 1903, the commissioner returned his report, to which numerous exceptions to the findings of the commissioner on the question of boundary lines and other matters were taken by the defendants, who were contesting the title of King and denying his right to redeem, but the report was not then filed. At the time this report was returned, the matter of the alleged disqualification of the judge came up, and is grounded upon the following additional facts: On the 28th day of February, 1903, Judge Doolittle, John Dingess, and S. C. Fisher took a coal lease for 30 years on about 800 acres of land admittedly located within the boundaries of the Morris grant as claimed by King in his petition, and known as the "Moses

Mounts Land." In his answer the judge says the question whether this land was affected by the King claim was raised, and he was assured by John B. Wilkinson, who represented Mounts, that King had no claim to it, and that whatever claim he had had to that land he had conveyed to Harvey, Miller, and Nighbert, and that the title of Mounts was perfect by long possession and payment of taxes. It seems to be admitted that on the 30th day of March, 1903, one of the counsel for parties contesting King's claim privately expressed to the judge his opinion that he was sufficiently interested to disqualify him, and requested him not to sit further in the case. On the following day, when the commissioner's report was brought in, the judge stated the facts from the bench relating to his alleged interest, and expressed the opinion that he was not disqualified. Then counsel representing the junior patent claimants insisted that he was disqualified, indicating the reasons therefor; and he announced that he would take the matter under advisement until the following Monday, April 6th, at which time he would announce his conclusion. On Saturday, April 4th, on the motion of King, by his counsel, and the motion of John S. Marcum, counsel representing the state in said suit, the petition and amended petitions of King and the bill and amended bills of the state were all dismissed as to the lands upon which said lease had been taken; the order of dismissal specifying by bounds a tract of land including all of said Mounts land. On the 6th day of April, 1903, the commissioner's report and exceptions thereto were filed, and the contesting defendants, as the junior patent claimants are called, tendered and filed a motion, in writing, alleging the disqualification of the judge, accompanied by the affidavit of L. B. Baugh, showing that the land upon which the lease had been taken was within the Morris grant, as claimed by King, and requesting that the judge vacate the bench, and permit the election of a special judge to try the case, or call in for that purpose a regularly elected judge from some other circuit, or remove the cause for trial into the circuit court of some county outside of his circuit. Upon this motion, time was allowed until the 11th day of April for counter affidavits to be filed by King. On said last-mentioned day the affidavit of M. F. Stiles, counsel for King, was filed in resistance of the motion; stating that the opinion given by Wilkinson to the judge at the time the lease was taken was correct, but admitting that at that time a portion of the Mounts lands was still included in King's amended petition, and had not been excluded therefrom, but that King did not claim any portion of it, and had compromised his claim thereto with Harvey, Miller, Altizer, and Nighbert, and executed to them a deed therefor. This affidavit further showed that, when Harvey and his associates took said

deed from King, they expressed a purpose not to set up any claim of title thereunder as against persons other than King, nor ask to be permitted to redeem any land under said deed, but that the purpose was merely to strengthen their own title, and that the disclaimer and renunciation filed by King on April 4th was filed "as an act of simple justice to said judge, * * * in order that the record might conform to, and not belle, the facts." After the filing of this affidavit, and argument of counsel, the motion was overruled, and the cause was set down for argument upon the exceptions to the report of the commissioner on the 21st day of April, 1903. It is charged in the petition and admitted in the answer that, when the motion came on to be heard on April 11th, Clement H. Hudson presented a petition on behalf of J. W. Hinchman, commissioner of school lands, praying that the decree of April 4th dismissing the bill and amended bills as to the lands therein mentioned be vacated. This petition was accompanied by a letter from Hinchman to Hudson authorizing the latter to have said order set aside and the cause reinstated as to said land, and proceeded with to final decree. Marcum, who had formerly been employed and authorized to represent the state in the cause, objected to the filing of the petition which he charged had been procured and prepared by counsel for the contesting defendants; and the judge says in his answer, "And this respondent, considering said petition improper and an impertinence, and said Hinchman not being a party to said suit, except in his private character as a defendant named in said fifth amended bill, refused to take any notice of the same by action thereon." The report of the commissioner on the question of the boundaries of the Morris survey was favorable to King, except that it so restricted the lines as to leave out on one side of the tract, as claimed by King, a considerable section of land, within which the Mounts lands lie. Confirmation of that report would exclude from the King survey the lands upon which the lease was taken. If the exceptions to that report should be sustained, and the whole matter of boundaries recommended to the same or another commissioner, the findings might include the lands upon which the lease was taken. Hence it is said the judge has a direct interest in land which is involved in the suit. King, however, has not excepted to the report, and, so far, claims nothing beyond the line located by the commissioner. At the time the lease was taken, parts of these lands were included in the claim of the state. For the respondents it is contended that the disclaimer and dismissal of April 4th have eliminated the Mounts lands from this case, even if it be true that the taking of the lease made the judge an interested party at the time it was taken, and that his disqualification has been removed by the dismissal. In

reply to this contention, it is urged that the dismissal is not binding upon either the state or King; that, in order to bind, it would have to be equivalent to a retraxit; and that a retraxit must be made by the parties in person, and not by counsel.

In endeavoring to ascertain whether there is a disqualifying interest on the part of the judge, it is necessary to consider the statutory regulations under which said suit is prosecuted, prescribing the duties and powers of the court and the commissioner of school lands, and determining the scope and nature of such suit. The commissioner of school lands is appointed by the circuit court, and he is the agent of the state, empowered to see that every officer having any duty to perform under chapter 105 of the Code of 1899 performs the same as therein required, and to report any failure of any such officer to the circuit court of his county. Once in each year he is to report to the circuit court a list of all tracts and parcels of land reported by the auditor and surveyor as forfeited or waste and unappropriated lands, which report has to be recorded in the chancery order book and preserved, and thereupon a suit or suits in chancery shall be commenced and prosecuted by and in the name of the state of West Virginia for the sale of every such tract and parcel of land so reported, to which the former owner, or the person in whose name it is forfeited, shall, if known, be made a defendant, together with all persons claiming title to or interest in such lands, and all persons claiming any such interest who are not made parties may come in by petition. If at any time during the pendency of such suit it shall appear to the court that any part of any tract has been sold by the state in any proceeding for the sale of school lands, and the taxes regularly paid thereon since such sale, or is held by any person under section 3 of article 13 of the Constitution of the state, the bill, as to such part, shall be dismissed, and the suit proceeded with to a final decree as to the remainder. "In every such suit brought under the provisions of this chapter, the court shall have full jurisdiction, power and authority to hear, try and determine all questions of title, possession and boundary which may arise therein, as well as any and all conflicting claims whatever to the real estate in question arising therein; and the court, in its discretion, may at any time, regardless of the evidence, if any, already taken therein, direct an issue to be made up and tried at its bar as to any question, matter or thing arising therein, which, in the opinion of the court, is proper to be tried by a jury. And every such issue shall be proceeded in, and the trial shall be governed by the law and practice applicable to the trial of an issue out of chancery; and the court may grant new trials therein as in other cases tried by a jury." Code 1899, c. 105, § 18. The former owner, his heirs, devisees, or assigns, may at

any time during the pendency of the suit file his petition, stating in full his title, accompanied by the evidence thereof, and praying to be allowed to redeem so much of the real estate as to which the title remains in the state; and upon full and satisfactory proof that, at the time the title to said land vested in the state, he had a good and valid title thereto, legal or equitable, superior to that of any other claimant thereof, the court may, by a proper decree, permit the petitioner, upon the payment into court or to the commissioner of school lands of the costs, taxes, and interest properly chargeable thereon, to be fixed by the court in its decree, to redeem the real estate mentioned in his petition. But such petitioner shall acquire no other title to the lands so redeemed than was vested in him immediately before such forfeiture, and such redemption shall in no wise affect or impair any title or interest any other person may have in said real estate, or any part thereof, by purchase from the state, or under and by virtue of section 8 of article 13 of the Constitution. "Every final decree entered in any such suit shall be a bar to the claim of every person to the real estate, or any part of it or any lien thereon, or to the proceeds thereof, who has failed to appear and present his claim thereto as is provided in the sixth section of this chapter, except as to the excess of the proceeds of the sale thereof, as provided in section sixteen of this chapter. And except as provided by the last clause of section seventeen of this chapter." Code 1899, c. 105, § 20.

Obviously, these statutory provisions contemplate a proceeding against the land as to which the bill is filed, adverse to every claimant thereof. Here the King title to so much of the 500,000-acre tract as lies in this state is asserted by the state of West Virginia, not only as against King, but as to all other persons claiming either under or against him. The suit proceeds upon the theory of a forfeiture of the title, by whomsoever formerly held, for nonentry of the land for taxation, or nonpayment of the taxes thereon, if entered for such purposes. Neither King nor any other person can be permitted to redeem, except by pleading sufficiently that he had at the time of the forfeiture a title to the land superior to that of any other person, and had adduced full proof of such title. Whoever comes and makes such a showing will be permitted to redeem by payment of all the taxes, interest, and costs. If no person can establish such title, then the whole proceeds of the land go into the state treasury. It is immaterial to the state whether King or some other person can make out such title, but, if no person can, the state is benefited. Hence it has an interest in upholding its claim for taxes and making good the forfeiture against the whole world.

The statute contemplates two classes of persons as to whom there may be a dismissal. They are persons holding the lands by

purchase in a former proceeding for the sale of school lands, and persons having title under section 8 of article 13 of the Constitution, but there shall be no dismissal as to them unless it appear to the court that they have such title. When such suit is prosecuted to final decree, the statute expressly declares that the final decree shall be a bar to the claim of every person as to the land, or any part of it, or the proceeds thereof, except that the former owner, upon proof of title at the time of forfeiture, may have the excess of the proceeds, after payment of taxes, interest, and costs, and that a person having title by purchase in a former proceeding for the sale of school lands and persons having title under section 8 of article 13 of the Constitution shall be protected.

It is clear, therefore, that the lands upon which the lease was taken were originally involved in the suit of State v. King and others, and that a portion thereof was not excluded from said suit until after the lease was taken. The dismissal of the bill and amended bills upon the motion of counsel for the state, and admission of said counsel that this land was not subject to sale, and the dismissal of King's petition and amended petition upon his motion and renunciation of title, put the leased lands out of this suit. As has been shown, the decree of April 4th is not void, but voidable. In the matter disposed of by that decree, the judge was undoubtedly and concededly interested. It is said that it was a decree entered by consent of parties, and went as a matter of course. This may do as to King, but it does not bind the state. There is no authority for a dismissal as to the state, except that given by the statute, and it only authorizes such dismissal when it appears to the court that the land has been sold by the state in another proceeding for the sale of school lands, or is held by some person under section 8 of article 13 of the Constitution. The mere admission of the attorney for the state that such land is not subject to sale does not amount to proof of the facts upon which a dismissal may be ordered.

As to the motion made by counsel of the state and by counsel for King, it is to be observed that the dismissal based thereon does not bar either King or the state. If it be viewed in the light of the law governing disclaimers, it is not sufficient to bar, for a disclaimer is in the nature of a release, and must be the act of the party himself. The authority of the attorney does not extend to the making of releases. 6 Enc. Pl. & Pr. 724; 1 Dan. Ch. Pr. 708; *Dickerson v. Hodges*, 43 N. J. Eq. 47, 10 Atl. 111. In order to be binding, it must be either a disclaimer or a retraxit, and neither can be made by an attorney without special authority therefor. A retraxit must be the act of the party himself. 18 Enc. Pl. & Pr. 898. "It is improper to enter a retraxit, or a judgment in the nature of a retraxit, and having the effect of

a judgment upon the merits, without the personal consent of the plaintiff in the action. Such is the rule of the English common law, and, in the absence of statute, such is the rule in this country." *Hallack v. Loft*, 19 Colo. 74, 81, 34 Pac. 568, 570. "In the progress and until the consummation of the judgment, the attorney has, no doubt, and ought to have, a large and liberal discretion; but he cannot enter a retraxit, for that is a perpetual bar, and equivalent to a release. This was the resolution of the court in *Beecher's Case*, 8 Co. 58, 'because,' said the court, 'it shall be a perpetual bar, and, in a manner, a release, and the admittance of the court cannot prejudice the plaintiff in so high a degree. But in all dilatory matters the admission of the court may turn the plaintiff or demandant to delay, but shall never bar the plaintiff or demandant.'" *Kent*, C. J., in *Kellogg v. Gilbert*, 10 Johns. 220, 221, 6 Am. Dec. 335. See, also, *Lambert v. Sandford*, 2 Blackf. 137, 140, 18 Am. Dec. 149; *Barnard v. Daggett*, 68 Ind. 305, 511; *Merritt v. Campbell*, 47 Cal. 542, 545; *Smith's Adm'r v. Lamberts*, 7 Grat. 142, approved in *Crotty v. Eagle's Adm'r*, 35 W. Va. 143, 151, 13 S. E. 59; 3 Am. & Eng. Enc. Law (2d Ed.) 370. It does not appear that counsel for King or the state had any special authority to enter a dismissal, and it affirmatively appears that the written disclaimer and renunciation of King was signed by his counsel.

Thus it appears that the utmost that can be conceded as to the order of dismissal of April 4th is that it is a voidable order. How it may be voided need not be determined here, but it would seem that the statute provides for a reinstatement. Section 11 of chapter 127, Code 1899, says: "Any circuit court may, on motion, reinstate on the trial docket of the court, any case dismissed, * * * within three terms after the order of dismissal may have been made." Section 7 of chapter 105, relating to suits for the sale of school lands, says such suits shall be "proceeded in, heard and determined in the same manner, and in all respects as other suits in chancery are brought, prosecuted and proceeded in, and shall be subject to the same rules of chancery practice as other suits in chancery in the state courts of this state, except as herein otherwise provided." In the absence of the statutory provision for the reinstatement of a dismissed case, a new suit would have to be instituted; and this statute is therefore an innovation upon the common law, and might be said to fall under the rule requiring a strict construction in such cases. But it is a remedial statute, and clearly falls under the rule requiring a liberal construction. And it is by no means clear that a strict construction would result in the nonapplication of the statute to this case. It says any case dismissed may be reinstated. Here the whole case has not been dismissed. Only part of it has been dismissed. But as

the statute authorizes reinstatement where the whole case has been dismissed, shall it not be said, with great reason, that the whole includes each part—the greater, the lesser—and that the part dismissed may be reinstated? Moreover, it is the dismissal of the whole case as to a part of the tract included in the bill, and the statute authorizes, upon a proper showing, a severance of the tract, and dismissal as to part of it. At least, it must be said that there is color of right to reinstatement, such as calls upon the court for a decision upon the question, if such reinstatement shall be demanded by the state or any other interested party. In reply to this, it may be asked what right the court has to assume that anybody will demand a reinstatement, or that any party will not ask it. But that is an insufficient response. No such assumption is required or proper in pursuing the question whether the judge is interested. If it be held that he is qualified to sit in the cause, he must be held competent to sit in it for all purposes, with power to pass upon all rights involved. If any person has the right to call upon the court, in the case of *State v. King*, for an adjudication as to whether or not a reinstatement can or should be allowed, and the judge sitting in that cause cannot pass upon the question without passing upon a matter in which he is directly interested, then he is clearly disqualified by reason of his interest. The inquiry is not as to what the parties will or will not do, but as to what rights they have in the case. There is at least color of right to reinstatement, if not a clear right to it.

Nor can there be any doubt that, in passing upon a motion for reinstatement as to the Mounts land, the judge would have an interest involved sufficient to disqualify him, although not a party to the suit. The statute expressly provides that a final decree in such suit shall be a bar to the claim of every person to the real estate, or any part of it, or lien thereon, or to the proceeds thereof, who has failed to appear and present his claim thereto, except as to the excess of the proceeds of the sale thereof, and as to persons holding under a former sale or under section 8 of article 13 of the Constitution. Should the case be reinstated as to the Mounts land, upon which the judge holds, with others, a lease and a final decree of sale, his title would be absolutely gone. Should he rule against reinstatement and correction of the dismissal order, he would thereby render a decision in support of his own lease. Thus, even if it were necessary that the interest be such as would be affected by the decree to the extent of absolute conclusion of right, he appears to be a person interested in the subject-matter of the suit.

As must be apparent, this conclusion results from a consideration and analysis of the statutory provisions relating to suits for the sale of school lands, and the statute concerning the reinstatement of dismissed cas-

es. There are no precedents. It is a case of first impression on the question of disqualifying interest. That interest appears to be of the most direct and substantial character. To make it otherwise, it would be necessary to assume that no motion for a reinstatement will or can be made, and that the act of the commissioner of school lands in employing counsel and moving the vacation of the order of dismissal of April 4th is not bona fide, but captious and impertinent. This the court cannot do. It can only ascertain what rights and interests are involved in the case, and then whether the judge is competent to pass upon, not some only, but all, of those rights and interests, and it clearly appears that he is not.

The interest here, upon the view taken of the statutes, is far greater and more direct than was the interest of Judge Bennett, which disqualified him in the case of Findley v. Smith, 42 W. Va. 299, 26 S. E. 370. There a small judgment, which he had assigned unconditionally and without recourse, was asserted as, and adjudicated to be, a lien upon real estate. He was not a party to the record, nor a necessary party to the suit; but the court held that an adjudication that the judgment was unpaid was a decree in his favor, because, although without recourse, his assignment of the judgment was a warranty that it was what it purported to be, that he had done and would do nothing to prevent its collection, and that it had not been paid. There was no intimation or suggestion that there had been any breach of that warranty, and yet this court, not doubting in the least the absolute integrity of the judge, and his absolute freedom from any possible wrong or impure intention, felt itself bound to reverse that decree because of this insignificant interest, which the judge had, no doubt, inadvertently overlooked.

This jealousy of the law is founded upon the following considerations, stated by Hurlbut, J., in *Oakley v. Aspinwall*, 3 N. Y. 547, 552, as follows: "It is the design of the law to maintain the purity and impartiality of the courts, and to insure for their decisions the respect and confidence of the community. Their judgments become precedents which control the determination of subsequent cases, and it is important, in that respect, that their decisions should be free from all bias. After securing wisdom and impartiality in their judgments, it is of great importance that the courts should be free from reproach or the suspicion of unfairness. The party may be interested only that his particular suit should be justly determined, but the state—the community—is concerned not only for that, but that the judiciary shall enjoy an elevated rank in the estimation of mankind." In that case a judge of an appellate court, on the bench of which sat seven other judges, four of whom concurred with him, had acted in the case at the request of counsel on both sides, made immediately after he had an-

nounced his disqualification and started to retire from the bench, and yet the judgment was reversed because of his disqualification. In this case, as in that, this court looks no further than to the question of disqualification.

It was suggested in the argument that the writ cannot go until after this court shall have decided on appeal that the interest is such as disqualifies, for the trial judge has jurisdiction, and must be allowed to pass upon collateral matters arising in the case, and his disqualification cannot be settled beyond question, except by the decision of this court. In *Mayor of London v. Cox*, L. R. 2 H. L. 259, 283, the answer to this objection is found in the following language: "Indeed, it seems not too much to assert that the question at what time a prohibition ought to issue is one of practice, only, and that there is not necessarily any difference in the form of the writ of prohibition itself, or the declaration thereupon, between the case of want of jurisdiction apparent upon the proceedings in the court below, and want of jurisdiction made known to the court above by surmise of collateral matter. The declaration in this case, for instance, which appears to be concisely and well drawn, is equally applicable to either alternative, and it is only upon the record that any question can arise in this house. Nothing but prolixity of pleading could ever have raised such a question upon the record, or otherwise than in the first instance upon the motion. No one can read the writs of prohibition already referred to, and the form of the record in *Bracton*, and the writs in the register *ubi supra* (which furnish good evidence of the law, more especially in the case of so ancient a writ as prohibition), without perceiving that no distinction is made between the two cases, and that in each the question to be tried upon the record is that of jurisdiction only. All the rest is but interlocutory on motion to satisfy the court that there is occasion for the prohibition, or for allowing the question of competency to be tried. If the application be resisted as unnecessary or vexatious or premature, the practice which has prevailed of deciding such matters at once upon the motion seems unquestionably the more convenient one. No case has been cited or found in which it was raised or decided upon the record. And there is abundant authority to show that even upon motion it is not an objection that ought to prevail, and that the party proceeded against in the inferior court may, at his option, either plead there, or apply for a prohibition." In this opinion, several instances are cited in which the writ of prohibition was awarded upon the application of parties who had never appeared to the actions in the courts of the judges against whom the writs were issued. The want of jurisdiction was shown upon the application for the writ of prohibition, and not otherwise. The language, "and it is only upon

the record that any question can arise in this house," found in the above quotation, relates to the character of the tribunal in which the case was pending; it having no original, but only appellate, jurisdiction in cases of prohibition. It was the House of Lords, deliberating upon a proceeding in error against a decision of the Exchequer Chamber, which had affirmed a previous decision of the Court of Exchequer, in which the record had been made up. The inconvenience of making the record, in the court against whose judge the writ is applied for, show the want of jurisdiction, is adverted to in this language: "Nothing but prolixity of pleading could ever have raised such a question upon the record, or otherwise than in the first instance upon the motion." Our statute is a copy of the Act 1 Wm. IV, c. 21, and, in the same case, it is said that the only effect of that statute is to do away with the awarding of the writ upon what was called mere suggestion, without affidavit, and to substitute therefor an affidavit, and to do away with the common-law requirement that a declaration in prohibition should be upon behalf of the party, and also of the crown. A reference to our statute will show that this is true.

It is further urged that disqualification may be relied upon as error in the final decree to be made, and corrected on appeal. The anomalous character of such a proceeding has already been indicated. To what has been said it may be added that it would be worse than absurd to put parties to the labor and expense of proceeding to a final decree before an interested judge, only to find in the end that, although just such a decree as the law pronounces, it must be reversed because the judge had no power to enter it. If the awarding of the writ were purely discretionary, these considerations would abundantly justify it in such cases as this. But it is not and never was a purely discretionary writ. "The writ of prohibition at suit of a party is not, as it was thought to be by some eminent judges at the close of the seventeenth century [see, per Holt, C. J., *Clay v. Snelgrove*, and the decision of the same judge in *Wharton v. Pits*, overruled in *Velthasen v. Ormsby*], in the discretion of the court. This erroneous opinion may in part account for the fact that the cases reported to have occurred in the seventeenth century and the early part of the eighteenth, under the head of prohibition, are not to be reconciled with one another, or with earlier and later authorities. The law upon this question of discretion is thus stated in the judgment of the Queen's Bench in *Burder v. Veley*: "If called upon, we are bound to issue our writ of prohibition as soon as we are duly informed that any court of inferior jurisdiction has committed such a fault as to found our authority to prohibit, though there may be a possibility of correcting it by appeal. * * * The writ, however, although it may be of right, in the sense that upon an application

being made in proper time, upon sufficient materials, by a party who has not by misconduct or laches lost his right, its grant or refusal is not in the mere discretion of the court, is not a writ of course, like a writ of summons in an ordinary action, but is the subject of a special application to the court upon affidavit, which application, and the proceedings thereupon, are now regulated by Act 1 Wm. IV, c. 21." *Mayor of London v. Cox*, L. R. 2 H. L., 239, 278, 279. There is no pretense of laches in this case, because, as has been shown, the petitioners have not submitted to the jurisdiction of the judge since his interest attached. On the contrary, they have resisted it in the court below without avail, and at last resorted to this court for the writ. Moreover, authorities hold that the parties cannot waive the disability of the judge.

Though Judge Doolittle cannot further act in the cause as to its merits, he may call in the judge of another circuit to hear it (Code 1899, c. 112, § 3), or direct the election of a special judge (Code 1899, c. 112, § 11), and he may possibly enter an order removing the cause to another county (Code 1899, c. 128, § 1). In the absence of any statute, an interested judge may act so far as is necessary to prevent a failure of justice. When he has sole jurisdiction, and the law provides no way by which any other judge may try the case, he may try it. His authority is then grounded upon necessity. In *re Ryers*, 72 N. Y. 1, 28 Am. Rep. 88; *Great Charte v. Kennington*, 2 Str. 1173; *Mayor of London v. Markwick*, 11 Mod. 164; *Dimes v. Gr. Junc. Can. Co.*, 3 H. L. Cas. 759; *Findley v. Smith*, 42 W. Va. 299, 26 S. E. 370.

For the foregoing reasons, the writ of prohibition is awarded as prayed for.

(54 W. Va. 16.)

FOLEY v. DODDRIDGE COUNTY COURT.
(Supreme Court of Appeals of West Virginia.
Nov. 7, 1903.)

EMINENT DOMAIN—COMPENSATION—INJUNCTION—EQUITY—ADVERSE POSSESSION.

1. Where private property is being taken for public use without compensation, equity has jurisdiction to enjoin the act, though there be controversy as to title or boundary of the land, and to pass on the right of the parties finally.

2. No title by adverse possession can be acquired of land owned by a county and used for public use for the site of a courthouse and other public buildings.

(Syllabus by the Court.)

Appeal from Circuit Court, Doddridge County; M. H. Willis, Judge.

Suit by Tabitha J. B. Foley against the county court of Doddridge county. Decree for defendant, and plaintiff appeals. Affirmed.

J. V. Blair, for appellant. M. R. Crouse, W. S. Stewart, and Carter & Dupuy, for appellee.

¶ 2. See *Adverse Possession*, vol. 1, Cent. Dig. §§ 42, 43.

BRANNON, J. Nathan Davis was the owner of a tract of land on which stands the town of West Union, the county seat of Doddridge county. Davis, by deed dated May 15, 1845, conveyed to the county court a lot or parcel of one acre out of this tract "for the purpose of erecting thereon the necessary public buildings for the use of said county." Afterwards he laid out the town into streets and lots, and made a plat or diagram of the town, numbering the lots, showing the lot so conveyed to the county, and the relative position of it and the streets and lots as to each other, which plat was recorded in the office of the county clerk. After making the deed to the county, Davis conveyed to individuals four lots between the northwestern turnpike called "Pike Street," later "Main Street," and "South Street," later "Court Street," said lots on said plat being numbered 3, 14, 15, and 16, forming a block; 3 and 14 adjoining said courthouse lot or square on its west side, the conveyances of these lots calling for said square in their description or boundary. These four lots by mesne conveyances came to be the property of James A. Foley; lot 3 by deed dated November 6, 1848, and the others by deed dated December 29, 1851. Foley died in 1871. His will devised these lots to his widow, Tabitha J. B. Foley, for her life, with power of disposal, and remainder to his children, thus giving her at least an estate for her life. Foley took actual possession of these lots at once upon his acquisition of them, and the county took actual possession of its lots at once upon its acquisition by the erection and maintenance of a courthouse upon it. A strip of ground 21 feet 4 inches wide on Main street and 15 feet on South street is in controversy between the county and Foleys, the county claiming that its deed includes it, the Foleys denying this, and claiming its ownership. The question is one of boundary. In 1899 the county, by its contractors, began the excavation upon its lot of a foundation for a new courthouse, and deposited a large quantity of earth upon this disputed strip of ground, which was included in part by an old fence built by Foleys, and occupied by a coal house, trees, and shrubbery placed there by them; but the strip was virtually in common from absence of fence in part, and was largely taken up with briars and weeds and wild or neglected growth. Mrs. Foley filed her bill in equity setting up her title to said lots and the acts of the county court in such invasion of said strip, and alleging that said county designed to apply said strip for public purposes without having the same condemned according to law. An injunction was awarded against the county court restraining it from further acts upon said strip of ground. The county court demurred to the bill, but its demurrer was overruled. It then filed an answer setting up its deed from Davis for said courthouse square, claiming that it covered the strip of land in issue, and gave title to the county, and that it had right to deposit earth upon the strip,

and to take possession of it for public use, and admitted that it had taken such possession, and was fitting the strip for public use by filling a drain thereon and grading the land, and denying any right in the Foleys to it. Depositions covering hundreds of pages of the printed record were taken, and upon the hearing the court made a decree of absolute dismissal of the bill and dissolution of the injunction, and from this decree Mrs. Foley appealed.

The first question we meet is whether equity has jurisdiction. The defense would justify the decree by the argument that the acts of the county are nothing but mere trespass, doing no irreparable damage, and that remedy adequate could be had by action at law, on principles stated in *Becker v. McGraw*, 48 W. Va. 539, 37 S. E. 532, and several prior cases. It does seem that the injury is of such character as to be compensated by action at law, so far as the nature of the acts of the county goes; but do the rules given in those cases answer in this cause? This is not a mere trespass, transient and passing, slightly affecting the freehold, because the bill alleges and the answer admits that the county was taking the strip of land for permanent public use, without compensation, forever wresting the land from the plaintiff, if her property; and it is settled that where a town or county is taking property for public use, without compensation, not merely injuring it, there is no legal remedy answering the emergency, and injunction lies. *Boughner v. Clarksburg*, 15 W. Va. 394; *Yates v. West Grafton*, 33 W. Va. 507, 11 S. E. 8; *Mason City S. & M. Co. v. Mason City*, 23 W. Va. 211; *Ward v. Ohio R. R. Co.*, 35 W. Va. 481, 14 S. E. 142; *Spencer v. Railroad*, 23 W. Va. 406. In the case of taking land for public use without compensation no averment of irreparable injury is necessary, the very "taking" being such. *Hilliard on Injunc.* 588; *Western v. Owings*, 15 Md. 199, 74 Am. Dec. 563. Where the right of the plaintiff to the land is clear, and the power taking it has no title to it, the cases say that, as the Constitution imperatively demands prepayment or security of compensation, the injunction will restrain until compensation be paid or secured. But in this case there is controversy as to boundary, and consequently title is in dispute. Whilst injunction lies, is it only temporary until title or boundary shall be settled by recourse to law action, or will equity, having jurisdiction under the cases just cited for one purpose, go on to decide upon the question of boundary and title, and finally adjudge the right? The case of *Freer v. Davis*, 43 S. E. 164, 52 W. Va. 1, was a case where titles to land were hostile, and under one of them oil operations were going on for the taking of oil, and jurisdiction for injunction was sustained; but, as the matter involved was one of title, it was held that the injunction should be temporary, only until the conflict of title should be settled by action in the law forum, and

then dissolved or perpetuated, according to the decision at law. The question will be found discussed in the two opinions in that case. Where there is no question as to title or boundary, or the matter is clear, the equity court gives full decision in case of irreparable damage, as conceded in that case by all the members of the court; but where title or boundary is fairly in issue the majority held that under the general rule that equity will not try contested title or boundary unless there be jurisdiction under some known head independent of title or boundary, the injunction should be entertained only until legal adjudication, and equity could not decide title or boundary, as the Constitution gives a claimant to land trial by jury. This doctrine presents the objection that the arm of equity falls limp as soon as a controversy of boundary or title crops out in the case, and further litigation in another suit is necessitated. But much authority sustains it. In that excellent equity work, *Am. & Eng. Dec. in Eq.*, vol. 8, p. 524, is an elaborate review of this question, sustaining jurisdiction for at least temporary injunction. See page 430. I expressed no final opinion in the *Freer Case* upon this question, nor do I in this case. In that case I did not, and in this case do not, find it requisite to do so, because I contended in it, as I do in this case, that when a party chooses the equity court, and submits his whole case to it, he cannot, in case of defeat, raise the question of jurisdiction. Mrs. Foley chose her court in this case. If a decree made without jurisdiction because the law forum is the proper one were absolutely void, it might be different. Then the court, without being asked, might treat it as not binding anybody; but such decree is not void, but merely erroneous upon complaint by appeal. *St. Lawrence Co. v. Holt*, 51 W. Va. 352, 41 S. E. 351. I cite *Buskirk v. King*, 72 Fed. 22, 18 C. C. A. 418, sustaining temporary injunction during contest of title. I cite *Erhardt v. Boaro*, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1116, for the language: "It is now a common practice in cases where irremediable mischief is threatened or being done, going to the destruction of the substance of the estate, such as extracting of ores from a mine, or the cutting of timber, or the removal of coal, to issue an injunction, though the title be in litigation." See 8 *Am. & Eng. Dec. in Eq.* 431. And in *Haskell v. Sutton*, 44 S. E. 533, 53 W. Va. 206, this court upheld the jurisdiction for at least temporary injunction. In *Camp v. Dixon*, 112 Ga. 872, 88 S. E. 71, 52 L. R. A. 755, 8 *Am. & Eng. Dec. in Eq.* 421, the jurisdiction to fully decree on adverse titles seems to be asserted fully. Where equity once lawfully takes jurisdiction by injunction against trespass working irreparable damage—as extracting oil, or taking land for public use without pay—and question of title or boundary arises, I do not say whether or not equity can decree the whole case without recourse to law. Under *Freer v. Davis* it cannot do so. I do not say

whether or not a party who has objected to jurisdiction can, in case of decree against him, reverse for that cause. I only say that one who has chosen the equity court, and thus waived a jury, ought not to be permitted to do so; but *Freer v. Davis* holds that he is not estopped. In the cases where this court has entertained appeals from decrees in injunction cases against taking land for public use the court seems to have considered all questions, though the question whether the court should decide all questions without recourse to common law was not pointedly considered in them. Those cases, however, show that the jurisdiction was not questioned. In the present case the plaintiff not only selected the chancery court, and submitted her rights to it, but in this court she asked the court "to take the case for all purposes, settle the disputed line, and enter such decree as should have been entered by the lower court." But without regard to the fact that the plaintiff elected to go into equity, the whole court thinks that, as the Constitution prohibits the taking of private property for public use without compensation, equity has jurisdiction in this case to pass upon the merits in full.

The question involved is the location of the line dividing the courthouse square from the Foley lots 3 and 14. When we once locate the lines of the courthouse lot or square, this question of the case is ended, because the deed from Davis to the county is first in date, and, besides, the conveyances by which the Foleys claim call for this courthouse lot, and thus limit the Foley lots by it. The Foleys have no title to invade the county property. I cannot detail the several hundred printed pages of evidence on this boundary question. Even the reference to it here made is unnecessary, and even improper, as it can be of no use for purposes of precedent, but it is made to indicate reasons why we find the boundary controversy in favor of the county, when in fact we need not, ought not, do even this, but simply find the result of the evidence. The evidence shows certain salient facts which plainly lead to the conclusion that the strip in issue is within the boundary of the courthouse lot. The north side line of the county courthouse square is Main street, once called "Pike Street"; its south side line is South street, once "Court Street." On its east side it joins lot No. 2, and on its west side the Foley lots 3 and 14. The deed of Davis to the county gives the boundary of the courthouse lot thus: "Beginning at a point near the spring drain, on the west side of said drain, and the Northwestern Turnpike road, and running S. 32 W. 13 poles to a stake; thence S. 53 E. 12 poles to a stake; thence N. 32 E. 13 poles to a stake; thence N. 58 W. 12 poles to the beginning." As shown by the original plat of West Union made by Davis and recorded, this courthouse square is bounded on its north side by Main street and an alley, and on its south side by Court or South street,

on its east by lot No. 2 on said plat, and on its west side by the Foley lots 3 and 14. Where shall we place the beginning corner of the courthouse lot? We do not put it just at or in the drain that ran from the public spring in courthouse lot, as Foley seems to have thought he had right to do, because the county deed says the square begins "near" the drain, on its west side. This word "near" is indefinite—does not give exact point. But look at that plat made by Davis laying down the courthouse square, and the lots of the town by number, and the streets, and we find north of Main street an alley running from the north to Main street, passing lots 1 and 10, and stopping at the courthouse lot, and then resuming its course south from South street, passing lots 17 and 4. And we see on this plat that the line of these lots is marked clear through the town, running past lots 1 and 10 north of Main street, crossing Main street, and passing between the courthouse square and the Foley lots 3 and 14, and then crossing South street, and then passing on the west side of said alley along lots 17 and 14. Why shall we not adopt this line? Approach court square from the north or south by this line, and we find it continuing along the courthouse lot, dividing it from the Foley lots. That plat, the original one of the town, dictates the location of the dividing line between the courthouse square and the Foley lots. After 50 years, after the fathers of the town sleep, that plat lives, and points for us the unerring finger of indean. Nobody says that this line is not the line of lots 1 and 10 north of Main street, and of lots 4 and 17 south of South street, and the plat shows that the Foley lots between those streets have a common east line with the lots north and south of them. We cannot escape from the line so plainly shown by this plat. That plat says we must put the beginning corner of the courthouse lot just at the point where that line leaves Main street on the south side of Main street. It never was the intent of Davis to make these Foley lots just a wide space farther east than neighboring lots across Main and South streets from them. It would produce irregularity, and defeat the plan of the town, as shown by the old plat. The plat denies this claim. This alone settles where the dividing line is, and ends the controversy; but it is by no means all that goes to the same result. Away back in years, shortly after Davis conveyed to the county the courthouse lot, and shortly after he conveyed the Foley lots, when the first settlers of West Union were living and Davis living, a storehouse was built by Foley himself on Foley's lot 3 on South street just at the corner of courthouse square. It is now the Foley residence. It is fair to presume that when the lines were well known it was the intent to place this house just at the line of the courthouse square. There it is to-day. But it is not a mere presumption, for Hickman says that he well

knew of the building of this storehouse by Foley, and that his purpose was to put it just at the line of the courthouse lot, and was careful to do so. Other witnesses say so. Hickman had peculiar means to know this, because he was clerk of the courts in the forties, right on the courthouse ground, and a friend and in daily intercourse with Foley, as is attested by Foley's will directing his wife as executrix to follow Hickman's advice. Here, then, we have the action of Foley, the owner of lot 3, certifying that this old plat line, now claimed by the county court, was the true line. To confirm the position that this line is the true one, upon it a fence was built many years ago joining the house, and running thence to Main street at the point where stands a stone very lately planted by the county as the point claimed by it as the beginning corner of the courthouse lot. This fence is gone, but traces of it remain. Just inside this fence from two to three feet Foley himself planted a line of apple trees many years ago. He built or recognized that fence. The line of apple trees was set by him because he recognized that fence as the line. This fence, these apple trees, were set soon after Davis conveyed the Foley lots. They tell in strong voice where that line was. Those trees stand to-day on the line above spoken of, living monuments to prove the true division line. They stand two to three feet from a line run from that house to that stone on Main street. One of them stands nearly at that stone claimed by the county as such beginning corner. Now, if Foley, when the matter was new, thought that the true line was $10\frac{1}{2}$ feet east of that house on South street, as claimed by Foleys at one time, or $15\frac{1}{2}$ feet, as claimed by them later, and 21 feet east of the stone on Main street, as claimed by them at one time, or $16\frac{1}{2}$ feet, as claimed by them later, why did he not put that fence on that different line, and set his trees there? Because he did not then think the line was there. He did not then so understand the deed. Here a legal principle has telling force. "If the language used in the descriptive clause is uncertain and doubtful, the practical construction given to the deed by the subsequent acts of the parties may be shown by parol evidence." 2 Devlin on Deeds, § 1042. Their acts speak their construction. Caperton's Adm'r v. Caperton's Heirs, 36 W. Va. 479, 15 S. E. 149. That this house does abut on the courthouse lot is shown by further evidence. The evidence of J. N. Wolverton, county surveyor, shows that he went to a point on South street to a nail or peg placed for a corner at the Union Bank, placed there by an old county surveyor for a proper corner of a lot on Columbia street, and, making proper allowance for that street's width, ran along South street along the Foley lots to the corner of said house next the courthouse lot, and found the distance of the Foley property on South street 198 feet, just as called for in their deeds. But they would

go on 10 or 15 feet further, and cut down by that length the line of the courthouse lot, though it was first conveyed, and the Foley grant was limited by it. And this house is just on that line running across the town above spoken of as shown by the old plat. And, treating the house as on the line, the Foley lots have the same distance along South street as the lots on the other side of the street, the Maulsby and Neely lots, harmonize with them; whereas the claim of Foleys would give them $19\frac{1}{2}$, or 14 feet more length than those lots, when they should be the same. That house ends on the line, and a line from it by the county's deed S., 32 W., $214\frac{1}{2}$ feet, conveys us to Main street at the stone claimed as the beginning corner of the county lot by the county court. We must add an important item of evidence to corroborate this. Who should know the line, the beginning corner, better than Davis, the common grantor? He showed Hickman this controverted line in 1845 or 1846, and the corner of the courthouse lot on Main street was at or near where stands the stone claimed as the true corner by the county.

But let us seek this beginning corner and this line of division from another direction. There is a point admitted by both sides to be the northeast corner of the courthouse lot. It was established as such corner by a verdict in an ejectment between Knight and Charter. Though this finding is not evidence in this case competent, yet it is conceded that it is such corner, and that from it there ran an old fence to South street near the old jail, at a rock planted many years ago by Sherwood between lot No. 2 on the old town plat and the courthouse lot, and that this is the true eastern line of that lot—the opposite end of the lot from the division line litigated in this case. Now, run from the said point or corner on the alley, the northeast corner of courthouse lot, along the line of lot No. 2 along the fence to the old jail, and then with it to the stone planted years ago by Sherwood for the corner of lot No. 2 and the courthouse lot, by the course and distance of the county deed, and it brings us to that stone on South street at the corner of the old jail. Then run from this corner along South street the course and distance called for by the county deed, and the line ends on the corner strip of the said storehouse erected by Foley. This fully corroborates the much other evidence to sustain the position that said house has its end on the true division line between the courthouse lot and the Foley lots. Thus we have three established corners, and from them we can inevitably locate the fourth. That fourth corner must mathematically be found at the intersection of two lines. Run one from the storehouse by the call of the county deed, and it ends at the stone on Main street claimed by the county as its beginning corner; run the other from said northeastern corner to the courthouse lot, the Knight-Charter cor-

ner, along the alley and Main street, by the course of the county deed, and it ends at that stone. The evidence shows that Foley in his life moved that old fence, or rather built new ones, each time further east on the public property. He told an intimate friend that he would do so; that his line was on Main street where the drain emerged; and he made an excavation for an icehouse, and dumped the earth into the drain, ravine, or hollow, and pushed the drain further east, and intended to get further over on the courthouse property. He told his friend that he intended to fence in the spring when he again removed the fence. He knew where the true line was. Suppose we run the lines according to the Foley claims. We dislocate streets and lots by disarrangement and denial of the town plat, a strong argument against the Foley claim. It would change the shape of the end of the Foley lots following the county deed. The present Foley fence, which has gone to decay, practically leaving their lots to common, is 10 feet and 2 inches east of the house on South street. A point on the opposite of the lot—that is, on Main street—21 feet and 4 inches from the stone set by the county, is the point first claimed by Foleys as the corner of the courthouse lot and their lots. The fence ran to it. You cannot run a line between these points along the fence and follow the course of the deed. The deed call is 82 degrees; this line call 88 degrees. Say that the point 21 feet 4 inches from the planted stone is the beginning call on Main street, and say that the said house is a corner on South street. A line run between these corners varies from the deed, and, after passing the house and crossing South street, would not follow the alley shown on the plat, now Church street, but would invade lot 17 on the south side of South street, and run diagonally through it. Then run a line from said point on Main street along the Foley fence, and it will not follow or touch Church street, but will cross South street and invade a lot on the east side of Church street (old alley), lot 16 on the old plat, and on the north of Main street run through O'Leary's building. But the Foley claim for the point on Main street seems to change from the distance of 21 feet and 4 inches from the stone to a point $16\frac{1}{2}$ feet from the stone, and from a distance of 10 feet 2 inches east of the house on South street to one 15 feet east of the house. This line would cross South street and invade still more lot 16, and violate the town plan as shown on the original plat. These considerations, and other more tedious ones might be added, show that the claim of the Foleys antagonizes the plat forming the town, cuts down the courthouse lot, the first grant, and adds to the Foley lots, and disagrees with the true relative location of many neighboring lots as presented by said plat. The line from the corner of the Foley residence on South

street to the stone on Main street must be held to be the true division line between the courthouse lot and the Foley lots.

Another question. Mrs. Foley claims that, be the line where it may, she has good right to the strip by adverse possession under the statute of limitations. This question is tested by the question whether one can, by encroachment upon a public street, get title against the public by adverse possession. Both a street and a courthouse lot are held in trust for public use, and no other purpose whatever, by town and county court. They are not in such cases private property owners. The county court has legal title, it is true, but solely for governmental purposes. As to streets this court has held that no one can by possession get title against the public right. *Ralston v. Weston*, 46 W. Va. 544, 33 S. E. 326, 76 Am. St. Rep. 834; *Weston v. Ralston*, 48 W. Va. 170, 36 S. E. 446; *McClellan v. Weston*, 49 W. Va. 669, 39 S. E. 670, 55 L. R. A. 898. The town does not own the streets, nor do the people of a town, "but the public at large." In *Norfolk v. Chamberlaine*, 29 Grat. 534, one reason for this position is based on a general rule, hoary with age, founded on public policy and necessity, that the obstruction of a public way is a public indictable nuisance, and that no lapse of time will legitimate it. Encroachment upon courthouse ground is a public nuisance, because it affects the public, which has a right to its unrestricted use. 21 Am. & Eng. Ency. L. (2d Ed.) 683; *Commonwealth v. Eckert*, 2 Browne, 249. Such public nuisance prevents the public use, and where even the property, the very title, is vested in the state, county, or municipality, such wrong prevents the state, county, or municipality from freely using the property to accomplish the only purpose of its ownership; that is, its application for governmental purposes in its public use. If such were not the law, then the governing power would lose property essential for government purposes because of the inattention of officials or their ignorance of hostile possession. But it is said by some that this rule is changed in this state from the fact that section 20, c. 85, of the Code of 1899, says that "every statute of limitations, unless otherwise expressly provided, shall apply to the state." The books say that the statute runs as to property held by the government merely as owner in private ownership, but not as to that held for purposes of government in its actual use. *Elliot, Roads & S.* (2d Ed.) §§ 882, 136. That exception applies even where the statute runs against the state, for, if there were no statute making limitation apply to the state, there would be no need of such exception. The well-considered Georgia case of *Norrell v. Augusta Railway Company* (1902) 42 S. E. 486, 59 L. R. A. 101, meets this objection pointedly as do other authorities, holding that even where there is a statute making adverse possession apply to the state, the statute is to be construed as

intended to apply only to such property as is held by the state like an individual proprietor, and operate only on its property interest, and as not intended to apply to property held by the state for purely governmental purposes. The court said, "Prescription does not run against a municipal corporation in regard to land held for the benefit of the public." This is a fair construction of such a statute, and is only an instance of the rule often applied in the construction of statutes; that is, that we must not too closely and literally follow the letter, but must follow the spirit; for statutes have a spirit and intent as well as a letter. Shall we always make a statute do what we are sure will work a result not intended by the Legislature, simply because to do so would be justified by its letter, when we know there are other instances where conformity to its letter will attain the real purpose, as if we give this statute application against the state as to its demands for money and property rights vested in it as if a private owner, and not held in trust for actual use in the exercise of governmental functions? Let us illustrate: West Virginia owns thousands of acres of wild land forfeited for taxes. This property is not itself used in the exercise of government. Its proceeds only are so used, but not the very land. If one claiming title seizes himself upon this land, he gets a good title from the lapse of time, because the statute cited makes limitation run against the state in such a case. As state officers cannot possibly watch lands in all sections of the state, we may well doubt the wisdom of the statute giving benefit of limitation to the occupant in such case, and thus causing the state to lose its property. But the Legislature has seen proper to do so; but can we say that it intended to deprive the state of property which in its very self is held for government purposes, and essential to enable the public authorities to carry on government? We cannot think so. Suppose one should hold for 10 years the state capitol, or an annex or subsidiary building, or a part of the capitol ground, or any ground or property used in actual government, could we think the Legislature intended the state to lose it by adverse possession? Suppose the state owned a turnpike, can we think the Legislature designed by the act in question to lose to the state that turnpike by adverse possession? Reason, necessity, the public welfare, and legal authorities deny such result. But if you contest this position, and say that the letter of the act covers all property, and every right of the state, then we take you at your word, and fall back on the very letter of the statute, and say that it applies only to "the state." A county or town is not the state. The state does not own a courthouse lot or street or road. Indeed, I go further and say that, as to a highway, neither the county nor town owns it; nobody owns it; only that noncorporate, indefinable "public" owns it, if owner-

ship anywhere there is. *Hoadley v. City*, 50 Cal. 285; opinion in *Norfolk v. Chamberlaine*, 29 Grat. 534. Where is the statute of limitation in letter applying to that right? The statute of limitations supposes a right in one party to be made good by time, and a right in another to be defeated by time. Who has the right in a highway to be defeated by time? There is no legal entity to which the statute can apply, no person against whom it can run, no individual right. This is illustrated by the late Nebraska case of *Krueger v. Jenkins*, 59 Neb. 641, 81 N. W. 844. Former cases in that state held that adverse possession would defeat the public right in a street, but this case involved a highway in the country, and the court said that those earlier cases were based on the statute which gave the town actual title to a street, and enabled it to sell it, and devote its proceeds to any use, whereas in a case of a county road that statute did not apply, and that no time would bar the public right in such road. The court said: "The right involved in this litigation is one belonging exclusively to the public at large. Neither Douglass county nor its citizens have any peculiar interest in it. A county does not hold legal title to county roads. It has no power of disposition over them, no proprietary interest in them. In performing duties with which it is charged in connection with them, it is an agent of the state, and in the interests of general public. Title to part of a county road cannot be acquired by adverse possession." In West Virginia the adjoining owner owns the soil of a street or road. The county or towns own nothing. The public has right of passage, and the county or town simply has control and management for the public use. There is no property in it; no person owning such property as that limitation can run against him in the absence of a statute plainly making the public right subject to limitation. The Georgia case of *Norrell v. Augusta Railroad Company*, 42 S. E. 468, 59 L. R. A. 101, says that, as the city has no power to grant away a street, it cannot lose it by inaction, citing *Augusta v. Burum* (Ga.) 19 S. E. 820, 28 L. R. A. 340, holding that no time gives right to continue an awning over a street, though the statute runs against the state. The court in the latter case said that we must attribute the presence of the awning to a mere revocable license express or implied; that "the public are the rulers—the source of all power—and it cannot be sound doctrine that their servant in any lawmaking department can, by lapse of time, be deprived of powers the exercise of which are essential or necessary to the proper performance of their duties and obligations to the public." A later Georgia case, decided August 14, 1903, repeats this holding. *Langley v. City Council*, 45 S. E. 486.

It is sound law that a municipal corporation cannot by express act give up or sell a part or all of a street without statute au-

thority. *Roper v. McWhorter*, 77 Va. 214; *Mayor v. Ray*, 19 Wall. 468, 22 L. Ed. 164; *Jordan v. Chenoa*, 166 Ill. 536, 47 N. E. 191. It is therefore going far to say that by mere negligence a town can deprive the public of an essential right of passage over its street. Is it unreasonable that a court should, before holding the statute of limitation applicable to work so dire a result to the public as the loss of a great right of highway, demand a statute from the Legislature plainly requiring it to so hold? The public right is the highest in this land. It is to be preferred to mere individual right. It would be disastrous to the public welfare to allow the public highways to be lost by private encroachment until the Legislature shall so command. We cannot recede from the position three times taken by this court in the three cases above cited.

Since those cases were decided there have been subsequent review and declarations of the law upon this subject. The Georgia case decided in 1902 has been above stated. In a late note in *Northern Pac. R. Co. v. Ely* (Wash.) 87 Am. St. Rep. 775, this subject has been reviewed upon many authorities, and the statement made that sound law and the great and conclusive weight of authority show that the public cannot thus lose its right in a street. Language used by Judge Dent in the opinion in *Ralston v. Weston*, 46 W. Va. 544, 83 S. E. 326, 76 Am. St. Rep. 834, is extensively quoted in that note, and is pronounced as reflecting sound law. All the great text-books substantially so state the law, especially the late ones. That late and most valuable work on municipal corporations, *Smith on Municipal Corporations*, § 1092, says: "From some loose dicta both in this country and in England it has been supposed that a right to maintain a public nuisance may be acquired by prescription, but no such right should exist in reason, and the great weight of authority is against it. There can be no sound rule of law that will protect any man in thus depriving others of the substantial use and enjoyment of their property." In section 1511 we read: "And so a part of a road which is not used or traveled for six years, and becomes impassable for vehicles, ceases as to such part to be a highway, and the village or city is not liable for injuries thereon received. (Under a statute.) But this nonuser by the public must be distinguished from such an occupation by a trespasser of a part of a highway as amounts to an obstruction or nuisance, and he cannot acquire a prescriptive right to the highway by a continued occupation of twenty years." See *Tiedeman on Munic. Corp.* § 312; 1 *Hogg's Eq. Proced.* § 370; 1 *Cyc.* 1117; 1 *Am. & Eng. Ency. L.* (2d Ed.) 878; *Elliott, Roads & S.* § 883. Also late cases of *Raht v. Southern Ry. Co.* (Tenn. Ch. App.) 50 S. W. 72; *Board v. H. Weston Lumber Co.* (La.) 83 South. 923; note to *Schneider v. Hutchinson* (Ga.) 76 Am. St. Rep. 474, 488; *Northern Pacific Ry. Co. v. Ely* (Wash.)

65 Pac. 555, 54 L. R. A. 526, 87 Am. St. Rep. 766, 775; Opinion of Justice Field in *Grogan v. Town of Hayward* (C. C.) 4 Fed. 161; *Simplet v. Chicago, etc., Ry. Co.* (C. C.) 16 Fed. 350; *London & San Francisco Bank v. Oakland*, 90 Fed. 691, 702, 33 C. C. A. 237. If the idea of abandonment be suggested, I would say, as stated in the case of *Town of Weston v. Ralston*, 48 W. Va. 182, 36 S. E. 446, that I cannot conceive how abandonment by a town of its street by mere nonuser can be asserted, because, as shown by authorities there cited, there must be not only a mere nonuser, but also express intention to abandon. How can we say a town or a county court, mere corporations acting by officers, can be held to abandon a street or a courthouse lot? It is well settled that even a private owner cannot be held to have abandoned his property without both act of nonuser and intent to abandon. *Lowther Oil Co. v. Miller-Sibly Oil Co.*, 44 S. E. 433, 53 W. Va. 501; *Hast v. Railroad Co.*, 52 W. Va. 396, 44 S. E. 155. Mere silence of a town council could not be considered an abandonment of a street. It would surely require express order of vacation. *Shirk v. City*, 196 Ill. 298, 63 N. E. 193; *De Kalb v. Luney*, 193 Ill. 185, 61 N. E. 1036. How otherwise could it be proven that a town intended to abandon a street? How can we say that a county court intended to abandon part of the court square without an order of the court? That the public right cannot be lost on the idea of mere abandonment, see, further, *De Kalb v. Luney*, 193 Ill. 185, 61 N. E. 1036; *Shirk v. City*, 196 Ill. 298, 63 N. E. 193; *Taylor v. Pearce*, 179 Ill. 145, 53 N. E. 622; *Chafee v. City of Aiken* (S. C.) 35 S. E. 800; *Crocker v. Collins*, 37 S. C. 327, 15 S. E. 951, 34 Am. St. Rep. 752; *Reilly v. City of Racine*, 51 Wis. 526, 8 N. W. 417; *Elliott, Roads & S.* (1st Ed.) 660.

There is another argument against adverse possession applying to streets and public squares by mere encroachment upon their bounds, and that is that it wants that essential element to apply limitation, namely, that the possession must be either under color or claim of title with intent to claim. Where one holds under color of title, occupation is prima facie proof of claim of title and intention to claim. *Ketchum v. Spurlock*, 34 W. Va. 597, 12 S. E. 832. Where, however, there is no color of title, it must distinctly appear that the encroachment by occupation was with intent to claim the property as his own. The claimant must make this affirmatively appear. *Hudson v. Putney*, 14 W. Va. 561; *Clarke v. McClure*, 10 Grat. 306. As suggested by the Georgia court in *Augusta v. Burum*, 93 Ga. 68, 19 S. E. 820, 26 L. R. A. 340, such possession would be presumed to be under license—a tacit license. Where one fences a whole street we may infer intent to claim; but where he fences only a part, makes a partial encroachment on a street or courthouse lot, without paper color

of title, should we not infer a tacit license, in order to save the public right? At least, should we not demand of the encroacher affirmative evidence of actual intent to claim the property as his own? Otherwise the possession is not adverse.

For these reasons we affirm the decree dismissing the bill.

(54 W. Va. 32)

ATKINSON v. WASHINGTON AND JEFFERSON COLLEGE et al.

(Supreme Court of Appeals of West Virginia.
Nov. 14, 1903.)

TRUSTEE—CONTRACT OF SALE—AVOIDANCE—BILL—STATUTE OF FRAUDS—BURDEN OF PROOF—NOTICE OF SALE—PUBLICATION—SUFFICIENCY—SALE FOR CREDIT—INADEQUACY OF PRICE.

1. A contract of sale between a trustee in a deed of trust and a purchaser is complete when the trustee, selling at auction, knocks the land down to the bidder, makes a memorandum of the sale and its terms, and signs the same.

2. When a plaintiff, seeking to avoid such sale, admits in his bill that it was made, but does not set up the statute of frauds, nor claim the benefit thereof, he is taken to have admitted an agreement which is either good under the statute, or otherwise binding upon him; and the contract will be held good, although it does not appear that such memorandum was made and signed.

3. When the purchaser at such sale is not the trust creditor, nor a person in any way connected with the deed of trust, except by his act of purchase, nor in any way chargeable with responsibility for the regularity of the proceedings of the trustee, nor having power of control over them, nor affected with any notice of irregularities, the burden is upon the party attempting to set the sale aside on the ground of want of due advertisement to show failure of advertisement, defects in the notice, want of sufficient publication, or service or posting thereof.

4. Where the deed of trust provides that notice of a sale under it may be given by advertisement "published thirty days previous thereto in some newspaper," etc., publication in such newspaper once a week during such period of 30 days is sufficient.

5. Failure to serve the notice upon the non-resident attorney in fact of the debtor will not invalidate the sale made by the trustee, although such attorney may have been domiciled in the county.

6. In the law of process and service thereof, the term "resident" is generally synonymous with inhabitant.

7. Under the statute relating to sales under deeds of trust, a purchaser of the property upon which the trust deed is, or a subsequent incumbrancer thereof, is not entitled to personal service of the notice of such sale.

8. A sale made by a trustee will not be set aside on the ground of failure to post the notice of sale at the front door of the courthouse, when such failure is denied, unless there is proof thereof; the burden being upon the plaintiff to establish such irregularity.

9. A sale made by a trustee will not be set aside because of his failure to make the report required by section 3 of chapter 87 of the Code of 1899.

10. Where a trustee has sold property under a notice specifying the terms of sale to be cash, and afterwards, with the consent of the creditor who is entitled to receive the purchase money, allows the purchaser time in which to pay a portion of the purchase money, receiving notes therefor, and the residue in cash, with-

out any prior agreement or understanding between the trustee and purchaser that there should be an allowance of credit as to any portion of the purchase money, such departure from the contract of purchase does not invalidate the sale.

11. When a deed of trust provides that any sale of the property made by virtue thereof may be for cash or on credit, or partly for cash and partly on credit, and does not stipulate for personal notice of the sale to any person not provided for as to such notice in the statute, the conduct of the trustee, in selling for cash, and failing to have the notice of sale served upon a lienor holding a subsequent deed of trust on the property, or claiming the land as a purchaser at a sale made under such subsequent deed of trust, is not fraudulent, inequitable, or illegal, and affords no ground for setting aside the sale.

12. Such sale will not be set aside, on the ground of inadequacy of price, at the instance of such holder of a subsequent deed of trust, or purchaser at a sale made thereunder, when his bill is unaccompanied by any offer to pay a larger price for the land than that for which it sold, and bond or other guaranty that such higher price will be paid on a resale, and the evidence as to the value of the land does not clearly show that the price for which it sold is so inadequate as to shock the conscience, and indicate that a fraud has been perpetrated upon the rights of the party complaining.

13. One who complains of such a sale is not entitled to more favorable treatment in a court of equity than a person who complains of an unconfirmed judicial sale.

(Syllabus by the Court.)

Appeal from Circuit Court, Hancock County; H. C. Hervey, Judge.

Bill by John H. Atkinson against the Washington and Jefferson College and others. Decree for defendants, and plaintiff appeals. Affirmed.

John R. Donehoo, for appellant. H. M. Russell and G. L. Cranmer, for appellees.

POFFENBARGER, J. John H. Atkinson, the appellant, held a lien by deed of trust upon the property of the American Fire Clay Company, in Hancock county, for a debt amounting to something over \$6,000, prior to which another lien on the same property was held by a Mrs. Donaldson for something over \$2,000; and, to enable his debtor to borrow \$10,000 from the Washington and Jefferson College, a Pennsylvania corporation, with which to pay, among other things, the debt due Mrs. Donaldson, he released his lien in the year 1890; and the Washington and Jefferson College loaned the fire clay company \$10,000, and took a deed of trust on the property, executed to G. L. Cranmer, trustee, bearing date July 28, 1890, and afterwards said fire clay company executed its note to said Atkinson for the sum of \$6,824, and a deed of trust upon the same property to secure the payment thereof, in which Albert Haigh was made trustee. Both debts being unpaid, as well as a large amount of other indebtedness due from said company to other parties, Cranmer, trustee, at the instance of the college, and after due advertisement

according to the terms of the deed of trust, as is claimed, sold the property on the 25th day of November, 1898, for \$12,910, announcing that James M. Porter was the purchaser. At January rules, 1899, Atkinson filed his bill in equity against the college, Cranmer, trustee, the American Fire Clay Company, Albert Haigh, trustee, Hugh L. Irwin, trustee, and James M. Porter, setting up all of the foregoing facts, and, in addition thereto, that there was a third lien by deed of trust on the property, in which said Irwin was trustee, in favor of numerous creditors, for amounts aggregating about \$22,000, and alleging the invalidity of said sale on the ground of irregularities and alleged defects in the notice of sale and service thereof, illegal and inequitable conduct on the part of the trustee in selling for cash under the peculiar circumstances existing, inadequacy of price, and failure on the part of the college to give a credit of \$300 on its debt. He further alleged that Porter had been put into possession of the property, and was receiving the rents and profits thereof; but, whether said sale had been fully consummated by the payment of the purchase price and the execution of the deed, plaintiff was uninformed, but he alleged that at the time of the commencement of his suit no deed to the purchaser had been recorded. Later, it was ascertained by Atkinson that Porter had purchased for himself and John A. Campbell, and that, instead of paying all the purchase money in cash, according to the terms of sale specified in the notice, they had paid \$5,000 in cash, and given their notes for the residue. Thereupon he filed an amended bill setting up these facts, and alleging considerable additional matter against the validity of the sale. Said amended bill is not in the record. The clerk certifies that it is not in the file of papers in the cause, and cannot be found. The substance of it, however, may be gathered from the demurrers and answers filed, and is admitted in the briefs of counsel on both sides, and no exception is taken on the ground of its absence from the record.

Among other things, it is shown that in 1896 Albert Haigh, trustee, made a sale under plaintiff's deed of trust at which plaintiff became the purchaser at the price of \$15,000; and it seems to have been alleged in that connection that the college consented to said sale, and agreed that the proceeds thereof should be applied to the satisfaction of its lien, which alleged agreement and connection with the sale on the part of the college is denied. Later a suit was brought by a creditor of the American Fire Clay Company and its other creditors to enforce a judgment lien, and it appears to have been alleged in that connection that the bill therein attacked the said sale made by Haigh, and that a decree was finally entered affirming the validity of that sale, and thereby affected, by way of an adjudication against it, the lien of said college. But this allegation

is denied, and it is averred that no finding was made by the decree respecting the validity of the sale, and that, lest the decree might, by inference, be taken to have decided any matters between the plaintiff and the college, the court added a provision that it was not intended to affect any of their rights, legal or equitable. Nothing is said about these matters in the brief of counsel for appellant, and evidently they have been abandoned. The argument in the brief proceeds upon the admission of a valid lien held by the Washington and Jefferson College, and merely attacks the sale as an uncompleted one, and as one which ought not to be completed because of the irregularities and defects in the proceedings on the part of the trustee, and alleged inequitable conduct on his part in proceeding as he did. No deed has been executed to the purchasers, and the reason given for this, as well as for the failure to pay all the purchase money in cash, by the appellees in their answers, is the institution of this suit. The purchasers say they were ready, and have ever since been ready, to pay the entire amount of the purchase money, upon receiving a deed for the property, and are informed and believe that the deed would have been executed and delivered to them by the trustee but for the bringing by the plaintiff of this suit, and that the pendency of this suit has since interfered with the closing of the transaction.

The purchase money not having been paid according to the terms set forth in the notice to sell, and no deed having as yet been made, counsel differ widely in their views concerning the nature of the sale and transaction, and the rights of the parties thereto, as determined by the nature of the sale; it being insisted on the part of counsel for the appellees that there is a complete contract of sale, binding the trustee to convey the title, and the purchasers to accept the same and pay the purchase money, in consequence of which the purchasers are entitled to the presumption in favor of the regularity of the proceedings which obtains in the case of a complete and confirmed judicial sale. On the other hand, it is claimed for the appellants that the sale has been arrested and stopped before completion, in consequence of which there is no presumption in favor of its validity, and that it stands in a position closely analogous to that of an unconfirmed judicial sale—liable to be set aside by the court for irregularity, with the burden resting upon the purchasers of proving the regularity and validity of the sale in the assertion of their demand for a conveyance of the title.

The rule announced in *Gibson's Heirs v. Jones*, 5 Leigh, 370, in reference to a completed sale under a deed of trust, is that, where it is impeached by an heir of the deceased debtor on the ground that the trustees did not make due advertisement of the sale in pursuance of the deed of trust, the sale is irregular, if the advertisement was not so

made, and that the burden of proof of such advertisement rests upon the parties claiming under the deed. That rule has probably been discarded in this state. It is now held that where a trustee has made a sale, and conveyed the land to a purchaser, who has recorded his deed, and a suit is brought by the grantor to set it aside because the land was not advertised in the manner specified in the deed of trust, the burden of proving the allegation is on the plaintiff, and that it will be presumed, after the making of the deed and recordation thereof, that the land was properly advertised. *Burke & Keatly v. Adair*, 23 W. Va. 139; *Lallance v. Fisher*, 29 W. Va. 512, 2 S. E. 775; *Fulton v. Johnson*, 24 W. Va. 95; *Dryden v. Stephens*, 19 W. Va. 1. An examination of the decisions of this court fails to disclose any case in which the aid of a court of equity has been sought by the debtor, or an interested creditor, in arresting the execution of the deed after the sale has progressed so far as the acceptance of a bid by the trustee, after crying the sale pursuant to advertisement, at the time and place fixed for sale, and payment of part of the purchase money by the purchaser. There is therefore no precedent to be followed in this case, and the conclusion must be determined by the general principles of equity cases involving sales by trustees under deeds of trust. There are many cases in which sales have been enjoined upon the application of the grantor in the deed of trust, showing equitable grounds, such as the misconduct of the trustee, want of notice, a defect in the notice, usury in the debt secured, or disputed claims as to credits upon the debt, but the bills have been filed and the injunction granted before the date of sale. In some cases sales have been set aside, even after the execution of the deed, upon equitable grounds. *Rossett v. Fisher*, 11 Grat. 492.

The nature of the contract between the trustee and the purchaser has been determined by this court in the case of *Fleming v. Holt*, 12 W. Va. 143, where Judge Green, delivering the opinion of the court, said: "A sale by a trustee, like a sale by a commissioner, is without warranty; but there is this obvious difference between the two: The contract of purchase at a sale by the commissioner is incomplete till his bid is accepted by the court, who is the real seller of the property, the commissioner of sale being the mere agent of the court. The bid is accepted by the court by the confirmation of the sale. After that, though the purchaser, before the deed is made to him, finds out that the title to the land is defective, he is nevertheless bound to receive it and pay the purchase money. In a sale by a trustee, the court does not accept the bid of the purchaser, but it is accepted by the auctioneer when he knocks the land down; and on the making by him of a memorandum of the sale and its terms, signed by the auctioneer, the contract for the sale is as complete as the contract for the sale

made by a commissioner is when the court accepts the bid by confirming the sale. After such knocking down of the land by the auctioneer, and the making of such memorandum, the purchaser must accept the deed and pay the purchase money, though he does find the title defective. He must, if he wishes to do so, investigate the title in this case, as in the other, while the contract is incomplete; that is, in the last case, before land is knocked down to him." This view seems to accord with the general tendency of the authorities. Auction sales, except those made under decrees of courts of chancery, are generally held to be within the statute of frauds, requiring a memorandum in writing to make them valid. "It was at one time thought that, by reason of their publicity, sales of land or goods at auction did not come within the statute; but, whatever may formerly have been the rule, it is now well settled that such sales not only come within the letter, but also within the spirit, of the statute. And no exceptions are made in this respect, except in favor of what are strictly judicial sales; that is, sales made under an order or decree of a court of chancery, or subject to its confirmation and control." Wood on Stat. Frauds, § 457. Some of the courts view sales by trustees, administrators, and other persons standing in a representative relation as quasi judicial sales, requiring no memorandum; and Browne on the Statute of Frauds, at section 264, says there are differences of opinion and decision, turning upon the fact of their being regarded, or not, as quasi judicial sales. But the more lengthy discussion of the subject found in Wood on the Statute of Frauds indicates that by the weight of authority such sales are within the statutes. Whether this sale is or is not within it is immaterial, except in so far as it bears upon the nature of the contract; the statute not having been pleaded here, and the plaintiff admitting that a sale was made. *Fleming v. Holt*, 12 W. Va. 143; *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220.

The acceptance of the bid and the making of a memorandum thereof by the trustee, being a complete contract of sale, binding the purchaser to accept the bid and pay the purchase money, must be, in seeking the enforcement of that contract, show that the trustee has proceeded regularly in making the sale? The contract does not confer title upon him. He obtains that by the deed. It confers only the right to call for the legal title; to enforce a specific performance of the contract of sale. If at this juncture the grantor in the deed of trust, or a subsequent deed of trust lienor having an interest in the property—an incumbrance upon the equity of redemption—in a sense standing in the shoes of the grantor, interposes, and denies that the trustee has proceeded regularly, and invokes the aid of a court of equity to restrain the trustee from passing the title to his prejudice, when he is not bound to do so by any

valid contract, is the burden of proof upon the purchaser to show that the proceedings of the trustee have been regular, or is it upon the grantor to show that they have not been regular? It is elementary law that he who sets up a contract of sale, and prays specific performance of it, must establish that contract by proof. On the other hand, in the case put, the grantor in a deed of trust files his bill asserting an equity and praying relief. Ordinarily, he who does that must not only allege, but prove, his equity, in order to obtain relief. In the absence of any presumption in favor of the regularity of the proceedings of the trustee, the burden seems to be upon the purchaser; if there is such presumption, then upon the grantor. Whether there is, or not, was not decided in *Dryden v. Stephens*, nor perhaps in any other case. Nor was the exact question discussed. But Judge Johnson did use the following language, bearing strongly upon it: "What would be required, in a suit promptly brought after the sale, to be proved as to the proper advertisement of the property, we will not decide in this case, although my own opinion is that the execution of the deed to the purchaser by the trustee is prima facie evidence that all the steps necessary for the trustee to take in order to give him the right to make the deed had been taken, and that this presumption would be conclusive, unless rebutted by other facts and circumstances in the case. Why should a cestui que trust in the deed permit his agent to make the sale, and, without showing mala fides on the part of the agent, be permitted to set aside the sale, unless the agent first showed that he had not sold contrary to law?"

As has been seen, the rule announced in *Gibson's Heirs v. Jones*, 5 Leigh, 370, denying the existence of any presumption in favor of the purchaser on the question of due advertisement of the sale, has been modified by this court. Whether the court would have gone further, had the aid of equity been invoked before the deed was made, and held that in that state of the case the purchaser should have the benefit of a presumption, it is impossible to say. Evidently the court was reluctant to overrule a decision based upon the reasoning of so eminent an authority as Judge Tucker, but it felt itself bound to do so because of the widespread disaster to land titles which would have resulted from adhering to it. However, Judge Johnson does not hesitate to say that the ruling made upon the notice was not necessary to the decision of the case, and that the dictum was wholly unsupported by authority. And he proceeds to show by the citation of numerous cases that the position does not accord with the rule announced by the courts. See pages 15 to 17. The peculiar circumstances of that case warranted the interposition of equity upon grounds other than want of due advertisement. The deed of trust under which sale was made was given by Mrs. Gibson in Jan-

uary, 1811. She died in October, 1811. In June, 1813, part of the land was sold, and the trust creditor bought it. The suit was brought by the heirs of Mrs. Gibson, who alleged that the debt was practically paid off, and claimed the benefit of large credits. The purchase was not made there, as here, by a stranger to the deed of trust, but by the very party at whose instance the sale had been made—the cestui que trust—between whom and the trustees and the heirs there was close relation, and between whom it was competent for a court of equity to do justice without the risk of injury to any third party. As the creditor himself had bought the land, sold by the trustee as his agent, of whose acts and proceedings he might well be supposed to be cognizant, the ruling that the burden was upon him to show that his purchase was regular in all respects may stand upon sound reason; but the reasoning upon which it is based is not necessarily applicable to a case in which the purchaser is a third party, sustaining no relation of confidence or privity toward the trustee or the debtor, but dealing at arm's length with the trustee, and having no notice of irregularity on his part. To hold, therefore, in a case like this, that the burden is upon the grantor to show want of notice, in no way impugns the soundness of the decision in *Gibson's Heirs v. Jones*.

The view that an innocent purchaser is entitled to the benefit of a presumption in favor of his title, which the grantor must rebut, is supported by *Marshall v. Stephens*, 8 Humph. 159, 174, 47 Am. Dec. 601, where the court say: "We hold it to be a sound principle, supported by both justice and reason, that when there is a power of appointment, which has been exercised, and there be a legal and an illegal mode of exercising it, and the proof leaves it doubtful which has been used, the legal presumption in favor of innocent purchasers or meritorious claimants is that it has been the legal one." This accords with the general principle of law. A plaintiff in an equity suit must state in his bill grounds for relief, and prove them as stated. One complaining of a decree or a judgment must bear the burden of affirmatively showing error. It may be said that this rests upon the presumption in favor of the regularity of judicial proceedings. So it does, but the rule of presumption does not stop there. Fraud is never presumed, but must always be alleged and proved. On the contrary, absence of fraud is presumed. 22 Am. & Eng. Enc. Law (2d Ed.) 1284. There is no presumption of negligence, but there is a presumption, in the absence of proof to the contrary, that a party charged with negligence is free from it, just as there is a presumption in favor of innocence, and of the performance of official duty and the regularity of official acts. The nature of the office of trustee, and the extent of the powers vested in him, confirm this view. He holds the legal title with full power to convey it. "Trustees of real or per-

sonal estate may, at law, sell, convey, assign, or incumber the same, as if they were the beneficial owners, and each of several trustees may exercise all his rights of ownership. If the trustees are joint tenants, each may receive the rents, and each may sever the joint tenancy by a conveyance of his share, and each may collect the dividends on stocks; and, on the death of one, the survivor may sell the whole estate. The general power of a trustee to sell and convey the estate is coextensive with his ownership of the legal title, and this general power over the legal title is entirely distinct from the execution of a special power given in respect to the sale of an estate. Though the trustees may thus sell, even in breach of the trust, a conveyance without consideration will not injure the cestui que trust, as the grantee, who is a volunteer, will hold upon the same trusts as the trustee held; and, if the purchaser for a valuable consideration have notice of the trust, he will still hold the estate upon the trust." *Perry on Trusts*, § 834. "As a general rule, the legal estate in the hands of a trustee has, at common law, precisely the same properties, characteristics, and incidents as if the trustee were the absolute beneficial owner. The legal title vests in him, together with all the appurtenances and all the covenants that run with the land. The trustee may sell and devise it or mortgage it, or it may be taken on execution. It may be forfeited, and it will escheat on failure of heirs, and so it will descend to heirs on the death of the trustee. All these properties and incidents attach to the legal estate at common law, whether in the hands of a trustee or of an absolute owner; but these incidents do not generally interfere with the proper execution of the trust, for all conveyances and all incumbrances made or imposed upon the estate by the trustee for other purposes than those of the trust, or in breach of the trust, are utterly disregarded by a court of equity, whatever may be the effect of such conveyances or incumbrances in a court of common law." *Id.* § 321. "It is now a universal rule that all those who take under the trustee, except purchasers for a valuable consideration, without notice, take subject to the trust, and they must either execute the trust themselves, or convey the property to new trustees appointed by the court." *Id.* § 346.

The application of these principles to the facts of the case makes it clear that a contract of sale has been made between the trustee and the purchaser. He has sold and agreed to convey the legal title, over which he had full power. He has power to sell and convey even in violation of the terms of the deed of trust. The purchaser deals with him as the owner of the legal title, competent to convey it. Although he can convey it, and the purchaser may take it from him, it will be subject in the hands of the purchaser to any and all equities which the grantor in the

deed of trust may be able to establish against him, even to the extent of showing that the sale was made in a manner not authorized, and is therefore invalid, as a result of which the right to have a reconveyance might be maintained. But these equities against the purchaser and in the property in his hands in no way limit and control the power of sale vested in the trustee. They are separate and distinct matters to be asserted by the grantor against the property in the hands of the purchaser, and he must plead them and prove them in order to obtain relief. Hence, as against a third party—one in no way connected with the deed of trust, except by his act of purchase, and in no way charged with the responsibility for the regularity of the proceedings, nor having power of control over them, nor affected with any notice of irregularities or equities—reason, justice, and authority make it manifest that the complainant must take upon himself the burden of showing wherein the sale is illegal, or an equity against the purchaser arises in his favor. It is the assertion of a cause of action, the whole burden of which is upon the plaintiff.

The allegation of the bill in respect to the insufficiency of the advertisement is that it was not published in the manner prescribed by the deed of trust, that no copy of the notice was served upon the grantor in said deed of trust, and that the notice was not posted at the front door of the courthouse as required by law. The deed of trust provided that "notice of any such sale may be given by advertisement, published thirty days previous thereto in some newspaper printed in the city of Wheeling, W. Va." It was published in the *Wheeling Intelligencer*, a daily newspaper, once a week for a period covering 30 days, as averred in the answer. In the bill it is charged that it was published in 6 issues, but as to whether there was a publication in each week during the 30 days the bill is silent. This seems to be regarded as unimportant by the counsel for appellant, his contention being that the deed of trust required the notice to be published each day for 30 consecutive days before the sale. The mode of giving notice prescribed in the deed of trust takes the place of that prescribed by the statute, and the inquiry is only whether it was given as required by the deed of trust. The language of a statute somewhat similar to that used in the deed of trust has been construed by this court in *Benwood v. Railway Co.*, 53 W. Va. 465, 44 S. E. 271. Point 2 of the syllabus gives the language construed, as well as the conclusion upon it, as follows: "A statute requiring notice to be 'given by publication for thirty days in some newspaper of general circulation,' published in a county or city, is sufficiently complied with by publication in the successive issues of a weekly newspaper through the period of time named."

The bill alleges that Hugh L. Irwin was

the attorney in fact of the American Fire Clay Company to accept service of process or notice, and resided in the county of Hancock, but the notice was not served upon him, nor upon the grantor in the deed of trust, nor upon any agent of the grantor. It is admitted that none of the officers of the company were in the county, and that it was a defunct organization, and that Irwin was its attorney in fact to accept service of process; but the answers deny that he resided in the county, and aver that he was not in the county, but spent the most of his time at Pittsburg, and in going about the country as a traveling salesman. From the testimony of Irwin, whose deposition was taken, it appears that he once resided in Hancock county, and owned property there, but some years before this sale had sold his property and removed to Genoa, Ohio, where he and his wife, for a time, kept house in rented property, and afterwards in property which he purchased, and that his business required his presence in Pittsburg during the greater portion of his time, and at times, for a month or two, his wife would go to Pittsburg, and stay with him, leaving the house shut up, and taking a part of the furniture with her. After moving away, Irwin only came back into the county on occasions of business, or to visit his mother and a sister, who resided in New Cumberland. On the occasion of the sickness and death of his mother early in November, 1898, he was in New Cumberland. He still claimed to be a citizen of that county, and exercised there his right to vote, which had been contested on two occasions.

Service of the notice upon the grantor, his agent, or personal representative is required to be made "if he or they be within the county," not if he or they be domiciled in the county, or reside in the county. But we must adopt some legal standard for determining what this means—what the Legislature intended. To say that it was intended that the trustee is bound to watch for, and avail himself of, a mere casual and temporary presence in the county, whether for an hour or a day, or at night or in the daytime, and, if it turns out that he was in the county when the service should have been made, without the knowledge of the trustee, by reason of which no service was had upon him, the sale shall be void on account of nonservice of the notice, would place a construction upon this language that would make it very inconvenient and difficult to obtain a legal execution of a trust. It would burden it with such inconvenience, risk, and the exercise of extreme diligence that it cannot be supposed that the Legislature intended it. The whole doctrine of personal service for judicial purposes depends upon the residence of a party within the territorial jurisdiction of the court. Although a nonresident, found casually within the jurisdiction, may be served with process, if

he be not so found, he is uniformly treated and proceeded against as a nonresident, although his domicile may be within the state. Ordinarily, if he is a resident, the law of process disregards the question whether the place in which he resides is his domicile. The principle of analogy, as well as the supposed intention of the Legislature not to burden the trust with great inconvenience, expense, and trouble, enforces the conclusion that the Legislature meant that the grantor, his agent or personal representative, shall have notice if he resides in the county. This seems to be the position of counsel for the appellees, while that of counsel for the appellant appears to be that there shall be service upon the grantor, his agent or personal representative, if domiciled within the county. The distinction between residence and domicile in the law of process and attachment is very clearly marked by the decisions. "Domicile" is a much broader term than that of "residence." A man may have his domicile in one state, and actually reside in another, or in a foreign country. If he has once had a residence in a particular place and removed to another, but with the intention of returning after a certain time, however long that may be, his domicile is at the former residence and his residence at the place of his habitation. "Residence" and "habitation" are generally regarded as synonymous. "A 'resident' and an 'inhabitant' mean the same thing. A person resident is defined to be one 'dwelling or having his abode in any place'; an inhabitant, 'one that resides in a place.' These terms will therefore be used synonymously as they may occur in the cases cited." Drake on Attach. § 59. The question of domicile is not involved in determining whether a person is a resident of a state or county. Id. § 58. The compatibility of domicile in one state with actual residence in another has been asserted and acted upon in the law of attachment by the courts of New York, New Jersey, Maryland, North Carolina, Mississippi, and Wisconsin. Id. § 65. The same conclusion was reached by this court in *White v. Tennant*, 31 W. Va. 790, 8 S. E. 596, 18 Am. St. Rep. 896, in determining what laws should control and govern the distribution of the personal estate of one who was domiciled in one state and died in another. The distinction was clearly marked in *State, Use of Burt, v. Allen*, 48 W. Va. 154, 35 S. E. 990, 50 L. R. A. 284, 86 Am. St. Rep. 29, involving the attachment laws and exemption laws of this state. There Judge Brannon, delivering the opinion of the court, said: "Domicile" means more than "residence." It imports residence and fixed intention to remain there. A man may be a resident of a locality without having his domicile there. He can have only one domicile at the same time, though he may have more than one residence." This makes it clear that, whatever may have been the domicile of Irwin

at the time of the sale (a matter which need not be and is not now decided), he was clearly not a resident of Hancock county, and failure to serve the notice upon him, even if he be regarded as an agent of the American Fire Clay Company, within the meaning of the statute (another matter which need not be and is not decided here), does not render the sale invalid.

As has been indicated, Haigh, trustee, had sold the property involved in 1896, and Atkinson had purchased it. It further appears that a deed was made to Atkinson. It seems, however, that he paid no part of the purchase money, for the reason that he took the property subject to the debt due the college, and the balance of the purchase money was due to himself. In addition to this, the bill and amended bill alleged that he (Atkinson) had no notice of the sale until about 10 days prior thereto. Although not argued, this presents the question whether he was entitled to notice by personal service—one which has not been decided by this court. The statute limits the requirement of personal service to the grantor, his agent or personal representative. This does not include his assigns or his heirs, unless, by construction, the statute be given effect beyond its letter. Upon a hasty consideration of the question, it would seem to be equitable and just that one who stands in the shoes of the grantor in respect to the property, as purchaser thereof, should have personal notice of the sale. As courts of equity proceed upon considerations of justice and fairness between man and man as a rule, it might be supposed that such courts would so construe the statute. But they do not construe statutes differently from courts of law, and they are equally bound by the stipulations of the parties where the trust is express, and its terms have been reduced to writing. Therefore when one comes into a court of equity asserting a right under an instrument creating the trust, equity can only give him what, by a fair legal construction of the terms of his contract, he is entitled to. He can have no more than the contract calls for. "It must also be observed that, if a trust is declared in writing, courts never permit parol proof of a trust to contradict an intention expressed upon the face of the instrument, for that would be to allow parol evidence to vary, contradict, or annul a written instrument." Perry on Trusts, § 76. That this is the true view appears to have been the opinion of Prof. Minor, who, in the second volume of his Institutes, at page 346, after referring to the jurisdiction in equity occasioned by the death of the debtor, which seems to have been acknowledged in Virginia, says: "Upon this conclusion, it is possible that the terms of the present statute, prescribing the duties of trustees, may exercise some control. * * * And it is the practice for the trustee to proceed to sell without regard to the debtor's death." Our statute is very similar, and where it is a part

of the contract, as it is here on the question of notice, the court can award no more under the statute than it gives. The courts of Illinois, North Carolina, Minnesota, and New York, in determining the rights of parties under similar contracts, have confined themselves within the stipulations of the contracts and the terms of the statute. In Illinois and North Carolina, where there seems to be no statute requiring personal notice, it has been held that the mortgagor or grantor in a deed of trust is not entitled to personal notice of the sale unless stipulated for in the instrument. *Hoodless v. Reid*, 112 Ill. 105; *Marston v. Brittenham*, 76 Ill. 611; *Loan & Trust Co. v. Munson*, 60 Ill. 371; *Bridgers v. Morris*, 90 N. C. 32; *Manning v. Elliott Bros.*, 92 N. C. 48; *Carver v. Brady*, 104 N. C. 219, 10 S. E. 565. The reasoning of the Illinois Court in *Loan & Trust Co. v. Munson* is in part as follows: "The debtor himself here prescribed the kind of notice which should be given in case of sale. It was not personal notice, but notice by advertisement in a newspaper. To say that a further personal notice was required by implication would be to annex a condition to the power of sale which the maker of the power did not see fit to provide, and the court would be making a contract for the parties, instead of enforcing the one made by themselves." If it be said that the benefit of the contract made by the grantor, stipulating for personal service to himself, would pass by assignment to his grantee, the reply is that the courts do not so hold. "The words 'personal representatives,' used in the statute relative to the foreclosure of mortgages by advertisement passed May 7, 1884, requiring the notice to be served upon the mortgagor or his personal representatives, means 'executors or administrators,' and not heirs or devisees. Where there is no personal representative to be served with notice, that provision of the statute is inoperative, and the foreclosure will be good if conducted in the mode otherwise prescribed in the statute." *Anderson v. Austin*, 34 Barb. (N. Y.) 819. To allow a statutory requirement of notice to the grantor to attach to property and pass by assignment as an incident to a conveyance thereof by the grantor would subject the creditor to the burden and expense of notifying every heir in case of the death of the debtor, and every subsequent lienor by a deed of trust as well as purchasers. It must be assumed that, if the Legislature had intended to impose upon the trust-deed creditor all these additional requirements, and expose him to the risks and delays in the enforcement of his claim which inevitably attend them, it would have made the language of the statute broader, so as to expressly include them. As this is the clear and logical result of the application of well-settled principles to the statute, it becomes unnecessary to decide whether the stipulation contained in the deed of trust concerning the notice to be given,

and omitting the requirement of personal service, relieves the trustee of the duty of making such service under the statute.

Failure to post the notice at the front door of the courthouse is affirmed by the plaintiff and denied by the defendants in the court below, and there is no evidence to support either side of the issue. The burden being upon the plaintiff, he fails to make out a case in that respect.

The validity of the sale is contested on the further ground that the trustee has not made his report as required by section 3 of chapter 87 of the Code of 1899. As the making of such report is always subsequent to the sale, and relates only to the distribution of the proceeds, failure on the part of the trustee to perform that duty could not be permitted to undo a valid sale.

It remains now to inquire whether the sale ought to be set aside upon the ground of fraud. Under this heading it is urged that there was collusion between the trustee and the purchasers; that the sale was not made for cash as advertised, but on credit, contrary to the terms of sale; and that under the circumstances the sale wrought gross injustice and wanton injury upon the appellant, without any equity demanding it upon the part of the college. The provision of the deed of trust concerning the terms of sale reads as follows: "Any sale of the property made by the trustee by virtue of this deed may be for cash or on credit with good security, or partly for cash and partly on credit, with good security." The trustee was also attorney for the college, and the argument is that by way of favor and partiality toward his client he made the terms of sale cash, failed to give appellant personal notice of the sale, thereby rendering it impossible for him to make such preparation for bidding as he might otherwise have made, entered into a collusive agreement with Porter and Campbell, with the consent of the college, whereby they should purchase the property ostensibly for cash, but really on credit, and thereby oppressed and injured the appellant, in violation of his duty as the agent of both parties. It has been decided that the trustee is the agent of the grantor and creditor, but not that he is the agent of the creditor in the deed of trust executed to him and of other lien creditors, nor of the grantor and purchasers at the sale. This distinction is not regarded as important, but its tendency is toward clearness and accuracy in the disposition of this question. In making the terms cash, the trustee acted within the strict letter of the contract, the grantor having authorized a sale for cash, and in failing to give the appellant personal notice of the sale the trustee violated no duty imposed upon him, as has been demonstrated. Of the alleged agreement and understanding between the trustee and the purchaser, prior to the sale, that they should purchase at the price at which the land was knocked down

to them, and have the benefit of time on the purchase money, there is no proof. What is urged as evidence is the language of the trustee in his deposition on cross-examination, where he said: "Immediately after making the sale, I went down to the bank with Judge Campbell, where the arrangement was made. He signed the notes there, and I then went to Mr. Porter's house and got his signature to the notes"—it being pointed out that the word "immediately," by its definition, shows that his going down to the bank with Judge Campbell was in pursuance of some agreement, and none could have been made after the sale and before they went down there, and that, therefore, it must have been made prior to the sale. Even learned men are not supposed to use words in the sense of their exact definitions at all times, and it is a well-known rule of law that the whole of language importing an admission must be taken, read, and considered together. One word or clause cannot be permitted to control other language in conflict with it. Cranmer and Porter both testify that there was no such agreement or arrangement. Cranmer says the time arrangement was suggested after the sale by Campbell because of the prevalence of rumors of litigation, and he, as the attorney of the college, his client, which is entitled to receive all the purchase money, consented to take \$5,000 cash, and give time as to the balance. As the charge of collusion is supported by nothing except the alleged admission, supplemented by the fact that time was given, and the whole of the testimony on that question clearly negatives the proposition, there is no admission nor any evidence of the charge. Clearly, there was no fraud on the part of the trustee, and, unless there was such inadequacy of price as calls upon a court of equity to set aside the sale, there is nothing shown which even savors of fraud.

There is some testimony tending to show inadequacy. One man, the president of the defunct company, testifies to \$30,000 as the value of the property, but others say that it brought all it was fairly worth. There was competitive bidding, A. F. Wilkins having run it up to \$12,900. The value of the property is a question of fact, and has been passed upon by the court below; the issue, as made by the witnesses, being whether the property brought its full value, not the amount of inadequacy. Inadequacy of price must be very great to warrant the court in setting aside a sale. In the absence of evidence tending to impeach the fairness of a sale, "it cannot be set aside for inadequacy of price, unless it be so inadequate as to justify the presumption of fraud and collusion, and, to justify such presumption from this inadequacy alone, it must be so strong and manifest an inadequacy as to shock the conscience and confound the judgment of any man of common sense. Half the estimated value of such property is not such an inade-

quacy." *Bradford v. McConihay*, 15 W. Va. 732. A sale under a deed of trust will not be set aside unless for weighty reasons. *Corrothers v. Harris*, 23 W. Va. 177. Even in the case of judicial sales, where no advance bid has been made, and the objection to confirmation is grounded upon the inadequacy of price, supported only by parol evidence, the proof must be very clear. *Connell v. Wilhelm*, 36 W. Va. 598, 15 S. E. 245. In another case of judicial sale, where a like objection was made, Judge Brannon, delivering the opinion of the court, said: "Affidavits of individual opinion of the worth of the land placed the property higher; but that is only opinion. There was no offer by any one of greater price; no guaranty that on a third sale the land would fetch more." *Schmertz v. Hammond*, 51 W. Va. 408, 41 S. E. 184. The argument in the brief of counsel for appellant is that this sale ought to be treated as an unconfirmed judicial sale. If that could be conceded, the sale could not be set aside upon the grounds thus far considered, under the authorities cited, as well as many others that might be referred to. It seems that in the amended bill there was a sort of an offer to pay more for the property, but it was not accompanied by any bid, or bond, or guaranty of any kind, and it gave no assurance that, if another sale should be allowed, a larger price would be obtained. Where a judicial sale has been regular, and there is an effort to defeat confirmation on the ground of inadequacy of price, there must be an upset bid, accompanied by security. *Kable v. Mitchell*, 9 W. Va. 492. Surely, a subsequent lienor or purchaser of property sold under a deed of trust is entitled to no greater equity against a purchaser under a prior deed of trust, at a sale made by the trustee, than a lienor upon or owner of property sold at judicial sale can claim.

As to the alleged credit of \$300, the evidence shows that the note was simply held as collateral security for the trust debt, and was not to be credited until paid. It was not paid, there being no pretense that anything was paid on it except \$54. This payment is admitted, and no credit is given for it, it seems; but the sale cannot be set aside on that account. The following language of *Moncure, P.*, in *Hogan v. Duke*, 20 Gr. 244, approved and applied in *Sandusky v. Faris*, 49 W. Va. 150, 38 S. E. 563, settles this contention: "The bill does not allege any attempt by the plaintiff to have a settlement of any of these matters with Duke, or any refusal of Duke to settle them. On the contrary, it alleges that he promised to credit them, but has failed to do so. Non constat that he was not willing to credit them when the balance due on the bonds was ready to be settled by the debtor, or out of the proceeds of the trust sale of this property." The college people admit the payment of \$54, and that it is to be credited on the debt; hence there is no controversy about it, and no rea-

son for any interposition on the part of a court of equity upon that ground. Even if there were a controversy, it is not clear that the sale should be set aside on account of it, for it is not a matter with which the purchaser has anything to do, but is such as may be settled by a court of equity between the parties who are concerned in it, without affecting the sale.

For the reasons herein given, the decree complained of should be affirmed, with costs.

(54 W. Va. 192)

CHAPMAN et al. v. MILL CREEK COAL & COKE CO. et al.

(Supreme Court of Appeals of West Virginia. Nov. 28, 1903.)

DEED—CONSTRUCTION—RESERVATION.

1. C. and H. conveyed to P. 925 acres of land by deed in which there is this language, after the granting clause: "Excepting always that the parties of the first part hereby expressly reserve to themselves, their heirs and assigns, forever, the use and occupancy of any one of the coal banks on said land that they may at any time hereafter, or that either of them or their heirs or assigns may jointly or severally select, together with right of way for ingress and egress to and from same." There are six separate coal veins underlying the land. The heirs of the said grantors instituted their action of ejectment to recover one of said coal veins or seams, designating it, and claiming under said exception or reservation, from the defendants, who claim title to all the coal under the deed to P. *Held*, that such deed does not reserve the title to said coal, or to any part thereof, and that said reservation or exception will not support an action of ejectment for said coal.

Poffenbarger, J., dissenting.
(Syllabus by the Court.)

Error to Circuit Court, Mercer County; J. M. Sanders, Judge.

Action by A. A. Chapman and others against the Mill Creek Coal & Coke Company and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

C. W. Smith, C. R. McNutt, White & Buchanan, and John Osborne, for plaintiffs in error. A. W. Reynolds and J. S. Clark, for defendants in error.

MILLER, J. By grant bearing date on the 1st day of July, 1851, there was granted by the commonwealth of Virginia to David Hall and Henly Chapman a tract of land containing 1,750 acres, lying in the counties of Mercer and Tazewell, the greater part thereof being in Mercer. The boundaries are set out in the grant. On the 5th day of April, 1858, Hall and wife and Chapman, by their deed, granted to David K. Perdue, for the consideration of \$307.75, that part of said tract lying in the county of Mercer, containing about 925 acres, described in the deed by metes and bounds. The deed contains the following exception or reservation: "Excepting always that the parties of the first part hereby expressly reserve to themselves, their heirs and assigns, forever, the

use and occupancy of any one of the coal banks on said land that they may at any time hereafter or that either of them or their heirs or assigns may jointly or severally select, together with right of way for ingress and egress to and from same; and the said parties of first part for themselves, their heirs, etc., hereby alien and convey to the said party of the second part all the right, title, and interest which they acquired in and to the said parcel of 925 acres of land by virtue of their grant as aforesaid; and they will warrant and defend the title to the same, with the reservation as aforesaid, against all persons claiming by, through, or under them, and from none else." At the October rules, 1893, A. A. Chapman, Charles T. Painter, S. W. Nowlin, and 65 others filed their declaration in ejectment in the clerk's office of the circuit court of Mercer county against the defendant Mill Creek Coal & Coke Company, a corporation, alleging therein that "on the 1st day of May, 1893, the said plaintiffs were possessed in fee of a certain coal bank or coal seam known as vein or seam number 3, in a certain parcel or tract of land, lying and being mainly in the said county of Mercer and state of West Virginia, containing nine hundred and twenty-five acres, being the same land conveyed by Henly Chapman and David Hall to David K. Perdue by deed dated April 5th in the year 1856." The metes and bounds as in said deed were then set out. Afterwards, on the 24th day of February, 1894, by order of the court, E. W. Clark, H. M. Bell, and Joseph I. Doran, trustees of the Flat Top Coal Land Association, landlords of the defendant, were made defendants with the said Mill Creek Coal & Coke Company. After sundry orders had been made from time to time in the action, the defendants, at the May term, 1902, entered their plea of not guilty, and, issue being joined, a jury was selected and sworn to try the same. At the close of plaintiffs' evidence in chief it was all stricken out by the court on motion of defendants. The plaintiffs then declining to take a nonsuit, the jury, being instructed by the court so to do, found a verdict for the defendants, to which the plaintiffs excepted, and moved the court to set it aside and to grant them a new trial. This motion being also refused by the court, the plaintiffs again excepted, and the court then rendered judgment against them on the verdict. All of the evidence introduced on the trial is certified in a bill of exceptions and is a part of the record. To the judgment aforesaid plaintiffs obtained a writ of error and supersedeas, and say, for assignment of error, that the verdict aforesaid is contrary to the law and the evidence; that it was error to exclude plaintiffs' evidence from the jury and direct the jury to find for defendants; and that the refusal of the court to set aside the verdict and grant plaintiffs a new trial was also error.

Plaintiffs are the descendants and heirs at law of grantors Hall and Chapman, and claim the said coal bank or coal seam by virtue of the reservation in the deed as aforesaid. The defendants claim under said deed, and contend that the reservation therein was and is void for uncertainty, and because it infringes the rule against perpetuities; that the right of selecting a "coal bank," reserved to the grantors in the deed to Perdue, could be exercised by the grantors only, and did not survive them; that the right reserved to select a "coal bank" does not give the right to select a coal vein; that the right reserved as aforesaid is not sufficient to support an action of ejectment; and that, if the said reservation is a vested interest in the land, it has been forfeited to the state for nonentry and nonpayment of taxes thereon according to law.

For the purposes of its consideration, it is immaterial whether that part of the deed of Hall and Chapman to Perdue, upon which plaintiffs predicate their action, is called an exception or reservation. Technically, they are different in meaning, but have often been used as synonymous. "Though apt words of reservation be used, they will be construed as an exception if such was the design of the parties." *Klister v. Reeser*, 98 Pa. 1, 42 Am. Rep. 608. In order to determine the questions raised, it is necessary, first, to ascertain the meaning of the words employed by the parties to the deed. In doing so we must take the language used most strongly against the grantors. Hammon on Contracts states the following rules for the construction of deeds and other written instruments: "Ambiguous words are to be taken most strongly against the person using them." Section 413, and cases cited. "This rule is applied to exceptions and provisos in deeds. They are taken most favorably to the grantee." *Id.* note 132. "Conditions, exceptions, reservations, and provisos are to be strictly construed against the person in whose favor they are introduced. Nor will the law permit a thing which is expressly granted, covenanted, or promised to be defeated by subsequent restrictions." Section 411. "Contemporaneous construction of a contract is that drawn from the time when and the circumstances under which the contract originated. It is of great weight in determining the intent of the parties. * * * And the state of the country and of the manners of society at the time the contract was made is also to be regarded in giving it a construction." Section 398. These principles are supported by *Hurst v. Hurst*, 7 W. Va. 299; *Gibney v. Fitzsimmons*, 45 W. Va. 342, 32 S. E. 189.

The foregoing rules will now be applied to the deed in question. The word "bank" is defined in standard dictionaries as "the face of a coal vein in process of being mined"; "the surface immediately about the mouth of a mine"; also, "to form, or lie in banks." In geology a thin layer or stratum of rock is

called a "seam." The same term is applied to coal. "Vein of coal," "coal bed," and "coal seam" are used as equivalent terms. In 1856, when the deed to Perdue was executed, that section of country in which the land in question lies was almost an uninhabited wilderness. So far as this record discloses, there was but one family living near the land. There were no roads to it. As a witness describes it: "There was nothing but cow paths. There was at that time an opening in the land, from which coal was taken for blacksmithing purposes." Another witness says: "They just cut it out [the coal] with a mattock, or something like that. There was no place in under the ground at all at the time, and I don't suppose that there was anybody in the county that would have gone under the ground ten feet then. They carried the coal away on their shoulders through bushes and brush. There was no use made of coal in that part of the county then except by blacksmiths." He further states "that he never knew anybody at that time to go there [to the place of getting coal] with a horse or wagon; that the coal could not have been taken in that way; that there was a path which crossed the ridge between a quarter and half mile from the coal opening; that it wasn't much more than a path, because there were at that time very few people there to use it [the path], and it was used only for going to mill and such things." It is fair to presume that coal in that section at that time had no commercial value, and that no person then knew the land was underlaid with the deposits of coal which have since been discovered. Certainly the parties to the deed did not expect the mining developments and great increase in the value of coal and coal lands in that section of the state, which have taken place since that time.

It appears that six veins of coal underlie the land in controversy. Since the coal developments in that region, those veins have been numbered, and are known as coal veins Nos. 1, 2, 3, 4, 5, and 6, respectively; the lowest one being No. 1, the highest No. 6. No. 2 is about 40 feet below No. 3, and is 30 to 36 inches in thickness. No. 1 is 50 to 60 feet below No. 2. No. 6 is from 150 to 175 feet above No. 3, and is between 3 and 4 feet in thickness. The thickness of vein No. 3, the one in controversy, is from 7½ to 8 feet. Of the tract of 1,750 acres Hall and Chapman conveyed 925 and retained 825 acres. They also expressly reserved to themselves, their heirs and assigns, forever, the use and occupancy of any of the coal banks on said land (conveyed) which they might at any time thereafter or that either of them or their heirs or assigns might jointly or severally select, together with the right of way for ingress and egress to and from the bank so selected. The exception for the use and occupancy of the coal bank and for the right of way are in one sentence. "By the term 'right of way' is generally meant a private way, which is an incorporeal hereditament of that class of ease-

ments in which a particular person or particular description of persons have an interest and a right, though another person is the owner of the fee of the land in which it is claimed." Angell on Highways (3d Ed.) § 1. According to this author, the exception as to the "right of way" reserves an incorporeal hereditament only, and not the title to any portion of the land. Again, this clause reserves "the right of way for ingress and egress to and from" the coal bank which might be so selected. This language certainly does not confer upon the grantors, or those who claim under them, the right to pass over the tract of land to the several openings of the various mines which might be necessary for the purpose of mining coal vein No. 3. It is shown that it would be impracticable to mine all of the coal in that vein from one opening.

Does this clause in the deed retain in the grantors the title to any coal, and, if so, to how much? If it reserves to the grantors the title to any one of the coal veins, or coal beds on the land, it reserves the title to all. The selection was to be made in the future, and, on this theory, when the selection was made, if ever, the title to the coal veins not selected remained in the grantors, their heirs or assigns, because "no estate of inheritance or freehold, or for a term of more than five years, shall be conveyed unless by deed or will." Code 1899, c. 71, § 1; Code Va. 1860, c. 116, § 1. If, under the deed, the title to the coal passed to Perdue, he or his assigns for the same reason held the title after the selection was made by the heirs of Hall and Chapman. In *United States v. Grundy*, 3 Cranch, 337, 352, 2 L. Ed. 459, the Court says: "It seems to be of the very nature of a right to elect one of two things; that actual ownership is not acquired in either until it be elected; and, if the penalty of an offense be not the positive forfeiture of a particular thing, but one of two things, at the choice of the person claiming the forfeiture, it would seem to be altering materially the situation in which that person is placed to say that either is vested in him before he makes that choice. If both are vested in him, it is not an election which to take, but which to reject. It is not a forfeiture of one of two things, but a forfeiture of two things, of which one only can be retained." In *Sir Rowland Heyward's Case*, 2 Coke, 35a, it is held that: "If I have three horses, and I give you one of my horses, in this case, the election ought to be made in the lifetime of the parties, for, inasmuch as one of the horses is given in certainty, the certainty, and thereby the property, begins by election." If we hold that the title to the coal beds or any of them remained in Hall and Chapman, their heirs or assigns, until the reserved right of selection was exercised, it follows that the deed to Perdue was and is, in effect, nugatory, as to the coal underlying the land, because the grantee could not lawfully sell or use it un-

til the reserved interest was definitely ascertained, which might not be done within a hundred years or more. "A deed should be considered as intended to have some effect, and a construction making it operative will be preferred to one rendering it void. Some effect will, if possible, be given to the instrument, for it will not be intended that the parties meant it to be a nullity." Devlin on Deeds, vol. 2, § 850. If grantors reserved the title to the coal, or any part thereof, neither Perdue nor his assigns could maintain an action against a person for the digging or removal thereof from any of the veins until after a selection as aforesaid. The lien of a judgment against Perdue or his heirs or assigns would not have attached to any of the coal. "The lien of a judgment attaches to the precise interest or estate which the judgment debtor has actually and effectively in the land." Black on Judg. § 420; *Marshall's Ex'r v. Hall*, 42 W. Va. 641, 26 S. E. 300; *Cleavenger v. Felton*, 46 W. Va. 249, 33 S. E. 117.

Henly Chapman, one of the grantees, died in April, 1864, and David Hall, the other, died in Indiana in 1867. Their heirs and claimants under them, at the time of the trial of the action, resided in Arkansas, Idaho, Kansas, Missouri, West Virginia, and other sections of the country. The Hall heirs were represented by their agent and attorney in fact, D. H. Torbett, a grandson of David Hall. The grantors in the deed before their deaths, and their heirs, at different times had removed from the section of country in which the land is situated, seemingly leaving no interests behind them. Thirty-seven years had elapsed after the execution of the deed before their action of ejectment was commenced. The marvelous developments of the last 25 years in Mercer and adjoining counties had made the coal underlying that tract of land immensely valuable. Vein No. 3, the most valuable of the six, had been opened, and in 1893 was being mined by persons holding under the title conveyed to Perdue. Plaintiffs then for the first time sought to make their selection under the reservation in the deed, selected No. 3 as the "coal bank" referred to in the deed, and commenced their aforesaid action for its recovery. These are circumstances against the contention of plaintiffs that they have a vested right in the land, the coal in place being a part of the freehold. "Tell me," said Lord Chancellor Sugden, "what you have done under such deed, and I will tell you what the deed means." *Caperton's Adm'r v. Caperton's Heirs*, 36 W. Va. 486, 15 S. E. 257, and authorities there cited. Plaintiffs' action is brought on the assumption that Hall and Chapman reserved the title to this coal vein, and that the title thereto descended to them. If we adopt this construction of the reservation in the deed, we must say that, instead of a reserved right of selection, the grantors and their heirs had and

have the right of rejection of five of the six coal veins. But the language is, "Excepting always that the parties of the first part hereby expressly reserve to themselves their heirs and assigns, forever, the use and occupancy of any one of the coal banks on said land that they may at any time hereafter * * * select," etc. This language imports a future selection, and does not indicate an intention of the grantors to hold the effect and operation of the deed in abeyance. To select is to make choice of that which is most desirable or suitable. Selection does not carry with it the idea of ownership until the selection be made. The customer selects the article desired from the stock of the merchant. The settler selects and takes up a parcel of land from the public domain, under the provisions of the land act.

Plaintiffs cite numerous authorities to support their contention, among which is *Mapel v. John*, 42 W. Va. 30, 24 S. E. 608, 32 L. R. A. 800, 57 Am. St. Rep. 839. In the opinion, at page 37, 42 W. Va., page 611, 24 S. E., 32 L. R. A. 800, 57 Am. St. Rep. 839, Judge Holt says: "This brings us to the evidence. Joshua M. Ross sold and conveyed to Jesse Everly, by deed dated 16th February, 1860, the land now owned by plaintiff, Mapel. In it he makes this reservation: 'The said Ross excepts the privilege of coal for his part of the farm at the bank now in use.' What Ross did not then sell, which he calls 'his part of the farm,' is the land now owned by defendant, John. As to the nature and extent of defendant's right to mine coal on plaintiff's land, it is enough for our present purpose to say that the privilege to mine coal at the bank then in use was an easement annexed to defendant's land, the dominant tenement, to mine coal at that open mine on plaintiff's land, the servient tenement, which was only a privilege to take coal at a particular place for a particular purpose," etc. We do not think that this case adds any strength to the contention of the plaintiffs.

Testing the language of the reservation in the deed by the rules above laid down, and giving due consideration to the time when and the circumstances under which the deed was executed, our conclusion is that Hall and Chapman did not, in and by said deed, reserve to themselves, their heirs or assigns, the title to the coal, or any part thereof, underlying the said 925-acre tract of land. We are further of opinion that the exception in the deed, if good for any purpose, reserved only the right to take coal for the purposes for which it was then used in that section from any of the coal veins on the said conveyed tract of land to be selected by the persons mentioned in the deed; and that the terms, use, and occupancy of any one of the coal banks on said land must be restricted to the purpose of digging and removal of coal for the purposes aforesaid. It follows, there-

fore, that the said action of ejectment cannot be successfully maintained.

In *Witten v. St. Clair*, 27 W. Va. 770, 771, the court, by Judge Snyder, says: "Accordingly, in order to enable the plaintiff to sustain this action, it is essential that he be clothed with the legal title and the right of possession at the time the action is instituted. The plaintiff must always, in the first instance, make out a legal and possessory title to the premises in controversy, and the defendant's evidence may be confined to the falsifying his adversary's proofs or rebutting the presumptions which may arise from them." See, also, *Suttle v. Railroad Co.*, 76 Va. 284; *Hancock v. McAvoy* (Pa.) 25 Atl. 47, 18 L. R. A. 781, 31 Am. St. Rep. 774; *Am. & Eng. Enc. Law* (2d Ed.) vol. 10, 482; *Wait, Actions & Defenses*, vol. 3, p. 10. A plaintiff in ejectment must at the time of instituting his action and at the time of its trial have a legal title to the land he sues for. *Am. Dig. (Cent. Ed.)* vol. 17, col. 1960. In Pennsylvania, where great latitude obtains, there being no courts of chancery, it has been held that ejectment is almost the only action for trying title to land. "But the action will not lie for a mere privilege or incorporeal hereditament. The general rule is recognized in Pennsylvania, as elsewhere, that ejectment will only lie for things whereof possession may be delivered by the sheriff. The case of common appendant or appurtenant is said to be in some degree an exception; but then the officer, by giving possession of the land, gives possession of the common." *Tyler on Eject. & Ad. Enjoy.* 59. On page 37 the same author says: "By the common law and the general rule an ejectment will not lie for anything wherever an entry cannot be made, or of which the sheriff cannot deliver possession. It would follow, therefore, by this rule, that ejectment is only maintainable for corporeal hereditaments." "Ejectment will not lie for an incorporeal hereditament." *Am. Dig. (Cent. Ed.)* vol. 17, col. 1954. The exception in the deed being a privilege only, as the right to take water from a spring, or of watering stock at a stream on the lands of another, is an incorporeal hereditament, for which the action of ejectment will not lie. A decision of the other questions presented is therefore unnecessary.

For the foregoing reasons, there is no error in the judgment complained of. It must be affirmed.

POFFENBARGER, J. (dissenting). Being of the opinion that the exception contained in the deed, though in form a reservation, does not lack that certainty which is necessary to vest a title, and that by its express terms it carries an interest in, and not a mere right to do something upon, the land, I am compelled to dissent from the conclusion to which my associates have come. This

is not a case in which a choice to take one of several different things is reserved or granted. It is an express exception, which is practically the same thing as a grant, of an interest in one thing, which is made certain by the description found in the deed. That one thing is the tract of land. The only question left for determination is the extent of the interest excepted, or the particular designation of the part excepted. Nobody could hesitate in saying that it was competent for the grantors to reserve to themselves all the coal in the tract of land granted. Having the power to reserve all, can it be said that they had not the power to reserve part of the same thing? The case of the United States v. Grundy, 3 Cranch, 337, 2 L. Ed. 459, and the hypothetical case put in *Sir Rowland Heyward's Case*, 2 Coke, 359, illustrate an entirely different proposition from the one involved here. In the former the United States had the right to elect whether it would take a ship itself or the value of that ship in money, to be recovered of the owner. The ship and the money were two separate and distinct entities or things. Until the choice was made, it was left wholly uncertain as to which of those things would be taken. There was uncertainty of the thing in which the interest would be taken. The statute did not provide that the government should have an interest in one certain thing, leaving the extent of that interest to be determined by election, but said that the government should have, by reason of the forfeiture or violation of the statute, an interest in one thing or an interest in another thing, as it might elect, without saying in which thing it should have an interest. There was no uncertainty of any kind whatever. Hence no title could pass or vest until the entity in which it was to vest was indicated and made certain by the election. The instance of giving one of three horses is of the same kind. If the gift had been of a one-fourth or a one-half interest, according to the election of the donee, in that certain white horse called "John," an interest would have passed and vested at once. Nothing would have remained unsettled except the extent of that interest, and the mode of making that certain would have been expressly stated in the declaration of gift. The specific piece of property in which the interest is given is, in such case, designated, pointed out, and made absolutely certain. So, in this case, a tract of land is described by metes and bounds, located and identified to an absolute certainty, and then the deed says one of the coal banks, to be selected by the grantors, is reserved and excepted from the conveyance. That coal bank is a part of the one thing conveyed, and is not a separate and distinct entity. All six of the coal veins, and the strata of stone between them, and the earth on top, and all that lies below constitute the thing identified and passed by that deed, in which an interest is reserved. The only matter left open is the amount of

the interest, and the means of ascertaining that are specified in the deed. That is certain which can be made certain. Suppose it had been the conveyance of 100 acres of land, excepting therefrom 1 acre, or 10 acres, to be selected by the grantor. Would that have been void for uncertainty? By no means. "If a man grants twenty acres, parcel of his manor, without any other description of them, yet the grant is not void, for an acre is a thing certain, and the situation may be reduced to a certainty by the election of the grantee." 3 Bac. Abr. 307. "So, if one being seised of a great waste, grants the moiety of a yardland lying in the waste, without ascertaining what part, or the special name of the land, or how bounded, this may be reduced to a certainty by the election of the grantee." *Id.* "When one and the same thing passeth to the donee or grantee, and the donee or grantee hath election in what manner or degree he will take this, there the interest passeth immediately, and the party, his heirs or executors, may make election when they will." *Id.* 311. "And it was said if a man gives two acres to another, habendum one acre to him in fee and the other acre to him in tail, and he aliens both, and hath issue, and dies, in this case the issue may bring a formedon in descender for which acre he will, for the election is not determined by his death; for an estate passes presently by the livery, and the issue shall take by descent." *Sir Rowland Heyward's Case*, 2 Co. 35a, 37a. At the same page Lord Coke says: "When nothing passeth to the feoffee or grantee before the election to have one thing or the other, there the election ought to be made in the life of the parties, and the heir or executor cannot make the election. But when an estate or interest passeth presently to the feoffee, donee, or grantee, there election may be made by them, or by their heirs or executors. When a thing passeth to the donee or grantee, and the donee or grantee hath election in what manner or degree he will take it, there the interest passeth presently, and the party, his heirs or executors, may make election when they will." This principle was applied in *Anderson v. Donelson's Ex'rs*, 1 Yerg. (Tenn.) 197, under the following conditions: Anderson had covenanted to convey to Donelson 700 acres of land, to be selected in a square or oblong out of any one of the four corners of a large tract. After Donelson's death his executor selected the land, and Anderson refused to convey it. Thereupon an action was brought on the covenants. In deciding the case the judge quoted and applied a part of the language above quoted from Lord Coke, and then said: "It is a simple title bond for 700 acres of land out of a 5,000-acre tract, making Donelson in equity a tenant in common with Anderson in proportion as the 700 acres are to the whole tract; and the option spoken of in the bond refers alone to the mode of partition, which Donelson

reserved the right to control to a certain extent." This is not an exceptional case. A great many others so hold in several different states, some of which are cited in support of the following text, found in 17 Am. & Eng. Enc. Law (2d Ed.) 663: "Where a conveyance is made of a certain number of acres of a tract of land, not described by metes and bounds, the grantee becomes a tenant in common with the grantor or the other owners, where the land is held in common, of the entire property, the extent of his interest being determined by the proportion which the number of acres conveyed bears to the number of acres in the entire tract." These decisions have settled what, in early times, was an open question, namely, whether in such case there was a tenancy in common. "Upon a covenant, in consideration of marriage, to stand seised of so much land as shall be of the yearly value of forty marks, it hath been a question whether they to whom the assurance was made might enter into any part of the land of the value of forty marks, at their election, and hold the same in severalty, or if they should be only tenants in common with the other, and whether they may choose one acre in one place and one acre in another, and so through the whole land, where they please." 3 Bac. Abr. 307, 308. The question was what the relation between the parties should be, but no doubt was expressed that an interest attached and passed by such a covenant, although far more uncertain in its nature than that which is excepted here by the clause in question.

As the relation of co-tenancy in the land is created by this exception, it was in the power of *Perdue*, the grantee, or any person claiming under him, to compel at any time an election on the part of the grantors or their heirs, just as in any other case. One co-tenant may, by a proceeding for partition, have his interest set apart for his separate use and enjoyment. Before the statute authorizing conveyances of land by deed without livery of seisin, this exception could hardly have been made, and, if it could have been made, it would have failed if the election were not made within the lifetime of the party in whose favor it was made. A man could not make a feoffment to commence after his own death, for estates of freehold could not be made to commence in futuro. 4 Bac. Abr. 203, 204. Neither could a man reserve to himself a life estate. *Id.* 204. There is another reason why, under a feoffment, it was necessary that the election be made in the lifetime of the feoffee. The delivery of possession of the land was necessary to the completion of the transfer of title. Lands could only pass by livery of seisin, and livery of seisin was delivery of the possession. Anciently this was done without any writing, but later a charter or deed accompanied it as evidence thereof, but the delivery of the possession continued to be the essential part

of the transaction. Where the livery was in deed, both parties went upon the land, and when the conveyance was by livery within view or livery in law, title did not vest in the feoffee until he entered upon the land. Until entry the livery operated as a license to take possession for the purpose of completing title, and, if the feoffee died before entering, his heirs could not enter. 4 Bac. Abr. 200, 202. As lands now pass by grant, and estates may be so created to commence in futuro, these old principles do not apply, and election is not necessary to the completion of title. Entry upon the land is no longer required. Therefore *Bullock's Case*, cited in *Sir Rowland Heyward's Case*, is not applicable. That was a feoffment of a house and 17 acres of land out of a large tract, and the land was not selected and entered upon by the feoffee in his lifetime.

Nor do I think the exception can be limited to the creation of a mere incorporeal hereditament—the mere right to go upon the land and dig and carry away, in common with the other owners, coal. The exception is of the use and occupation of the coal bank. Occupancy, when applied to real estate, implies an estate in the land. An occupant of land is a tenant or an owner. If he occupies at the will of the owner, he has an estate at will or at sufferance; if for a period of years, an estate for years; if for a lifetime or any greater period, he has an estate of freehold. The mere right to go upon land and do certain acts, such as to take away the wood or coal, is not an estate in the land of any kind or character. Certain grants or reservations in respect to coal have been held by the Pennsylvania courts to create mere incorporeal hereditaments, and not to pass any interest in the land. But in most of these instances the instrument disclosed upon its face the intent to pass nothing more than a mere right to dig and carry away coal; not all the coal, but some of the coal; the grantor reserving the right to dig and carry away from the same seam or mine also. One case may be said to be somewhat similar to this. The instrument conferred the "free right to dig coal at the coal bed under my lot, with the privilege freely to carry the coal from the said lot, as also free ingress and regress to and from said coal bed through my land at all times hereafter, doing as little damage as may be in the uses," etc. *Gloninger v. Coal Co.*, 55 Pa. 9, 93 Am. Dec. 720. That deed expressly gave the right to dig and carry away coal. It did not give in express terms the use and occupation of the coal bank, as the reservation here does. There is no escape from the conclusion that this passes an interest in the coal, except by resorting to construction, so as to narrow these terms and make them mean less than the words used technically and ordinarily mean. *Rex v. Inhabitants of Batington*, 4 T. R. 178, holds that: "If A., residing on a cottage of his own, grant it by lease and release to B.

in fee, in consideration of £361, with a proviso 'that A. shall live in and occupy the said cottage with the appurtenances as he theretofore had done and then did for life,' B. only takes an estate for life in A." Lord Kenyon said: "If this question had depended on the first words in the proviso, I should have thought that they would have been satisfied by determining that only a liberty to inhabit the cottage was reserved to the father; but the word 'occupy' carries the interest reserved still farther, and shows that the whole estate was intended to be reserved to him." Ashhurst, J., said: "The word 'occupy' in the proviso is extremely material to show that the deed must have this operation; for it is a reservation of the thing itself—of the whole estate." Buller, J., said: "Something more was meant than a bare license to inhabit or live in the house, for the word 'occupy' is added to them." The same force was given to the word "occupy" in *Rabbeth v. Squire*, 4 De G. & J. 406, where a will gave a joint use and occupation of land. Applying the reasoning found in the above quotations to the language of this exception, it might be said that, if it had stopped with the word "use," a mere privilege would have been imported; but it does not stop there. It gives not only the use of the coal bank, but the occupancy of it, and by giving the occupancy of it it excludes the grantee and those claiming under him, and this necessarily vests an interest in the grantor.

Thus it clearly appears that, unless a different intention on the part of the parties to the deed can be found, the coal bank itself was excepted. Where is this intention to be found? Not in the deed. In order to hold that less than an estate passes under the exception, it must be found that the words "use and occupancy" were used in some sense different from their technical meaning. The only ground offered for this purpose is the fact that at the time of the conveyance the use of coal was limited, and it was not mined extensively, if at all, for commercial purposes, and not mined at all in that section of the country except for blacksmithing purposes, and therefore the exception was only intended to give to the grantors the right to go upon the land and take coal for such purpose. Had Hall and Chapman been blacksmiths, and using a coal bank for that purpose, that fact might have given some color to this contention. But they were not so using it, nor were they blacksmiths. There was an opening on the land, from which coal was taken for blacksmithing purposes, and the inference to be drawn from these circumstances, if any, is that Hall and Chapman were receiving pay for the coal so taken, and thus deriving an income from the land which they desired to continue. Moreover, they were lawyers, and are supposed to have known the legal meaning and force of the terms used in the exception—a circumstance which strongly argues against any

intent different than from that imported by the technical meaning of the terms used. I do not see that the purpose for which the coal was then used has any bearing upon the question. If it be true that only such use was made of this mineral at that time, might not the grantors just as well have reserved to themselves the exclusive right of one coal bank for that purpose as for any other purpose? If such ignorance of the use and value of the mineral obtained at that time, may we not well suppose that the parties were wholly ignorant of the extent of that mine, and that the grantors, in order to assure themselves of a sufficient supply, were careful to reserve the whole of it to themselves? The grantee being equally ignorant of its extent and value, may we not say he was perfectly willing to let it be cut out of the conveyance? If they did, the subsequent demand for and value of this great deposit cannot change the original intent. This argument of the limited use of coal and ignorance of its value and quantity is a sort of two-edged sword, and cuts as deeply on the one side as on the other, and it by no means supports the alleged intent different from that imported by the words used in the deed.

Again, it is said we must ascertain the intent by the conduct of the parties under the deed. What conduct? What use of this coal mine have the grantors or their heirs made? What act of theirs can be pointed to as indicating their construction of this language? Does it appear that under it they have confined themselves to the exercise of a mere liberty in taking coal? By no means. It appears that they have done nothing under it. Instead of conduct or acts under it showing intent or construction, want of action appears. How, then, can the rule of conduct be applied? It appears that since the deed was executed some 37 years have elapsed, in all of which there has been absolute silence and inactivity on the part of the grantors and their heirs respecting the reserved coal mine. A good illustration of the construction of a reservation determined by the acts of the parties under a deed is given in *Jones on Real Prop. in Conv.*, at section 523, where he says: "Thus, where there was an exemption and reservation 'of sixty-eight feet of land from the east end of the described premises,' and the grantor retained possession of a lot of that width along the whole east side of the land, putting the purchaser in possession of the remainder, and the parties built a fence along the line thus fixed, and the grantor built a house and barn on the portion held by him, and after many years conveyed the tract as being sixty-eight feet wide, it was held that the acts of the parties established the interpretation that the exception was of a strip sixty-eight feet wide along the east side of the lot, and not merely of sixty-eight square feet, which would be a strip of the width of only six inches." In that case there was action, not

want of action; things done, not things omitted; affirmative conduct, not entire want of conduct.

The last contention is that by the use of the words "one of the coal banks" the parties could have meant nothing more than the surface or walls of the coal or opening. It seems to me we are not warranted in assuming or inferring that the grantors, in reserving to themselves and their heirs the exclusive use and occupancy of this coal bank, intended to use it for residence purposes or temporary occupancy when out in pursuit of wild animals, or for any purpose other than the digging down of those walls and making use of the material taken from them. It is pointed out that coal was then used to a very limited extent, even in that wild country; and, as it is impossible to discover any reasonable purpose for which this reservation could have been made except to make use of the coal, in doing which the walls would be pulled down and the surface pushed back from time to time, possibly to the extent of exhausting the whole vein, we ought to say that this was the purpose of the exception.

If the court had adopted this view, the result would have been embarrassing to the company now operating in the vein of coal for the recovery of which this suit was instituted. It would have been the result of their own lack of caution and prudence. They must have known this exception was in the deed under which they claimed, and, as prudent men, it was their duty to acquire that outstanding interest before expending their money in the development of the mine.

(54 W. Va. 122)

STATE v. FAUDRE.

(Supreme Court of Appeals of West Virginia.
Nov. 14, 1903.)

INTERSTATE FERRIES—TOLL—AMOUNT.

1. The state of Ohio has right to establish ferries on the Ohio side of the Ohio river, and to fix their charges for ferriage over that river from Ohio to West Virginia.

2. West Virginia cannot punish one who acts under a ferry franchise given by the state of Ohio to operate a ferry from its side of the Ohio river over that river, for charging one coming from Ohio more than is allowed by West Virginia law for ferriage over that river. (Syllabus by the Court.)

Error to Circuit Court, Mason County; F. A. Guthrie, Judge.

Bert Faudre was convicted of overcharge on a public ferry, and brings error. Reversed.

H. R. Howard, for plaintiff in error. The Attorney General, for the State.

BRANNON, J. Bert Faudre was indicted in the circuit court of Mason county for charging C. E. Winger ten cents for ferriage

of himself from Gallipolis, in the state of Ohio, over the Ohio river, to the West Virginia side, contrary to the order of the county court of Mason county fixing five cents as the charge. The case was tried by the court in lieu of a jury, and the court found Faudre guilty, and fined him \$10. As I understand the evidence, the defendant was operating the ferry under a ferry franchise conferred by the Virginia Legislature in 1796, and reenacted in 1819. He justified this charge under an ordinance of Gallipolis establishing a ferry "from the end of Court street," in that city, "across the Ohio river to the Virginia shore," and a license from the city to operate the ferry; the ordinance allowing the ten cents charge, he operating under this license also.

The Ohio is a great, navigable river dividing the states of Ohio and West Virginia, a public highway open to all. Unless an exception to the general rule, we must apply the general rule, which is that "a state has the right to grant the exclusive right to ferry from its shores across a navigable river between two states." 16 Am. & Eng. Ency. Law, 1091; Cooley, Con. Lim. 731. "In the case of boundary rivers, like the Mississippi, a ferry franchise conferred by a single state is valid without the concurrent sanction either of Congress or of the state upon the opposite side of the river, or the right of landing beyond the limits of the state by which the grant is made." Gould on Waters, § 35; Conway v. Taylor, 1 Black, 603, 17 L. Ed. 191; Gear v. Bullerdick, 34 Ill. 74. To say that a state has not this right to give its people facility of departure would detract from its sovereignty and be of great detriment. A ferry need not own land on both sides. Conway v. Taylor, 1 Black, 603, 17 L. Ed. 191. The point of departure is the seat, the base, the home, of the ferry. Sistersville Ferry Co. v. Russell, 52 W. Va. 356, 43 S. E. 107. "A ferry is in respect of the landing place, and not of the water. The water may be to one; the ferry to another." 13 Viner, Abridg. 208 A; Conway v. Taylor, cited. Thus, as the Ohio ferry had a foothold presumably on the end of Court Street, Gallipolis, it was a lawful ferry. Under this rule no state can prohibit another from granting a ferry right. Under its franchise the boat can depart, and, the stream being a highway, it can navigate its waters, and it can land on the opposite shore, and cannot be prevented by the state on the opposite shore. It cannot land on private property without consent, but it has right to land at a public wharf, paying reasonable wharfage. In carrying persons and property it is engaged in interstate commerce, and its landing could not be prohibited or taxed, though it may be made to pay wharfage. The landing is a necessary part of the act. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 186, 5 Sup. Ct. 826, 29 L. Ed. 158; Cannon v. New Orleans, 20 Wall. 577, 22 L. Ed. 417;

* 1. See Ferries, vol. 23, Cent. Dig. §§ 12, 73.

Newport v. Taylor's Ex'rs, 16 B. Mon. 784; *Trans. Co. v. City*, 107 U. S. 691, 2 Sup. Ct. 732, 27 L. Ed. 584. The right to have a ferry includes the right to land. The right to land is incidental to the right to navigate a public river. It is said that "the grant of a ferry franchise across a river between two states gives only the right to ferry from the shore of the state granting the franchise." 12 Am. & Eng. Ency. L. 1092; *Weld v. Chapman*, 2 Iowa, 524; *Gear v. Bullerick*, 34 Ill. 74.

But it is said that these principles apply only where the boundary of the opposite states is the middle of the river, giving each state indisputable jurisdiction over the shore and half the river, and that such is not the case with the Ohio river, for the reason that when Virginia granted to the Union the Northwest Territory her grant conveyed the territory "situate, lying and being to the northwest of the river Ohio." Great difference of opinion has been expressed as to whether this reserved to Virginia jurisdiction to low or high water mark on the west side of the Ohio. In *State v. Plants*, 25 W. Va. 119, 52 Am. Rep. 211, it was held that "the jurisdiction of West Virginia is coextensive with the water while confined within its banks." In *Ravenswood v. Flemings*, 22 W. Va. 52, 46 Am. Rep. 485, it was held that "the bed, banks, and shores of the Ohio river are held by the state in trust for the public." This would give West Virginia title to the top of the bank on the Ohio side. The first Constitution of this state claims the state's jurisdiction to include "so much of the bed, banks and shores of the Ohio river as heretofore appertained to the state of Virginia"; whilst the second declared without reserve that the state "includes the bed, bank and shores of the Ohio river." But, of course, we have no more than Virginia had. Nor could the Constitution confer greater title than in law existed. In *Bridge Co. v. Pt. Pleasant*, 32 W. Va. 331, 9 S. E. 231, I expressed the opinion that our territory extended to the low-water mark. I cited *Garner's Case*, 3 Grat. 655, in support of this statement. In that case fourteen Virginia judges sitting in the general court were greatly divided, and delivered exhaustive opinions, the decision by the majority holding, in effect, that low-water mark was Virginia's western line. The actual decision imports that. So the Supreme Court of the United States has several times held. *Handley's Lessees v. Anthony*, 5 Wheat. 374, 5 L. Ed. 113, the great Chief Justice Marshall, a Virginian, delivering the opinion. In *Indiana v. Kentucky*, 136 U. S. 479, 10 Sup. Ct. 1051, 34 L. Ed. 329, and *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 612, 19 Sup. Ct. 553, 43 L. Ed. 823, it was again so held. These cases involved the boundary line of Kentucky; but, as Kentucky was formed from Virginia after the grant of the Northwest Territory, she has the same western boundary, and these decisions apply. Ken-

tucky has uniformly held the low-water mark. *McFall v. Commonwealth*, 2 Metc. 394, 396. Indiana likewise. *Carlisle v. State*, 32 Ind. 55. Ohio holds that her territory extends at least to low water, if not to the middle. *Booth v. Shepherd*, 8 Ohio St. 243.

The chief argument for the line of the top of the bank on the Ohio side is the definition of a river. "A river is a running stream of water pent in on either side by banks, shores or walls." "A fresh-water river, like a tidal river, is composed of the alveus, or bed, and the water, but it has banks instead of shores. The banks are the elevations of land which confine the waters in their natural channel when they rise the highest and do not overflow the banks; and in that condition of the water the banks and the soil which is permanently submerged form the bed of the river." Gould on Waters, §§ 41, 45. For the other side it may be said that to confine Ohio to the top of the bank would deprive her of necessary state powers, such as the erection of wharves and other facilities, as well as police control of her border, and refuse to her necessary state power, and detract from her sovereignty. As will be seen in *Handley's Lessees v. Anthony*, cited, Chief Justice Marshall was influenced by considerations of great inconvenience to the new states that were to be formed out of this cession by Virginia. Virginia, by act of January 2, 1781 (10 Hen. St. 564), made it a condition of her grant that new states should be formed out of the territory granted, and it cannot be readily supposed that she intended to deprive such new states of the usual powers of states bounding on public rivers, and cramp their faculties by stopping their jurisdiction at the top of the river bank. It does seem to me that as the Constitution of the Union gives to the national Supreme Court jurisdiction in controversies between states, and its decision must be final, the rulings of that court must be accepted as law. That court has exclusive jurisdiction touching boundary between states. *Virginia v. West Virginia*, 11 Wall. 39, 20 L. Ed. 67. I shall not pursue this question, as I know that I can shed no more light upon it additional to that reflected by the great arguments in the cases cited. If the low-water line be the line, there can be no question that Ohio has the right to establish ferries on her shore and to fix rates from the Ohio to the West Virginia shore. We do not say that greater charge could or could not be made from the West Virginia shore to the Ohio shore, as it is not involved.

But we are not driven to say, as decision, whether *State v. Plants* is sound law. We can decide this case on another ground. After Virginia made the deed ceding to the republic the Northwest Territory, Congress passed the celebrated historic ordinance for the government of the territory "northwest of the river Ohio," providing that "the navigable waters leading into the Mississippi and

St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, duty or impost therefor." Virginia, by Act Dec. 30, 1788 (12 Hen. St. 780), referred to this ordinance, and declared that "the aforerecited article of compact between the original states and the people and states in the territory of the Ohio river, be and the same are hereby ratified and confirmed, any thing to the contrary in the deed of cession of the territory by this commonwealth to the United States notwithstanding." If otherwise before, would not this act accord to Ohio full use of the Ohio river in such modes as rivers are commonly used, among them the power to establish and regulate ferries having their seats on the Ohio side? That is not all. In the Virginia act providing for the formation of Kentucky it is declared "that the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this commonwealth, lies thereon, shall be free and common to the citizens of the United States; and the respective jurisdiction of this commonwealth and of the proposed state, on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river."

How far does the concurrence of jurisdiction of West Virginia and Ohio go? What is meant by it? It is only necessary and proper in this case to say that it goes far enough to give Ohio power on her shore, whatever the line under the deed, to authorize a ferry and govern it by regulations. This concurrence of rightful jurisdiction over the Ohio would seem to give ferries on the Ohio side right to carry both ways, and charge according to Ohio law. This compact of Virginia, on which Kentucky was admitted by Congress into the Union, has been held to be national law by the Supreme Court. *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 519, 14 L. Ed. 249; *Henderson Bridge Co. v. Henderson*, 173 U. S. 610, 19 Sup. Ct. 533, 43 L. Ed. 823. I find that in *Arnold v. Shields*, 5 Dana, 22, 30 Am. Dec. 669, and in *Newport v. Taylor's Ex'rs*, 16 B. Mon. 787, it is said of this compact: "Jurisdiction unqualified being, as it is, the sovereign authority to make, decide on, and execute laws, a concurrence of jurisdiction must entitle Indiana to as much power, legislative, judicial, and executive, as that of Kentucky over so much of the Ohio river as flows between them; and consequently neither of them can, consistently with the compact, exercise any authority over their common river, so as to destroy, impair, or obstruct the concurrent rights of the other."

The word "jurisdiction," as here used, must be wide. Why should it be confined to

any one of the three agencies of jurisdiction, legislative, executive, or judicial? In *J. S. Keator L. Co. v. St. Croix Boom Co.*, 72 Wis. 62, 38 N. W. 529, 7 Am. St. Rep. 837, this "concurrent jurisdiction" under said congressional provision is discussed, and it is given broad construction, in holding that one state may under it allow a boom hindering navigation on the other side. It may be doubted whether that is such an exercise of power as is lawful, because permanently affecting the right of the other state. "The state of Indiana possesses concurrent jurisdiction with the state of Kentucky for the enforcement of civil and criminal law on the Ohio river, where the two states possess the opposite shores." *Sherlock v. Alling*, 44 Ind. 184. The court said Indiana's legislation covered the river. It is only necessary for us to say now that Ohio had power to authorize a ferry and fix a charge for a person coming from its shore. The dividing line is one thing; concurrent jurisdiction is another thing. Kentucky, though having the same line as West Virginia, has always conceded to states on the Ohio opposite the right to establish and regulate ferries, and has held that her laws do not apply to them. *Newport v. Taylor*, 16 B. Mon. 699; *Reeves v. Little*, 7 Bush, 469. See *Gear v. Bullerdick*, 34 Ill. 74. How can our law govern a ferry created by Ohio?

After writing to this point, pursuing the matter of concurrent jurisdiction accorded states on the west of the Ohio, by Virginia, I find that Congress, in admitting Illinois, provided that its western line should be the middle of the Mississippi river, and that "said state shall have concurrent jurisdiction * * * on the Mississippi river with any state or states to be formed west thereof." In *Wiggins' Ferry Co. v. Reddig*, 24 Ill. App. 260, it was held that "neither Illinois nor Missouri can exercise exclusive jurisdiction over any part of the Mississippi, nor is either confined in the exercise of its own jurisdiction to the middle thereof. The two states exercise concurrent jurisdiction on the river for all judicial purposes." In matters to which this concurrence applies, the state which first assumes, retains jurisdiction of a matter to the exclusion of the other. In *State v. Mullen*, 35 Iowa, 199, the court interpreted this concurrence to give Iowa power to try a crime done on a boat near the Illinois shore. But the same court in *Buck v. Ellenbolt*, 51 N. W. 22, 15 L. R. A. 187, denied power in the state to abate a nuisance on an island east of the middle line, saying it was not on the river. But it said in all matters touching commerce on the river the state had concurrent jurisdiction over the whole river. As shown above, a ferryboat is an instrument of commerce and interstate commerce. Where two states bound on a river there is concurrence over the whole stream without compact. *Aitcheson v. Endless*, etc. (D. C.) 40 Fed. 253; 16 Am. & Eng.

Ency. L. (1st Ed.) 258. By reason of this concurrent jurisdiction, regardless of the line, the decision that Plants was guilty in *State v. Plants*, cited, was right, as he sold liquor on a boat lying in the water of the Ohio.

It is immaterial that the charge was collected from Winger after leaving the Ohio side.

The fact that the Virginia franchise authorized ferriage both ways would not derogate from the right of Ohio to establish a ferry.

If it would change the result that the defendant was acting under the Virginia franchise before he got the Ohio license, it does not appear which he accepted first.

After further examination of the question involved in this case, I find it settled by the decision of the Supreme Court of the United States, as also by the Kentucky Supreme Court, in *Conway v. Taylor*, 1 Black, 603, 17 L. Ed. 191. A Kentucky ferry sought an injunction against an Ohio ferry to prevent its ferriage both ways over the Ohio river, claiming exclusive right to do so under the Kentucky ferry grant. The lower state court awarded a total injunction, thus forbidding the Ohio ferry from ferrying either from Kentucky to Ohio or from Ohio to Kentucky. The Kentucky Supreme Court reversed this decree, and modified the decree of the lower court by limiting the injunction so as to prevent the Ohio ferry only from ferrying from Kentucky to Ohio. It thus recognized the full right of the Ohio ferry to ferry from Ohio to Kentucky. It conceded the right to ferry if "authorized to transport from the Ohio shore from a ferry established on that side under the laws of that state," but held that the Kentucky grant gave exclusive right to ferry from the Kentucky shore. See page 628. The Supreme Court of the United States affirmed this decision, conceding as beyond dispute the right of Ohio to establish a ferry upon its soil, saying that "the concurrent action of the two states is not necessary to the grant of a ferry franchise on a river that divides them. A ferry is in respect of the landing, not the water. The water may be to one; the ferry to another." Here the water is a public navigable way, and who disputes Ohio's right to the bank of the river? Owning the bank, she may attach a ferry to it. The federal Supreme Court further said, in speaking of the Kentucky law and decision: "The franchise is confined to the transit from the shore of the state. The same rights which she claims for herself she concedes to others. She has thrown no obstacles in the way of the transit from the states lying upon the other side of the Ohio and Mississippi. She has left that to be wholly regulated by their ferry laws. We have heard of no hostile legislation and of no complaints by any of those states. It was shown in argument at bar that similar laws exist in most, if not all, the states bordering upon those streams. They exist in other states of the Union bounded by navigable waters." In this ex-

tract, and in the whole opinion, the Supreme Court concedes and recognizes the right of Ohio to establish and regulate ferries on its bank of the Ohio. The Kentucky court, though it had statutes prohibiting apparently any ferriage from the Ohio shore except under a Kentucky franchise, refused to apply those acts to an Ohio ferry, and so did the national Supreme Court. How could it be otherwise considered alone under the compact made by Virginia upon the admission of Kentucky into the Union? 1 Rev. Code 1819, p. 59. That compact makes the Ohio a public highway, and gives concurrent jurisdiction over it to all states bordering on it, and deprived Virginia of exclusive jurisdiction over it. *Wheeling Bridge Case*, 13 How. 518, 14 L. Ed. 249. Yet in this case *Faudre* was fined for charging a passenger going from Ohio to West Virginia, not from West Virginia to Ohio.

The decisions cited above were based on the compact between Virginia and Kentucky, but when we consider the later Virginia act (Code 1849, c. 1, § 2) it is still plainer. Virginia thereby again ratified that compact by asserting jurisdiction for herself, "subject to the provisions contained in the articles of compact between Virginia and Kentucky hereinafter mentioned." See section 6. Our Code claims for this state jurisdiction over the Ohio "where there is no statute or compact to the contrary." Chapter 1, § 2, Code 1899. This recognizes the concurrent jurisdiction conceded by that compact. Under such concurrent jurisdiction granted by Virginia, it would seem to me that Ohio could grant a ferry valid to carry from both sides of the Ohio; but that is only a suggestion of my own, and not involved in the case. It has been remarked that this doctrine would enable Ohio to ruin every West Virginia ferry. What of it? We cannot help it. It is the result of lawful competition in business under authority of law. It would redound to the public interest in cheapness of ferriage. *Transp. Co. v. Standard Oil Co.*, 50 W. Va. 611, 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. Rep. 895. In *Cross v. Hopkins*, 6 W. Va. 323, the validity of a ferry grant by Ohio is recognized, though the subject is not discussed. "And in case of boundary rivers like the Mississippi a ferry granted by a single state is valid without the sanction of Congress or the state which bounds upon the opposite side of the river, or the right of landing beyond the limit of the state by which the grant is made." *Gould on Waters*, § 35. I think the case of *Memphis v. Overton*, 3 Yerg. 387, sustains the foregoing view. See *City of Newport v. Taylor's Ex'rs*, 16 B. Mon. 784, 787. In *McFall v. Com.*, 2 Metc. (Ky.) 394, a man was fined for celebrating marriage on a boat on the Ohio; but the court conceded that if Ohio had passed a law to authorize the minister to marry, and had thus exercised concurrent jurisdiction with Kentucky, there could be no conviction. Under these

principles West Virginia ferry rates apply only to West Virginia ferry franchises, and Faudre was not subject to them.

Having taken up this case again, I have just noticed that in *Garner's Case*, 3 Grat. 655, Judge Johnson said: "I conclude, therefore, that Virginia has exclusive jurisdiction to low-water mark on this side of the river, and Ohio has exclusive jurisdiction on the other, while over the permanent river they both possess concurrent jurisdiction; the ultimate property in the whole river to low-water mark on the Ohio side remaining in Virginia." Here is properly conceded concurrent jurisdiction. The soil on which the river runs is West Virginia soil to low-water mark on the Ohio side, but the water flowing over it is subject to concurrent jurisdiction of both states for certain purposes. It is this concurrent jurisdiction that rules this case. Above I have stated what it means. I add other authorities. Concurrent is "running together; having the same authority. Thus, we say such and such courts have concurrent jurisdictions; that is, each has the same jurisdiction." *Bouv. Law Dic.* "By conferring 'concurrent jurisdiction' Congress intended to declare that transactions occurring anywhere on that river between the two states might lawfully be dealt with by the courts of either according to its laws. Where a court of one state assumed jurisdiction in a particular case it would be exclusive until relinquished." *Sanders v. New Orleans & St. Louis Anchor Line*, 97 Mo. 26, 10 S. W. 595, 8 L. R. A. 390. See *State v. George*, 60 Minn. 505, 63 N. W. 100; *Opsahl v. Judd*, 30 Minn. 129, 14 N. W. 575; *Memphis v. Pikey*, 142 Ind. 304, 40 N. E. 527; *Welsh v. State*, 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664; *Meyler v. Wedding (Ky.)* 60 S. W. 20. *Rorer on Interstate Law*, 337, lays down correct law: "The existence of concurrent jurisdiction in two states over a river that is a boundary between them vests in each of such states, and its courts, except as to things permanent, and except as to maritime and commercial matters cognizable by the national government and its courts, jurisdiction, both civil and criminal, from shore to shore, of all matters of rightful state cognizance occurring upon such river in all parts thereof where it forms such common boundary." Observe that it says that this concurrent jurisdiction applies to "all matters of rightful state cognizance occurring upon such river in all parts thereof."

Now, is not the establishment and regulation of a ferry a matter of rightful state cognizance? Indeed, is it not a right of navigation? Can you deny that to a state on the Ohio river? Is it not a means of commerce on the water of the river? Can you deny the right of commerce? Observe that there is a difference between the soil or ground over which the Ohio runs, and its flowing water. The soil and things permanent in or attached to it—as a bridge, for

instance—are not subject to Ohio jurisdiction; but a boat used in ferriage is not such, a thing floating on the water. Many cases draw this distinction, holding that, where there is concurrent jurisdiction in two states upon a river, a state has no power over soil or things fixed in it beyond its line, but as to things not such, but transitory, floating upon it, both have common concurrent powers. The late well-considered case of *Roberts v. Fullerton*, 93 N. W. 1111, in the Supreme Court of Wisconsin, shows this distinction. There it is held that, as to soil and things attached, the concurrent jurisdiction does not extend, but, as to things having relation to the water, things transitory or floating upon it, it does fully extend. *Mississippi v. Ward*, 2 Black, 485, 17 L. Ed. 311. Judge Talliaferro, in *Garner's Case*, 3 Grat. 655, said it refers "only to things afloat." Surely, both states may establish and regulate ferries over the Ohio.

For these reasons we set aside and reverse the finding and judgment of the circuit court, and find the defendant not guilty, and that he be discharged from the indictment and go thereof without day.

NOTE BY BRANNON, J. I have not said that Ohio could establish a ferry on the West Virginia shore, but I think an Ohio ferry could carry back persons to Ohio.

POFFENBARGER, J. (concurring). I do not wish to be understood as agreeing to all that is said in the opinion on the subject of concurrent jurisdiction and the character of the ferry franchise. The exercise of a ferry franchise is clearly not a mere incident to the right of navigation. All citizens may use the navigable waters of this country without a license or permit of any kind from any of the states, and are only subject, in that respect, to such regulations as are imposed by the acts of Congress. The right to operate a ferry is an entirely different matter. The right of navigation is exercised in the operation of a ferry, but it confers no right to operate it. That right must be acquired by legislative grant. *Conway v. Taylor*, 1 Black, 603, 17 L. Ed. 191; 2 Wash. Real Prop. (6th Ed.) § 1215; *Huzzey v. Field*, 2 C. M. & R. 431; *Mayor, etc., v. Starin*, 106 N. Y. 1, 12 N. E. 631; *Newton v. Cubitt*, 12 C. B. 31. A ferry right is separate and distinct from, and subordinate to, the right of navigation. *Tied. Lim. Police Powers*, 621; *Huzzey v. Field*, 2 C. M. & R. 431; 21 Am. & Eng. Enc. Law (2d Ed.) 441; 12 Am. & Eng. Enc. Law (2d Ed.) 1089.

Washburn on Real Property says: "Ferries—that is, rights of carrying passengers across streams, or bodies of water, or arms of the sea, from one point to another, for a compensation paid by the way of a toll—are, by common law, deemed to be franchises, and could not, in England, be set up without the king's license, and in this country without

a grant of the Legislature as representing the sovereign power, and do not belong to the riparian proprietors of the soil." Conway v. Taylor, cited, expressly holds that "the authority to establish and regulate ferries is not included in the power of the federal government to regulate commerce with foreign nations and among the several states and with the Indian tribes."

I find no authority which, in my opinion, gives a shadow of countenance to the proposition that a state bordering upon a navigable river, and having concurrent jurisdiction with another state bordering upon the opposite side of such river, may establish a ferry from its own shore across the river and also from the shore of such other state across the river. None of the cases referred to in the opinion stand upon such a state of facts. No such claim was made or upheld in any of them. The nature of a ferry franchise, and the obligations imposed upon the state in the granting of it and upon the licensee in accepting it, stand opposed to such an idea. A ferry franchise is a valuable right. It is property created by law, by the sovereign power of the state. Patrick v. Ruffner, 2 Rob. (Va.) 222, 40 Am. Dec. 740; Huzzey v. Field, 2 C. M. & R. 431, 440; Reg. v. Railway Co., L. R. 6 Q. B. 422; Mayor, etc., v. Starin, 106 N. Y. 1, 12 N. E. 631; Conway v. Taylor, 1 Black, 603, 17 L. Ed. 191.

As said in the opinion of Judge BRANNON, a ferry "is in respect to the landing place, and not of the water." Ohio certainly has no right to the West Virginia shores. All that can possibly be conceded to her is jurisdiction of the shore on her own side of the Ohio river.

As against all except the sovereign granting a ferry franchise, it is exclusive, and shuts out all other persons from the exercise of the right conferred. Concurrent jurisdiction for the establishment of ferries from both sides of the river by each state at the same place is contradictory. Neither state could protect and uphold the right granted by it by controlling the rates, and the result might be a service wholly inadequate to, and unsuitable for, the accommodation of the public. Such a construction would give conflict of jurisdiction rather than concurrence. A safe rule for arriving at a conclusion is the conduct of the states and the construction adopted by them. So far as I am able to find, no state has ever attempted to do such a thing. West Virginia and Kentucky content themselves with granting franchises from their own shores to the opposite shore, and Ohio, Indiana, and Illinois with granting franchises from their shores to the opposite shores only. The only real and substantial concurrence in respect to the granting of ferry franchises is to be attained by limiting the power of each state to the granting of such franchises from its own shore to the opposite shore. That gives each state power

over the river in that respect. Concurrence is thereby effectuated. The nature of this exercise of the sovereign power is such that, if it be carried further, there is direct and useless conflict between the two states, which it cannot be supposed was ever intended.

Another view which supports this proposition is that the granting of a franchise does not carry with it a right of landing. 12 Am. & Eng. Enc. Law (2d Ed.) 1097; Burrows v. Gallup, 32 Conn. 499, 87 Am. Dec. 186; Walker v. Armstrong, 2 Kan. 198; Prosser v. Wapello, 18 Iowa, 327; Gant v. Drew, 1 Or. 35. Some decisions are to the contrary, but they are against the weight of authority. 12 Am. & Eng. Enc. Law (2d Ed.) 1097.

In Conway v. Taylor, an effort was made by persons under an invalid grant of a ferry franchise from the city of Newport, and a license granted by the state of Ohio, to obtain the right to ferry from the Kentucky side, to the detriment of another person holding a valid Kentucky franchise. It does not appear from the report of the case whether the Ohio license purported to give such right to ferry from the Kentucky shore, but the decree of the Kentucky court, which the Supreme Court of the United States affirmed, inhibited the parties claiming under the invalid Kentucky franchise and the Ohio franchise from ferrying from the Kentucky shore.

My concurrence goes only to the extent of conceding the validity of the ferry franchise from the Ohio side to the West Virginia side granted by the city of Gallipolis, and the right to the holder of that franchise to charge the rate of ferriage fixed by the Ohio authorities, and his innocence of any violation of the West Virginia ferry law in so doing.

DENT, J. (concurring). While I concur in the conclusion, there are some things in the opinion of Judge BRANNON that I do not assent to without reservation. This case depends on the ownership of the northwestern bank or shore of the Ohio river. If it belongs to West Virginia, Ohio has no control over the same, and no right to establish ferries therefrom. The Constitution of this state (art. 2, § 1) claims it to be a part of this state, and it has been so held in the case of Ravenswood v. Flemings, 22 W. Va. 52, 46 Am. Rep. 485. The Constitution also provides in article 1, § 1, that "the Constitution of the United States and the laws and treaties made in pursuance thereof, shall be the supreme law of the land." This necessarily includes the decisions of the Supreme Court of the United States. That court has held that exclusive jurisdiction to determine the boundary between states rests with it. Virginia v. West Virginia, 11 Wall. 39, 20 L. Ed. 67. It has already determined the boundary between this state and the Northwestern Territory ceded to the United States by the state of Virginia, including the state of Ohio, to be low-water mark on the Ohio side. Handly's Lessees v. Anthony, 5 Wheat. 374.

5 L. Ed. 113; *Indiana v. Kentucky*, 186 U. S. 479, 10 Sup. Ct. 1051, 34 L. Ed. 329; *Bridge Co. v. Henderson City*, 173 U. S. 592, 19 Sup. Ct. 553, 43 L. Ed. 823. This should settle this question and put it forever at rest unless the Supreme Court of the United States should be led to change its position, which is not at all likely, for the very reason that it is the only truly equitable conclusion under the circumstances that the court could justly reach in the interest of the general public good. This gives this state the land to low-water mark on the Ohio side and Ohio the land between high and low water mark on the same side, which necessarily includes the shore. The shores and bed of the river are thus held respectively by the two states in trust for the public good, and they cannot become the subject of private ownership. Ohio then has control of its shore, with the exclusive sovereign right to establish ferries therefrom to the opposite shore, while West Virginia has the same exclusive right to establish ferries from its shore. To make a complete ferry from shore to shore, both going and coming, requires the consent of both states. The navigable waters that run between the shores is under the concurrent jurisdiction of both states for the purposes of navigation, although from low-water mark on the Ohio side to the West Virginia shore they are within the state of West Virginia. *Conway v. Taylor*, 1 Black, 603, 17 L. Ed. 191; section 15, c. 44, Code 1899.

In the light of the decisions of the Supreme Court of the United States, the Constitution of this state, and the holding of this court in the case of *Ravenswood v. Flemings*, 22 W. Va. 52, 46 Am. Rep. 485, are wrong in so far as the Ohio shore and banks of the Ohio river are concerned, for, when Virginia ceded to the United States all the territory northwest of the Ohio river, the word "river" meant the line of the waters of the river at low-water mark. This is a question which in my opinion has been and should remain settled. *Garner's Case*, 3 Grat. 655; Code Va. 1860, c. 1, § 2. The great states of Ohio and West Virginia by mutual compact should fix this line by permanent monuments, so as not to permit it to be subject to the changes of the bed and shores of the river caused by natural and artificial fluctuations. Wisdom would dictate such a course.

(54 W. Va. 263)

PENCE v. BRYANT et al.

(Supreme Court of Appeals of West Virginia.
Nov. 28, 1903.)

PUBLIC STREET—OBSTRUCTION—PUBLIC NUISANCE—INJUNCTION—PARTIES—VACATING—DEDICATION—RETRACTION—PRIVATE BENEFIT—VALIDITY—REDUCTION OF WIDTH.

1. Obstruction of a public street by an individual is a public nuisance and an indictable offense, and an injunction may be maintained to stop or abate it, not only by the county or municipality, but by an individual whose lot

abuts on the street, and is materially injured by such obstruction.

2. One owning a lot abutting on a street may maintain an injunction against a person obstructing it by the erection of a permanent building upon it, if it injures the lot.

3. By section 28, c. 47, Code 1899, a town council may vacate a street, in whole or in part, for public welfare, but not that the ground may go to private use.

4. When land has been dedicated for a public street, and it has been accepted by long use by the general public as a street, so that retraction would be hurtful to the public, the dedication cannot be retracted, though no municipal order or action has accepted the dedication, and it is a valid street as between the dedicator and his alienees and the public. Without such corporate acceptance the town would not be chargeable with the street.

5. Can the owner of a lot upon a street, damaged in access by reason of the vacation of the street, recover damage from the town? Is such access a property right adhering to the lot, so that such vacation cannot be made without compensation?

6. The statute giving the town council power to vacate streets does not give it power to vacate a street or a part with sole intent and purpose for the benefit of a private person, or to free his land from public easement, but only for public ends and reasons. An ordinance of vacation made, not for public benefit or purpose, but only for the benefit of a private individual, is void.

7. Whether the motives of a town council in vacating a street are proper cannot be judicially inquired into, but the aim and purpose of the vacation, and the end accomplished, may be considered in passing on its validity. If the purpose effected by it is within the power of the council, its act will be valid; otherwise not.

8. An ordinance of a town council reducing the width of a street from 40 to 15 feet simply, not specifying what part of the street is to remain such, is void for uncertainty.

(Syllabus by the Court.)

Appeal from Circuit Court, Mercer County; J. M. Sanders, Judge.

Bill by Jennie K. Pence against R. G. Bryant and others. Decree for defendants, and plaintiff appeals. Reversed.

R. O. & B. McLaugherty and Mr. Williams, for appellant. A. W. Reynolds, J. S. Clark, and J. M. McGrath, for appellees.

BRANNON, J. Jennie K. Pence is the owner of a lot lying between Main and North River streets, in the town of Bramwell, Mercer county. It fronts on both streets. Along its side, between it and the depot lot owned by the Norfolk & Western Railroad Company, is a space of ground about 41 feet wide, and extending 125 feet between those streets. R. G. Bryant and W. W. Hamilton purchased part of this parcel of land, and upon it were excavating for the erection of a building, its wall to be 15 feet distant, but leaving along her lot a street or alley 15 feet wide between Main and North River streets. Jennie Pence claims that the entire space was years ago dedicated by the Bluestone Coal Company as a public street, and has

¶ 2. See *Municipal Corporations*, vol. 36, Cent. Dig. §§ 1448, 1503.

been recognized by the town and used as such. The council of Bramwell, 22d January, 1902, adopted the following ordinance: "It appearing that the plat of the town of Bramwell, which is of record in the clerk's office of the county court of Mercer county, does not show the width of the street adjoining lot No. 1 in said town, and extending from Main street to North River street, and on the request of the Pocahontas Coal & Coke Company, who own the land lying between said street and the station grounds of the Norfolk & Western Railway, that council determine on the width of the street, it was, on motion, unanimously resolved, that the width of the street be fixed at fifteen feet, and hereafter to be known as Pence street, and to extend from Main street to North River street." When Bryant and Hamilton were engaged in the work of erecting their building, Jennie Pence obtained an injunction against their further work, but on hearing it was dissolved, and the court later refused to reinstate it, and she appeals.

For the defense it is claimed that equity has no jurisdiction, as title is in controversy, and the right in contest must be first adjudicated at law before an injunction can be allowed, and *Watson v. Ferrell*, 34 W. Va. 406, 12 S. E. 724, and *Becker v. McGraw*, 48 W. Va. 539, 37 S. E. 532, are cited to support this position. These cases have no application. This is no controversy as to title to land. The plaintiff claims no ownership in the ground. She claims that a public highway affording access to her property is being permanently taken from the public, and passage over it forever obstructed, to the special and lasting detriment of her property. If this is true, a public nuisance is being maintained; for from the earliest period the common law has branded the closing or obstruction of a highway as a public nuisance indictable as a public offense, and our Code 1899, c. 43, § 45, makes it an indictable offense. 4 Bl. Com. 167. That injunction lies in the first instance, without first having recourse to a law tribunal, to prevent a public nuisance in the start, to prevent its maintenance, and to abate it, is shown by abundant authority, and this includes obstruction of a highway. *Moundsville v. Ohio R. Co.*, 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161. Authorities collated in *Town of Weston v. Ralston*, 48 W. Va. 194, 36 S. E. 456. See *Columbian Club v. State*, in volume 2, p. 340, of that late valuable work, *Amer. & Eng. Dec. in Eq.* 340, and note, page 352; *Huron Bank (S. D.)* 66 N. W. 815, 59 Am. St. Rep. 769.

But though there is jurisdiction, there is a question, not of jurisdiction exactly, but whether the plaintiff has such interest as will enable her to invoke that jurisdiction. The nuisance is a public one. Beyond question the town could invoke such jurisdiction, but can she as an individual? The general rule is that an individual cannot enjoin a

public nuisance, but, if it peculiarly affect him by material and substantial damage to the use and value of his estate, he can have the benefit of an injunction. *Talbott v. King*, 32 W. Va. 6, 9 S. E. 48; 2 *Amer. & Eng. Dec. in Equity*, 355. I conceive that I need not elaborate to show that when one is unlawfully building a house in a public street which gives access to a hotel, though it be not the only access, narrowing it from a street 41 feet wide to an alley of 15 feet running along the length of the hotel, an entrance being on that street, peculiarly affects the hotel in use and value as a great damage to it. As an abutter he has a peculiar interest; he is an adjoining owner, and has peculiar interest in the street. 2 *Smith, Munic. Corp.* § 1214; *Elliott on Streets*, §§ 709, 876; 1 *Am. & Eng. Ency. L.* 224.

Counsel have discussed the question whether the space of 41 feet was dedicated to public use and accepted as a dedication, and whether its use as a street made it such. Then we meet with the town ordinance above given. It fixed the width of the street, if it never had been fixed; and, if it had been a street 41 feet wide, that ordinance operated as a vacation in part, if valid. Our statute gives a town council wide power to "vacate, close, open, alter," etc., "roads, streets, alleys." Code 1899, c. 47, § 28. This subject is treated in that latest and elaborate work on *Municipal Corporations* by *Smith* (volume 2, § 1283). It says: "Where the power to vacate a street is vested in the municipality, the exercise of that power is discretionary." "A part vacation, leaving access to the property one way the same as before, does not entitle the owner to damages." "In the absence of fraud, courts will not review the action of a city council in vacating a street, and the general rule is that the determination of a proper board as to the opening or closing of a street is not the subject of review by the courts. The right to vacate includes the right to vacate a part of the street as well as the whole." *Elliott on Streets*, § 879, states the same law. In section 451 we read: "Power to regulate and improve streets and sidewalks includes the power to determine their width." Our act gives all these powers. "A statute authorizing the vacation of a highway will, it seems, authorize the vacation of a part thereof." 15 *Am. & Eng. Ency. L.* 397.

The appellee says that the street claimed by Jennie Pence to be a street is not a street, because never dedicated or recognized by the corporate authority of Bramwell by council action, since there is no evidence of acceptance of the dedication, and before acceptance it may be withdrawn, as may be said to have been done by the sale of a part of the street to the defendants. I think the lawbooks will sustain the position that for some purposes such municipal acceptance is necessary, for others not. If it is sought to charge the town with neglect to repair, it is

necessary; but when the contest is, as in this case, between dedicator or his alienees and a private individual or the public, it is not indispensable. *Hast v. Railroad Co.*, 52 W. Va. 396, 44 S. E. 155. "While acceptance by formal adoption by public authorities or by public user is necessary to impose on the public the duty to keep in repair a dedicated highway or street, still that is not necessary to the consummation of the dedication so as to cut off the owner from the power of retraction, or to subject the dedication to the public use wherever, in the estimation of such authorities, the wants or convenience of the public require it for the purpose for which it was originally given." *Board v. Seal* (Miss.) 5 South. 622, 3 L. R. A. 659, 14 Am. St. Rep. 545; *Moose v. Carson* (N. C.) 10 S. E. 689, 7 L. R. A. 548, 17 Am. St. Rep. 681; 2 *Smith, Munic. Corp.* § 1281; 2 *Dillon, Munic. Corp.* § 642; 2 *Greenleaf, Ev.* § 662; *Elliott, Roads and Streets*, §§ 150, 154; *City of Winchester v. Carroll*, 99 Va. 727, 40 S. E. 37. The owner of the land where now is the town laid it off into squares, lots, and streets, and made a plat. That plat shows North River street and Main street. Between these streets we find squares 1 and 3; on the south side of Main street we find squares 2 and 4. Each of these squares is laid off into lots by number. In square 1 we find lot 1, between those streets, and along its side an open area, not marked as a street, between lot 1 and the right of way of the railroad. It looks like the company owning the land designed letting that whole area remain open for ready access to what was designed to be the station, and where it now is. While such was the state of things, the Bluestone Coal Company by deed, 26th February, 1885, conveyed to William Berry lot 1 in square No. 1, now owned by Jennie Pence. This deed makes the lot begin "at the southwest corner of square No. 1," and runs thence to lot No. 3, and thence 125 feet to North River street, and with it 40 feet to the "N. W. corner of square No. 1," and says the lot is known "as lot No. 1, and for which reference is made to town plat of Bramwell, recorded in clerk's office, county court." This deed recognizes the square and this lot and this plat. That plat shows a vacant area along the side of lot No. 1. Why did the owner lay out the land into squares and lots, leaving this space vacant? Why did it not cut it into lots and make lot No. 1 there? Because the intention was to have it open. It was designed to have at least a street there, because the series of lots between North River and Main streets did not include the area. No square or lot took it in. Such the start. The engineer laying off the town staked off a street there. While we admit that a mere officer of a corporation cannot make a dedication, yet this engineer Welch was deputed to lay off the town, and I incline to think that his action is binding to show an intent to dedicate, as the company

sold lots by his work. Later, Bluestone Coal Company, by deed, 27th June, 1887, conveyed a lot in that area to the Norfolk & Western Railroad Company, and the deed makes this lot begin at a point on the right of way of the railroad company "in line with the north boundary of lots from No. 1 to No. 13, inclusive, thence south 7 degrees, 8 minutes west, 125 feet along the west side of — street to a street corner on the north side of Main street." This deed calls for a street then and yet unnamed along the west side of the Pence lot. It says, also, that the land conveyed to the railroad company "is described in the survey thereof made by W. W. Coe." Now, this gives this street a place certain, a corner on North River street, and a corner on Main. Looking at the plat, we see this street laid down along the Pence lot—between it and the lot conveyed to the railroad company. This deed is a plain dedication. The plat is part of the deed, and proof of dedication like it—express dedication. *Riddle v. Charlestown*, 43 W. Va. 796, 28 S. E. 881; *Noonan v. Braley*, 67 U. S. 499, 17 L. Ed. 278. Is it said that it has no fixedness in place? Who can say that the Pence lot cannot be located, or that the railroad lot cannot be? They can be fixed with mathematical precision. This street occupies all the ground between them. The call for a street corner on Main street indicates that the grantor company regarded this unnamed street as antecedently dedicated; but this is not material, as this deed is a plain dedication. Thus we have a dedication. Can the land company revoke it? No, because the dedication has been accepted and acted on by the public by use for many years. It has always been driven over and walked over and used by the public as a street, and not a word said against such use by the land company or anybody else. This cannot be denied; is not. This acceptance and dedication makes the ground a street, as between a dedicator and the public, and as between the dedicator and those claiming under it and Jennie Pence. So we held in *Hast v. Railroad Co.*, 52 W. Va. 396, 44 S. E. 155. "Acceptance may be by such long use by the public as to render its reclamation unjust and improper. Both dedication and acceptance may be presumed by long user." *Winchester v. Carroll*, 99 Va. 727, 40 S. E. 37. See 2 *Smith, Munic. Corp.* § 1498; *Elliott, Roads and Streets*, § 133; *City v. Stokes*, 31 Grat. 713. We may stop here and say that this street in its whole width was a street from dedication and user merely, without corporate acceptance. Such corporate acceptance is immaterial for the purpose of this case. *Hast v. Railroad Co.*, 52 W. Va. 396, 44 S. E. 155; *Yates v. West Grafton*, 33 W. Va. 507, 11 S. E. 8; *Moose v. Carson* (N. C.) 10 S. E. 689, 7 L. R. A. 548, 17 Am. St. Rep. 681; *Board v. Seal* (Miss.) 5 South. 622, 3 L. R. A. 659, 14 Am. St. Rep. 545; *City v. Stokes*, 31 Grat. 713.

We do not need to say, but do say, that this street is a street as to the town. The mayor put step stones across it on North River street; it was cleared of rubbish by the town, and as much work done on it as on any other street; the town allowed in it a car used as a house for photography, and received rent for it; the town council declared it a nuisance, and ordered it removed, and it is reasonable to say that it was held a nuisance only because in the street; and the town allowed a post office on it, showing that it was regarded a street. Looking at the ordinance of council above fixing the width of the street, it imports the antecedent existence of a street. So we have a street, of its original width 40 feet, unless it has been cut down to 15 feet by the ordinance of the council above given. Jennie Pence, as owner of a lot on that street, had a very valuable vested right in it—that of access. By it the main entrance to her hotel is reached. She built on the faith of its continuance as a street. Many cases hold this right of access as a vested property right annexed to her lot, protected by that clause of the Constitution saying that private property shall not be taken for public use without compensation. 2 Smith, *Munic. Corp.* § 1283; 5 *Amer. R. & Corp. Cases*, 117; 2 *Dillon, Munic. Corp.* § 656b; *Elliott on Roads and Streets*, § 877; *Sherlock v. Kansas City* (Mo. Sup.) 43 S. W. 629, 64 Am. St. Rep. 551; *Lewis on Em. Domain*, § 134; *Moose v. Carson* (N. C.) 10 S. E. 689, 7 L. R. A. 548, 17 Am. St. Rep. 681. There are cases which hold that the act of vacation will avail and entitle the lot owner to no remedy. *McGee's Appeal*, 114 Pa. 470, 8 Atl. 237; *Barr v. City*, 45 Iowa, 275; *State v. Deer Lodge*, 19 Mont. 582, 49 Pac. 147; *Levee Dist. v. Farmer*, 101 Cal. 178, 35 Pac. 569, 23 L. R. A. 388; *Mills, Em. Domain*, § 317. The former line says that a vacation of a street ends its existence so far as concerns the town or the general public, but that one owning a lot on the street has a special, peculiar interest from the general public, and can recover damages. I suppose the town and party obstructing would be liable.

It has been suggested that the order of council narrowing the street is void because made only to give back part of the street to the land company owning the fee, or, rather, to free it from street service for its benefit. I grant that a council cannot, under the guise of the power to vacate a street, do so, not for public interest, but only for private use. The Virginia court, in *Norfolk v. Chamberlaine*, 29 Gratt. 534, only spoke the general decision in saying: "Public streets are for public use, and the use is none the less for the public at large as distinguished from the municipality because they are situated with-

in the limits of the latter. In other words, public streets are not the property of the municipality, or of the people of the municipality, but of the public at large. * * * Upon these principles I am of the opinion that the council of the city of Norfolk had no authority to pass the resolution granting permission to appellee to occupy, by the steps of his building, any portion of a public street." In *Smith v. McDowell*, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393, the subject of power of vacation is well discussed. It is held that by platting of a village the streets, "in their entire width and length," are dedicated to the use of the public, and the village is seised in fee of the streets for the use of the local and general public, holding them in trust for such use and none other; and it may vacate them only where its authorities, in their discretion, determine the street is no longer required for public use; the power of vacation is to be construed in view of the purpose for which the village holds the streets; that it has not unqualified control and disposition of the streets, "and cannot alien or otherwise dispose of them for private use. The municipal authorities cannot vacate a strip of land along and in a street for the sole purpose of enabling a private person to occupy such strip with a permanent structure appurtenant to his building. Whether the motives of village trustees in voting for an ordinance are proper cannot be judicially inquired into, but the purpose accomplished by the ordinance—the object attained—may always be considered in determining its validity. If the purpose effected by it is within the power of the trustees, the act will be valid; otherwise not." I do not question these principles; but they do not fit this case. In the Virginia and Illinois cases, the orders of the councils on their face showed that they had for purpose the conversion of the street from public to private use, not the public interest. In this case the owner of the fee simply asked the council to fix the width of the street, and, while the result of its action was the return of the ground to the owner free of easement, that does not appear to be the purpose and aim of the council, but only resulted as a consequence by law. The fee was in them, and the action took away its servitude; this was a legal result. But we find the council ordinance void for another reason. It is void for uncertainty. What part of the street remains a street? Which side? Why that next to the lot of Jennie Pence rather than the other side? For this reason we reverse the decrees and reinstate the injunction.

Reverse decrees made in vacation of the circuit court on 30th September, 1902, and 19th December, 1902, and remand case for further proceedings.

(67 S. C. 487)

**WILLSON v. IMPERIAL FERTILIZER CO.
et al.**(Supreme Court of South Carolina. Nov. 27,
1903.)**PRINCIPAL AND AGENT—DUE CARE OF AGENT
—SALE OF GOODS—APPEAL—EXCEPTIONS—
AMENDMENT—CONTRACT—ASSIGNMENT.**

1. Where an agent under a power of attorney was appointed to take charge of the business of a party who had contracted to sell fertilizers, and prices advanced during his agency to such an extent that he was in a position, without incurring further expense, to dispose of all fertilizers unsold at a good profit, whereas, if he had waited to sell to the country trade with the usual proportion of credit sales, he would have run the risk of loss from bad debts and the danger of a decline in prices, his act in making such sale showed reasonable care and prudence.

2. Where an agent was engaged in selling fertilizers, his act in closing out all the fertilizers in bulk showed prudence and care in view of a letter from one fertilizer company to another, who was using its brand, claiming the right to terminate such use on demand.

3. A motion to amend an exception on appeal, where the effect is only to amplify it and make it clearer, will be denied.

4. A party to a contract waives his right to object to an assignment thereof by the other party where he actively co-operates in procuring the assignment.

5. Though the agent of a party contracting to sell fertilizers is liable to his principal for the difference between the price at which he could have sold the goods and the price at which he did sell them, the purchaser from such agent is not liable where there was no evidence that he acted in a fiduciary capacity in bringing about the appointment of the agent.

Appeal from Common Pleas Circuit Court of Charleston County; Gage, Judge.

Action by W. N. C. Willson, committee of Willson Griffith, against the Imperial Fertilizer Company and others. Decree for plaintiff, and defendants appeal. Modified.

The contract out of which the action arises is as follows:

"Charleston, S. C., June 26th, 1899.

"Mr. Willson Griffith, lessee, Charleston, S. C.

"Dear sir: We will the ensuing season make and deliver to your order to be sold for our account your brands of fertilizers and acid phosphates with and without potash, upon the following terms, prices and conditions in bulk, f. o. b. cars at our works, in not less than carload lots; we to furnish bags, branded as you may direct, at the cost of seven cents each, and to furnish the inspection tags, charging you the cost of same, according to the States into which the goods are shipped:

	Per ton.
9-2-2 fertilizer	\$12 25
8-2½-1 fertilizer	12 25
9-2-1 fertilizer	11 45
10-1-1 fertilizer	9 50
13 per cent. dissolved bone	6 25
13 per cent. dissolved bone (double milled)	6 40
10-1 acid phosphate	6 50
10-2 acid phosphate	6 85
10-2 acid phosphate (for wheat)	7 05
10-4 acid phosphate (for cotton)	8 75
10-4 acid phosphate (for wheat)	9 05
8-4 acid phosphate (for cotton)	8 05

—all goods to be shipped in good mechanical condition. The 8-4 acid to be made, however, as per your request, entirely of kainit for the potash, you taking any risk that may accrue as to the mechanical condition of this grade.

"The above prices are upon a basis of May 1st, 1900, any goods paid for prior to May 1st, a discount at the rate of 7 per cent. per annum will be allowed you from date of payment to May 1st; any goods closed by note payable in the fall of 1900, interest at the rate of 7 per cent. per annum to be added from May 1st, to date of maturity of the notes.

"You agree herewith to guarantee all sales to the extent of your aggregate profit on each group, to wit: for all goods sold payable between this date and the 1st of January, 1900, to be considered as the first group; all goods payable May 1st, 1900, the second, and all goods closed by note payable in the fall of 1900, the third.

"All settlements, whether in cash or by notes of the purchaser, are to be made direct with you, and you hereby agree that as such settlements are made, you will at once when cash is paid, turn over to us the gross amount received from purchasers, and when settlements are made by note, you will deliver to us the notes of said purchasers, payable to your order as lessee of the Etiwan Phosphate Works, duly endorsed by you, settlement to be made by us for your interest in said accounts in accordance with the following paragraphs.

"All collaterals taken on time accounts to be delivered also to us, duly endorsed when necessary, and said collaterals to be returned to you in the fall to be sent out for collection in accordance with contracts. When all the sales that are due on or about January 1st, are paid in full, we agree to pay you the profits that have accrued to you on these sales; first deducting from said profits any losses that may have occurred on such sales, if there be any, from the amount of the profit due you on this group; the same method to be pursued in regard to the two remaining groups, maturing May 1st and in the fall of 1900.

"We are to prepay freights when necessary to consummate sales of any of the goods, charging you interest on said freights from the dates paid until the maturity of the contracts, and all over prices named above freights and interest to be your profit on sales, subject to the above provisions agreed upon as to your guarantee on same.

"The amount of goods to be furnished by us on this contract is to be 3,000 tons of the various grades of dissolved bone and acid phosphates, and 1,000 tons of the various grades of fertilizers, that is, 4,000 tons in the aggregate.

"On January 1st, 1900, if the above amount of goods has not been placed by you, we are to have the option of cancelling the balance

of the contract, if so desired by us, or adding to same if the above amount has then been placed.

"All contracts to be taken on your forms, and when goods are sold on time, as far as possible with planters' notes as collateral security to the notes of the purchasers, and said contracts are to be submitted to this company for approval, they having the right of rejecting any contracts not satisfactory to them, and not to be bound to fill any contracts so rejected.

"You hereby agree to procure from the proprietor of the Etiwan Phosphate Works a lease of said plant for the ensuing season; that the question of the use of their brands by you may be legally established, should it become necessary.

"Imperial Fertilizer Company,

"By G. Walter McIver, Treasurer.

"The above is accepted upon the terms and conditions stated therein.

"Willson Griffith, Lessee."

Mitchell & Smith, for appellants. Nathans & Sinkler, for appellee.

WOODS, J. On June 26, 1899, the Imperial Fertilizer Company made a contract with Willson Griffith for the sale of 4,000 tons of fertilizers. The terms and prices are set forth in detail in the letter from the company to Griffith making the proposition. This letter and Griffith's note of acceptance, being essential to an understanding of the issues involved, will be found in the report of the case. The contract contemplated that Griffith, who was a fertilizer salesman of fine judgment and high character, should sell the fertilizers at an advance on the prices he was to pay, and the difference was to constitute his profit. As each separate sale was made and reported by him, the goods were to be shipped as he directed, and charged to him on the Imperial Company's books at the contract price. The company was to hold all notes and accounts taken by him as collateral, to be credited on his debt when collected, and all cash payments made by customers were to be remitted to it for like credit. All credit sales were to be subject to the approval of the company. The contract does not expressly stipulate that the fertilizers should be delivered under the brands of the Etiwan Phosphate Works, but this is implied by the last clause, which was to the effect that Griffith was to procure "from the proprietor of the Etiwan Phosphate Works a lease of said plant for the ensuing season, that the question of the use of their brands by you may be legally established should it become necessary." The Etiwan Company had ceased to manufacture, but its brands were popular, and it was expected their use would aid Griffith to resell the goods at a profit. In the contract he is spoken of as "lessee," the reference being to his supposed lease and control of the Etiwan

brands. The Imperial Fertilizer Company had the option of canceling the contract as to all goods not sold by January 1, 1900, "or adding the same if the above amount has then been placed."

After Griffith had sold 718 tons of the 4,000, his friends and business associates observed a marked decline in his physical health, accompanied by some eccentricity of conduct. For this reason G. Walter McIver, manager of the Imperial Fertilizer Company, became much concerned on account of the company's interest in this contract, and consulted with Griffith's sister and some of his friends as to the best course to be pursued. It seems all concurred in the opinion that he would not be able to carry on his business for several months at least, and that it would be necessary for him to appoint an agent to act for him. Griffith acquiesced in this conclusion, and on October 10, 1899, assigned his interest in the contract to W. I. Smith, then a book-keeper of Imperial Fertilizer Company, and on October 13, 1899, expressed his intention that Smith should act for him under the assignment by executing a power of attorney authorizing him, among other things, "to manage, conduct, and carry on my business concerning phosphates or fertilizers, removing, employing, or substituting agents under him; * * * to settle and to compromise, and to submit to arbitration all accounts to claims and disputes between me and any other person arising in or out of said business; to make new contracts and agreements or continue old ones with any person, firm, or corporation, as the conduct of my said business and affairs may, in his best judgment, require." McIver, in the interest of his company, energetically advocated this action by Griffith, and had the papers prepared. The price of fertilizers rose in the autumn of 1899, and late in November of that year Smith, while the market was advancing, released to the Virginia-Carolina Chemical Company, which in the meantime had purchased all the assets and stock of the Imperial Fertilizer Company, all Griffith's interest in the contract for the consideration of a profit of 25 cents per ton for the unsold portion of the 4,000 tons, amounting in the whole to \$2,432.25.

On April 25, 1900, Griffith was declared a lunatic, and the plaintiff, who was appointed his committee, immediately commenced this action for a general accounting by Smith, as attorney in fact, and particularly to require Smith and Imperial Fertilizer Company and Virginia-Carolina Chemical Company to account for the true value of Griffith's interest in the contract sold and released to Virginia-Carolina Chemical Company, it being alleged in the complaint that his interest was sold at much less than its real value. The cause was referred to G. H. Sass, Esq., master, who reported, among other things, that with reasonable diligence Smith could have realized 50 cents per ton more than he received.

and that he should be held liable for this neglect. As to the other defendants, the master holds that they acted in their own interest in dealing with Smith, without unfairness or impropriety, and are therefore not responsible to plaintiff. The circuit judge modified the report of the master, and found that the Imperial Fertilizer Company and the Virginia-Carolina Chemical Company were also liable for the true value as fixed by the master, on the ground that they occupied a fiduciary relation to Griffith; that the circumstances indicated Smith was their agent as well as the agent of Griffith, and therefore they could not purchase from him.

There are many exceptions, but the only two questions involved in this appeal are: (1) Did Smith, under all the circumstances, exercise reasonable care and prudence in making the sale, and, if not, what was the resulting loss for which he is liable? and (2) did the Imperial Fertilizer Company and the Virginia-Carolina Chemical Company, or either of them, occupy such fiduciary relation to Griffith or Smith as to make them jointly liable with Smith for any loss arising from the inadequacy of the price?

In endeavoring to determine whether Smith is liable, it is necessary to consider the obligations he assumed to Griffith and his rights at the time he made the release, as against the Imperial Fertilizer Company, or rather the Virginia-Carolina Chemical Company, which had by purchase assumed the position of the Imperial Fertilizer Company. The terms of the power of attorney indicate the expectation, at least, that Smith, as agent, was to carry on the business on the same plan that Griffith himself had initiated, and he did sell on this plan a small quantity of fertilizers. Nevertheless the evidence makes it very clear he exercised good judgment in not continuing this plan. Prices had advanced, under conditions somewhat abnormal, to such extent that he was in a position, without incurring further expense, to dispose of the entire 3,200 tons remaining unsold at a good profit; whereas, if he had waited to sell to the country trade, with the usual proportion of credit sales, he would have run the risk of much loss from bad debts, and the still greater peril of a decline in prices. It is also to be borne in mind that the company had the power to reject any credit sales he might make. In addition, it should be observed he had a very short time to learn the bearings of the business and dispose of the goods in the country before January 1, 1900, and on that day the contract would have been subject to forfeiture at the option of the Virginia-Carolina Chemical Company. The same risks would have been incurred in turning over the contract to Mr. Earle Sloan, who wished to undertake its performance on Griffith's part, in order that he, as part owner and manager of the Etiwan Phosphate Works, might keep

its brands on the market, and at the same time, as Griffith's friend, conserve his interests. Aside from the letters of Sloan to the president of the Virginia-Carolina Chemical Company, which were excluded by the master as incompetent, the evidence of McIver, and Sloan's letter to Messrs. Mitchell and Smith, make it manifest there was such lack of confidence and acute business antagonism between him and the managers of the Imperial Fertilizer Company and the Virginia-Carolina Chemical Company as to forbid any hope that this business, which involved in the credit sales of fertilizers so much reciprocal confidence, could have been successfully transacted between them. Besides, Smith could not have forced the Virginia-Carolina Chemical Company under a contract of this kind to accept Sloan or any one else as a substitute for himself. Another difficulty under which Smith would have labored if he had endeavored to continue the business on the plan upon which Griffith had begun it was the doubt as to his right to use Etiwan brands. He could find no written authority to use them among Griffith's papers, and we think the letter of Sloan, the manager of the company, to McIver, claiming the right to terminate their use at his demand, was clearly competent, not to prove that Sloan had this right, but to show that Smith had reason to apprehend that he might make such claim, which would seriously embarrass him, in view of the fact that he could not meet it by written authority from the Etiwan Company.

The defendants have moved in this court to amend subdivision 3 of the second exception, so as to make the point that the letters of Earle Sloan to Morgan, president of the Virginia-Carolina Chemical Company, should have been admitted in evidence, as tending to show "that no use of the Etiwan brands or disposition of the unsold fertilizers, originally included in the agreement of June, 1899, was possible by W. I. Smith, assignee, and that any delay on the part of the said W. I. Smith, assignee, in effecting a settlement of the unsold portion of that contract would have been destructive of any remaining value thereof in his hands." In these letters Sloan does propose to sell to the Virginia-Carolina Chemical Company the Etiwan Works, with the right to use its brands for the year 1900, and we think they were competent to enlighten the court as to the extent which the value of Griffith's claim to deliver the fertilizers under Etiwan brands might have been impaired in Smith's hands by an adverse claim. The motion to amend the exception was, in effect, only to amplify it and make it clearer. *Watts v. R. R. Co.*, 60 S. C. 67, 38 S. E. 240. The motion cannot be granted, however, for the reason that the letters were excluded by the master, and no exception was taken to his ruling.

Excluding these letters, upon the testimony

to which no objection was made we think Smith was without doubt justified in not running the risk of continuing the business on the plans laid out by Griffith. Indeed, as we understand, the plaintiff does not now seriously question the wisdom of a sale in bulk on the Charleston market, but it is insisted that, if Smith had offered the goods to brokers, he could have sold for a better price than he received. Smith admits he made no effort to sell except to the Virginia-Carolina Chemical Company, and there seems to be no doubt that, if he had 3,200 tons of fertilizers for sale, free of any contract restrictions, he could, with reasonable effort, have made a cash sale at 50 cents per ton more than he received. The important inquiry therefore is, did the Virginia-Carolina Company, as assignee of the Imperial Fertilizer Company, have such rights under Griffith's contract as to enable it to interfere in any way with his selling in open market in Charleston all the unsold goods? Assuming the contract was of such a personal nature as to deny to Griffith the right to assign it, and thus put in his place one with whom the Imperial Fertilizer Company would not care to deal in a relation implying so much confidence, the assignment to Smith was made with the company's active co-operation, and upon the very valuable consideration that by the assignment it was released from the embarrassment of being bound in a contract to furnish a large quantity of goods to Griffith, a man whose condition had become such as to place the company in a position of great uncertainty as to whether he would be able to take the goods or not. The company therefore waived the right of denying the validity of the assignment to Smith. But, if the assignment is disregarded, the result would not be affected, because Smith had a power of attorney to act for Griffith under the contract, the validity of which has not been disputed. The question, then, of Smith's right to reassign the contract is of no practical importance, because if he, as agent of Griffith, had the right to demand of the Virginia-Carolina Chemical Company the delivery of the unsold fertilizer in bulk at the prices named in the contract, it is manifest he himself could have contracted for the sale of these goods, and directed the Virginia-Carolina Chemical Company to deliver them to the person purchasing from him.

This leads to the inquiry whether he could have demanded of the company the delivery of the unsold goods without Etiwan brands, and in bulk, upon payment of the agreed price in cash. The contract was for only one season, and the goods were not to be sold under Imperial brands. It is therefore obvious no future advantage to the company for any trade Griffith might establish was contemplated. Griffith contracted to procure a lease of the Etiwan Phosphate Works, so as to establish his right to use the brands of

that company, and it was understood the Imperial Company would place those brands of goods shipped out on Griffith's orders, but neither the Imperial Company nor the Virginia-Carolina Chemical Company had, when the contract was made, any interest in the Etiwan brands, and they have not since acquired such interest. The sacking and branding of the goods was a burden imposed on the Imperial Company by the contract, and there is not the slightest evidence that this burden ever became a benefit to it. It was therefore subject to waiver by Griffith. Hence, even if Griffith had no legal right to use these brands, as it is alleged was the case, this fact would be of no concern to the Imperial Fertilizer Company or its assignee, the Virginia-Carolina Chemical Company, if Griffith or his agent could effect a sale of the entire quantity without the brands. It seems perfectly clear that the sole interest the Imperial Company had in the contract was to secure the sale of 4,000 tons of its goods at the prices herein stated, and to collect the purchase money, and all the duties of the contract imposed on the parties were only means provided for the accomplishment of this end. Smith could have demanded the delivery for cash of all the goods, waiving the requirement that Etiwan brands should be used and the condition that he might sell on credit. We suppose it will hardly be contended that the Imperial Company had the option to require Griffith or his agent, Smith, to undertake to sell some indefinite quantity of fertilizers beyond 4,000 tons, after that quantity had been sold. The testimony affords no ground for imputing bad faith, but we cannot avoid the conclusion that Mr. Smith, as a business man, should have known the Virginia-Carolina Chemical Company would be obliged to deliver the 3,200 tons in bulk, without Etiwan brands, to his order, on payment of the purchase money; and that he should have offered the goods to the trade, instead of restricting his negotiations to the Virginia-Carolina Chemical Company. He must therefore be held responsible for the loss which resulted from his failure to do so. The fact that Griffith owed Imperial Fertilizer Company on transactions for past years about \$25,000 does not enter into this question, because this debt was not in any way affected by the assignment and release made by Smith.

We are unable to find any sufficient basis for holding the Imperial Fertilizer Company and the Virginia-Carolina Chemical Company liable for the loss on the ground taken in the circuit decree that they occupied a fiduciary position, and that Smith was acting as their agent in this business. It is true Smith was the bookkeeper of the Imperial Fertilizer Company, and afterwards shipping clerk of the Virginia-Carolina Chemical Company, but these positions do not imply agency to transact business of this character; and we find

no evidence that any such trust was given by the companies, or undertaken by him. McIver conducted for them all the negotiations and transactions connected with the matter. It is true, he suggested that Griffith should give up his business until his health should improve, and that in the meantime he should appoint Smith his agent, and he had the power of attorney and assignment prepared; but it was certainly made perfectly clear to Griffith, as well as to his sister and his friends, that McIver was acting for the Imperial Company, and in its interest. The fact that Smith was bookkeeper for the Imperial Fertilizer Company was also well known to Griffith and his friends. McIver suggested that independent investigation should be made as to his capacity and character. The master found "that at the time that Mr. Griffith made this assignment and power of attorney he was mentally competent to do so, and, while he was not in his usual health, there was no reason to suppose that he was not fully aware of the force and effect of his actions, and that the said assignment and power of attorney were properly executed by him, without any undue influence being brought to bear upon him in the premises." This finding was not disturbed by the circuit judge, and we think it is supported by the evidence. That Smith was in the employment of the companies interested of which McIver was manager, and that they were advised by the same attorney, made their relations sufficiently delicate to warrant careful scrutiny of their dealings, and the exaction of more than ordinary candor and fairness; but these facts alone, in the absence of such gross inadequacy of price as to be suggestive of fraud, are not sufficient to make the Virginia-Carolina Chemical Company liable for buying at a price somewhat below the market value. Not only is there lack of evidence of collusion, but Smith assumes the whole responsibility of the transaction, and says he acted independently of McIver, refused to accept his first offer, and traded with him only after trying to bring him to a higher price than he obtained. McIver had a right to buy at the lowest price to which he could get Smith to agree, in the absence of fraud or imposition; and there is nothing in the evidence to suggest any inference of that kind. Smith made a bad trade, because, as we have seen, he did not use proper efforts to get a better one, but there is no evidence that McIver persuaded or influenced him not to make such efforts. Looking at the situation of affairs from the company's point of view, McIver seems to have conceived the idea that Smith could not sell the fertilizers without the Etiwan brands, and without following out the provisions of the contract which had been inserted solely for the purpose of obtaining sale and payment. This view was so clearly erroneous that Smith, from his point of view of Griffith's representative, should have rejected it; but there

is no reason to doubt McIver honestly entertained it, and there was no impropriety in his urging it in the negotiations.

For these reasons the judgment of the circuit court is modified as above indicated, and the report of the master is confirmed.

(67 S. C. 481)

BROWN v. CAROLINA MIDLAND RY. CO.
(Supreme Court of South Carolina. Nov. 28, 1903.)

RAILROADS — FIRES COMMUNICATED FROM
RIGHT OF WAY—PLEADINGS—CONSTITUTIONAL LAW—EVIDENCE.

1. A complaint alleged that the depot of defendant railroad was situated on its right of way, and that the company allowed fire to remain so near the building that it caught fire, which fire was communicated to property of the plaintiff. *Held* to state a cause of action within Code Laws 1902, § 2135, providing that a railroad company shall be responsible to any person for damages to property by fire communicated by its locomotives or originating within its right of way.

2. An allegation in the complaint that the fire which injured the property of plaintiff originated in consequence of the act of defendant railroad company is equivalent to an allegation that the fire "originated in consequence of the act of any of defendant's authorized agents or employes," as prescribed by Code Laws 1902, § 2135.

3. Code Laws 1902, § 2135, rendering a railroad company liable to the owner of the property injured by fire communicated from its right of way, is not unconstitutional, as in violation of the Constitution of the United States (article 14, § 1, of the amendments).

4. Under an allegation that a fire was communicated to plaintiff's property from a depot, it is competent to prove that the stove in the depot was defective.

5. A judgment will not be reversed for alleged error in the admission of evidence where the same kind of evidence is afterwards introduced by appellant.

6. The words "right of way," as used in Code Laws 1902, § 2135, rendering a railroad liable for fire communicated by its locomotives or originating on its right of way, do not refer to the title of the railroad company, but are used to designate the locality from which a fire must originate to render the company liable.

7. That, in determining an objection raised, the court gave an erroneous reason, is no ground for reversal, where its conclusion was correct.

Appeal from Common Pleas Circuit Court of Barnwell County; Gage, Judge.

Action by Jennie Brown against the Carolina Midland Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Robt. Aldrich, Izlar Bros., and Bellinger & Townsend, for appellant. Davis & Best, R. C. Holman, J. C. Patterson, and W. A. Holman, for appellee.

GARY, A. J. The nature of this action being in dispute, it will be necessary to refer to the complaint:

Paragraph 1 of the complaint alleges the corporate existence of the defendant. Para-

graph 2 alleges that, as such corporation, it owns cars and engines, and operates its said railroad through the county of Barnwell. The other allegations of the complaint are as follows:

"(3) That on or about the 9th day of January, A. D. 1899, the plaintiff was the owner of valuable buildings, known as the Brown Cotton & Manufacturing Company, * * * in the aggregate value of \$10,000.

"(4) That on the night of the 10th or the early morning of the 11th (about 1 o'clock a. m.) of January, A. D. 1899, as hereinbefore alleged, the defendant corporation, whose depot was situated on its right of way, near its line of road, and the plaintiff's buildings and other property, as aforesaid, being situated a like distance therefrom, to wit, five or six feet, allowed fire to remain in or so near said depot building that the same caught or took fire, communicating same to plaintiff's buildings, as hereinbefore alleged, completely destroying them, together with the cornmill outfit, cylindrical cotton press outfit, cotton gin, gins, feeders, condensers, fans, shaftings, conveyers, and pulleys. That said fire also destroyed the cotton, corn, cotton seed, cans and cases, engines and boilers, shaftings and pulleys, and each and every article as enumerated in the third paragraph of this complaint.

"(5) That, among other things, it was the duty of the defendant company to retain a night watchman at and around said depot, at night, to prevent such conflagrations as herein complained of, which they failed, negligently, so to do.

"(6) That said fire would not have occurred but for defendant's carelessness and negligence in allowing the same to remain in their stove or heater in said depot, and other fire to remain near or about said depot, and the plaintiff further charges that said defendant allowed a box car to stand between their depot and plaintiff's buildings in a dangerous condition, to wit, a hot box being thereto attached, all of which facts were well known, or should have been known, to said defendant; and by reason of the aforesaid facts the defendant has damaged the plaintiff (\$10,000) ten thousand dollars."

The answer of the defendant denied the allegations of the complaint, and set up the defense of contributory negligence.

The jury rendered a verdict in favor of the plaintiff. The defendant appealed, upon exceptions which will be considered in their regular order.

The first exception is as follows: "(1) That his honor the circuit judge erred in holding that the amended complaint stated a cause of action under the statute (Gen. St. 1882, § 1511; Rev. St. 1893, § 1688; Code Laws 1902, § 2135): (a) In that the said complaint does not allege that the fire originated within the limits of the right of way of the defendant corporation. The allegations merely being that the defendant 'allowed fire to remain in

or near [its] depot building.' (b) In that said complaint does not allege that the fire 'originated in consequence of the act of any of the defendant's authorized agents or employees.' (c) In that the statute does not render railroad corporations liable, without regard to negligence, for fires originating in depot buildings situate on their right of way, from fire allowed to remain therein, unless such fire was used in such building for a purpose peculiar to the business of a railroad, and other than for ordinary heating purposes. (d) In that the said complaint does not allege that fire was allowed to remain within the limits of the right of way, other than in the depot building which was situate thereon, and in holding that, under the statute, a cause of action is stated by the allegation that defendant allowed fire to remain in a depot building on its right of way, which became communicated to plaintiff's buildings, his honor the circuit judge deprived the defendant of the equal protection of the laws, and held it to an unconditional liability for the use of property in a manner similar or identical with such use by other persons, without regard to negligence or care, in violation of section 1 of article 14 of amendments to the Constitution of the United States, and of section 5 of article 1 of the Constitution of this state, and of section 12, of article 1 of the Constitution of 1868. (e) In that the construction placed by the circuit judge on the statute deprives the defendants of equal protection under the laws, and subjects them to an unconditional liability, without regard to negligence or care, for the use of property in a manner similar or identical with such use by other persons, and subjects defendants to other restraints in regard to their use of their property than such as are laid upon others under like circumstances, in violation of section 1 of article 14 of amendments to the Constitution of the United States, and of section 5 of article 1 of the Constitution of this state, and of section 12 of article 1 of the Constitution of 1868, whereas such statute should have been construed, in conformity with said provisions of the United States Constitution and of the Constitution of this state, to apply only to fires 'communicated by its locomotive engine, or originating within the limits of the right of way of said road, in consequence of the act of any of its authorized agents or employees' in the use of fire, for the purposes peculiar to a railroad."

The first assignment of error on the part of his honor the circuit judge, in ruling that the complaint stated a cause of action under the statute, is set out in "a." The statute is as follows (Code Laws 1902, § 2135): "Every railroad corporation shall be responsible in damage to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, or originating within the limits of the right of way of said road in

consequence of the act of any of its authorized agents or employes, except in any case where property shall have been placed on the right of way of such corporation unlawfully or without its consent, and shall have an insurable interest in the property upon its route for which it may be so held responsible and may procure insurance thereon in its own behalf." The right to bring an action at common law, founded upon negligence, was not superseded by the statute. *Hunter v. R. R.*, 41 S. C. 90, 19 S. E. 197; *Dent v. R. R.*, 61 S. C. 329, 39 S. E. 527. The allegations appropriate to an action under the statute are set out in the fourth paragraph of the complaint, and those appropriate to an action at common law are alleged in the sixth paragraph. It is true, the complaint does not follow the exact language of the statute, but it does not allege that the defendant, whose depot was situated on its right of way, allowed fire to remain in or so near said depot building that the same caught or took fire. The allegations of the complaint were in this respect a substantial compliance with the requirements of the statute.

The second assignment of error will be found in "b." While again, the complaint does not use the very words of the statute, it nevertheless alleges that the fire originated in consequence of the act of the defendant, and this is equivalent to alleging that the fire "originated in consequence of the act of any of the defendant's authorized agents or employes." The act of an authorized agent or employe is the act of the principal. "Qui facit per alium facit per se."

The third assignment of error is contained in "c." In the first place, the statute makes no such exception as that for which the appellant contends, and very properly so, for the use of a depot building on the right of way is as strictly a purpose peculiar to the business of a railroad as the locomotive that draws its cars. Furthermore, the heating of a depot building may be as necessary for the health and comfort of those working within the building as the heating of a passenger car for those traveling on the train. It may properly be said that both are railroad purposes. A depot building and its proper equipment are incidental and essential to the orderly operation of a railroad.

The other assignments of error are in "d" and "e." We do not regard the constitutionality of this statute as an open question, either in this state, or under the decisions of the United States Supreme Court. *McCandless v. R. R.*, 38 S. C. 103, 16 S. E. 429, 18 L. R. A. 440; *St. Louis & S. F. Ry. Co. v. Mathews*, 17 Sup. Ct. 243, 41 L. Ed. 611, in which this question is ably and elaborately discussed. This last case cites the case of *McCandless v. R. R.*, 38 S. C. 103, 16 S. E. 429, 18 L. R. A. 440; and the case of *St. Louis & S. F. Ry. Co. v. Mathews*, 17 Sup. Ct. 243, 41 L. Ed. 611, is cited with

approval in *Atchison, T. & S. F. R. Co. v. Mathews*, 19 Sup. Ct. 609, 43 L. Ed. 909.

The second exception is as follows: "(2) That his honor the circuit judge erred in admitting testimony to show that the stove or heater, or flues leading therefrom, were defective; no such defect being alleged in the complaint." The complaint alleged that the "fire was communicated," but does not set forth in what manner. The testimony was explanatory of this fact, and was responsive to the allegation of the complaint.

The third exception is as follows: "(3) That the plaintiff having specifically alleged in the sixth paragraph of the complaint 'that the fire would not have occurred but for defendant's allowing, first, fire to remain in the stove or heater in said depot; and, second, other fire to remain near or about said depot; and, third, a box car to stand between the depot and plaintiff's buildings, in dangerous condition, to wit, a hot box being thereto attached'—he confined the issue as to the origin of the fire to the three facts alleged, and the circuit judge erred in admitting testimony to show that the stove or heater was defective, or left in a defective condition, such defect not being alleged in the pleading." In the first place, these specifications of negligence are only appropriate to an action at common law. And in the second place, this exception is disposed of by what was said in considering the second exception.

The fourth exception is as follows: "(4) That his honor the circuit judge erred in admitting parol testimony to show that the lands on which the fire occurred was a right of way of defendant's company, inasmuch as the best evidence of right of way is the record evidence of same." After a lengthy discussion of this question, the presiding judge concluded as follows: "The Court: I think in a case like this, where the railroad company is defendant, and the allegation is that the fire occurred on the right of way, that it is competent to prove the distance of the building from the track, the manner in which the building was used, and every other relationship of it to the railroad company, and leave it to the jury to say whether or not it is on the right of way. Mr. Aldrich: Your honor rules he can prove orally the right of way? The Court: I will define to the jury what a right of way is, and leave them to say whether or not this place called a 'right of way' is a right of way. He can prove all the circumstances in connection with the use of the depot, its location," etc. In this we see no error. But apart from this, the defendant afterwards introduced in evidence the deed of the plaintiff conveying the right of way to the defendant. In the case of *Taylor v. Dominick*, 36 S. C. 368, 15 S. E. 591, the court ruled that it "is not sufficient ground to reverse the judgment, when it appears that the testimony, though erroneously ruled out at one stage of the trial, was in

fact received, and went before the jury." For a stronger reason, the judgment should not be reversed when the defendant furnishes the kind of testimony which it insisted should have been introduced by the plaintiff, especially as the plaintiff did not dispute the accuracy of the description mentioned in the deed.

The fifth exception is as follows: "(5) That his honor the circuit judge erred in admitting parol testimony as to the limits of the defendant's right of way, in order to show that the fire originated within such limits." This exception is disposed of by what was said in considering the fourth exception.

The sixth exception is as follows: "(6) That his honor the circuit judge erred in construing the deed by which Mrs. Brown conveyed the right of way to the railroad company (Exhibit C) in his charge to the jury in which he gave no effect to, but ignored, the portion of said deed conveying the land on which the depot was situated, whereas he should have construed said deed to exclude said lands on which the depot was situated from the limits of the right of way." The use of the words "right of way" in this statute has no reference to the title of the railroad company—whether having a mere easement or a greater estate—but they were intended to designate the locality within which the corporation would be liable under the statute.

The seventh exception is as follows: "(7) That his honor the circuit judge erred in refusing to charge, as requested by the defendant, 'that, if the jury find from the evidence that the fire originated in the depot building mentioned in the complaint, then the statute cannot apply, whether such building be on the right of way or not, and the defendant cannot recover without proving negligence.' Inasmuch as the statute (Gen. St. 1882, § 1511; Rev. St. 1893, § 1688; Code Laws 1902, § 2135) cannot be construed to apply to fires originating in buildings on the right of way without denying to the defendant corporation the equal protection of the laws guaranteed it by section 1 of article 14 of amendments to the Constitution of the United States, and by section 5 of article 1 of the Constitution of this state, and by section 12 of article 1 of the Constitution of 1868; and, where a statute can be given construction consistent with the Constitution of the United States and of the state. It should not be so construed as to conflict with either of them." This question has already been discussed.

The eighth exception is as follows: "(8) That his honor the circuit judge erred in refusing to charge, as requested by the defendant, 'that, if the jury find that the fire originated in a building, then, whether such building be on the right of way or not, the liability of the defendant for damages to the property of others to which the fire might extend is no greater than the liability of any

other person owning or occupying the building, situate otherwise, in which a fire originates under similar circumstances,' in that he thereby gave the statute (Gen. St. 1882, § 1511; Rev. St. 1893, § 1688; Code Laws 1902, § 2135) a construction inconsistent with, and in violation of, section 1 of article 14 of amendments to the Constitution of the United States, section 5 of article 1 of the Constitution of this state, and section 12 of article 1 of the Constitution of 1868, guarantying the defendant equal protection under the laws." This question has likewise been considered.

The ninth exception is as follows: "(9) That his honor the presiding judge erred in holding and charging the jury, that the language of the statute (Gen. St. 1882, § 1511; Rev. St. 1893, § 1688; Code Laws 1902, § 2135) is broad enough to cover fires originating in the buildings of a railroad company, inasmuch as such construction of the statute subjects railroad corporations to other restraints in regard to personal rights than such as are laid upon other persons under like circumstances, and imposes a burden upon railroad companies which is not imposed upon other persons owning houses, in violation of section 1 of article 14 of amendments to the Constitution of the United States, section 5 of article 1 of the Constitution of this state, and section 12 of article 1 of the Constitution of 1868, securing to the defendant equal protection under the laws." This question has also been disposed of.

The tenth exception is as follows: "(10) That his honor the circuit judge, having no doubt that the Legislature, when it passed the act in question, never contemplated a case like this, erred in holding that the language of the act is broad enough to cover a case like this, inasmuch as the intention of the Legislature should govern in the construction of the act." When a circuit judge errs as to his power to decide, a question, his ruling will be reversed. *State v. David*, 14 S. C. 428. The rule in cases where his conclusion is correct, but his reason erroneous, is thus stated in *Taylor v. Dominick*, 36 S. C. 368, 15 S. E. 591: "It is well settled that this court confines itself to a consideration of the question determined by the court below, without regard to the correctness of the reasons which may be given for the conclusion that may there be reached, and that, if the conclusion reached is correct, the fact that erroneous reasons are given for such conclusion will not warrant this court in reversing the judgment appealed from."

The eleventh exception is as follows: "(11) That his honor the circuit judge erred in not passing on the constitutional question as to the constitutionality of the statute (Gen. St. 1882, § 1511; Rev. St. 1893, § 1688; Code Laws 1902, § 2135), under his construction that it applies to fires originating in the building of a railroad company, and thereby imposes a burden upon a railroad company own-

ing houses which it does not impose upon other people owning houses. Such construction being clearly in violation of section 1 of article 14 of amendments to the Constitution of the United States, of section 5 of article 1 of the Constitution of this state, and of section 12 of article 1 of the Constitution of 1868." We have already considered the constitutional question which his honor declined to consider, just as if he had ruled upon it adversely to the defendant.

The twelfth exception is as follows: "(12) That his honor the circuit judge, having concluded and held that the statute (Gen. St. 1882, § 1511; Rev. St. 1893, § 1638; Code Laws 1902, § 2135) imposed a burden upon railroad companies owning houses not imposed on other persons owning houses, erred in not concluding that this was a denial to the defendant railroad company of the equal protection of the law, in violation of the Constitutions of the United States and of this state." This question is disposed of by what was said in considering other exceptions.

It is the judgment of this court that the judgment of the circuit court be affirmed.

The petition for a rehearing in this case having been withdrawn, it is ordered that the order heretofore granted staying the remittitur be revoked.

(102 Va. 215)

TENCH v. GRAY.

(Supreme Court of Appeals of Virginia. Jan. 14, 1904.)

MOTION FOR JUDGMENT—NOTICE—SUFFICIENCY—COMMENCEMENT OF TERM.

1. On a motion for judgment for money under section 3211, Code 1887, the notice takes the place of both writ and declaration, and must summon the party upon whom it is served to a fixed and certain day.

2. A notice on a motion for judgment for money under Code 1887, § 3211, must be served on defendant at least 15 days before the day on which the motion is to be made; and where a notice is served on October 13th on defendant, informing him that on the first day of the next term plaintiff would move for judgment, and the day fixed by law for the term to begin is October 27th, the notice is insufficient, though, as a matter of fact, the court did not open until the 29th of October.

Error to Circuit Court, Sussex County.

Action by one Tench against one Gray. From a judgment for defendant, plaintiff brings error. Affirmed.

George Mason, for plaintiff in error. J. F. West, for defendant in error.

HARRISON, J. On October 13, 1900, the plaintiff in error had written notice served upon the defendant in error by the sheriff of Sussex county, informing him that on the first day of the next term of the circuit court for the county of Sussex she would move that court for a judgment against him for the sum of \$615.30, with interest thereon from the 30th day of November, 1898, until paid. This notice was returned to the clerk's

office on the 16th day of October, 1900, and was placed by the clerk on the docket of the court. The time fixed by law for the term to begin was October 27, 1900, but the court did not open until October 29, 1900. Under the law, no judgment could be given upon this notice unless served on the defendant at least 15 days before the day on which the motion was to be made. The day fixed by law for the term to begin being October 27, 1900, it is apparent that a notice served October 13, 1900, did not give the 15 days required before the day the motion was to be made. The contention, however, of the plaintiff in error, is that because the court did not open until October 29, 1900, the last-named day became the first day of the term, and, the 15 days having then elapsed, she could, under the notice given, obtain judgment on that day.

It is true that courts view with indulgence these proceedings by motion upon notice, but this liberality has not gone to the extent of dispensing with the necessity for fixing a definite and certain day when the defendant can answer the demand for a judgment against him. The names of the parties, the amount for which judgment will be asked, and the time and place at which the motion will be made, must be stated in clear and unmistakable terms.

This court has held that on motion for judgment for money, under section 3211 of the Code, the notice takes the place of both the writ and the declaration. *Morotock Ins. Co. v. Pankey*, 91 Va. 259, 21 S. E. 487; *Grubbs v. National Life Ins. Co.*, 94 Va. 589, 27 S. E. 464. As the notice is in lieu of the writ, it must, like the writ, summon the party upon whom it is served to a fixed and certain day, when he can appear and make his defense. The statute declares when the terms of courts shall commence, and a litigant has a right to assume that the law will be complied with, and should not suffer loss from acting on that assumption.

In the case at bar the defendant in error had the right to interpret the notice, which informed him that judgment would be asked against him on the first day of the next term, to mean that the motion would be made on the day fixed by law for the term to begin. In short, that notice, as given, was equivalent to saying "on the first day of the next term, that being the 27th day of October, 1900." Indeed, it would have been a violent presumption that he was expected to make his defense on some other day, to be determined by the judge, whose mind on the subject was unknown to the defendant in error. If the court had opened on the first day of the term fixed by law, it cannot be denied that the notice in question would have been insufficient, and no judgment could have been had upon it. The mere circumstance that the court did not open for several days after the day fixed by law for the term to begin could not operate to revive and

lengthen a notice that had already perished by reason of the inherent infirmity of being too short.

The case of *Skipwith's Ex'r v. Cunningham*, 8 Leigh, 271, 31 Am. Dec. 642, is not authority for the position taken by counsel for plaintiff in error. That case turned upon the question whether a judgment related back to the first day of the term appointed by law, or to the first day of the term on which the court actually commenced its session. It was held that the judgment related back to the commencement of the term, that being regarded as the day the session actually begun, and did not, therefore, have priority over a deed of trust recorded the day appointed by law for the court to begin. In other words, the decision was that the commencement of the term was the first day on which the court was actually in session.

The question in the case at bar is not when the term actually commenced, but when was the first day of the next term of the circuit court for the county of Sussex, in contemplation of the notice that judgment would be asked on that day against the defendant in error. The statute answered that question for the defendant in error by providing October 27, 1900, as the first day of the term in question. Under the notice, that was the only day that could possibly have been known to the defendant in error upon which he could have appeared to defend the motion.

For these reasons, the judgment of the lower court, quashing the notice as insufficient and dismissing the motion, must be affirmed.

BUCHANAN, J., absent.

(102 Va. 239)

HANCOCK v. WHITE HALL TOBACCO WAREHOUSE CO.

(Supreme Court of Appeals of Virginia. Jan. 14, 1904.)

JUDGMENT—RES JUDICATA—ENTIRE CONTRACT—SEPARATE ACTIONS FOR BREACH—DAMAGES PROVABLE.

1. A lessor contracted to build for the lessee a factory equipped with modern appliances, to be ready by a certain date. The contract expressly stipulated that the lessor was to be at no charge during the term, except for insurance and taxes. It failed to build and equip the factory by the date specified, and the lessee sued to recover damages for a breach of the contract. *Held*, that the contract being entire, and the breach complete, the right of action at once accrued to recover damages for the entire contract, and the lessee could not recover any further damages for the same breach in a subsequent action.

2. It is not essential that all the injurious effects which arise from a breach of contract should have been suffered before suit, in order to enable the injured party to recover therefor; but not only are the actual effects down to the time of trial provable, but also those which may ensue can be taken into account, where they are imminent and reasonably certain.

Error to Circuit Court, Buckingham County.

Action by the White Hall Tobacco Warehouse Company against A. J. Hancock, doing business under the style of the Lynchburg Tobacco Company. There was judgment for plaintiff, and defendant brings error. Affirmed.

F. C. Moon, for plaintiff in error. S. S. P. Patteson, for defendant in error.

WHITTLE, J. This controversy arose out of a contract between the defendant in error, the White Hall Tobacco Warehouse Company, and the plaintiff in error, A. J. Hancock, doing business under the style of the Lynchburg Tobacco Company, whereby the defendant in error agreed to erect and have ready for occupancy by October 1, 1898, a tobacco factory for the use of plaintiff in error. The factory was to be built according to specifications, and "equipped with modern appliances for the proper steaming and handling of tobacco." Plaintiff in error agreed to lease the factory for a term of two years, with the privilege of extending the lease three years longer, from October 1, 1898, at an annual rental of \$450.

The defendant in error failed to equip the factory with modern appliances, agreeable to contract; and in September, 1900, plaintiff in error brought an action of trespass on the case against it, demanding damages to the amount of \$6,000 for the breach, in which action she recovered a verdict and judgment for \$250.

Prior to that suit, plaintiff in error had elected to continue the lease for the additional period of three years, and, having made default in the payment of rent, attachment proceedings were instituted against her for its collection. In those proceedings the defendant tendered a special plea of set-off, under section 3299 of the Code of 1887, in which \$5,000 damages, alleged to have been sustained by reason of the continuing breach of the contract on the part of the plaintiff with respect to appliances for steaming and handling tobacco since the first suit, were claimed. The trial court rejected the plea, and rendered judgment for the plaintiff, which ruling constitutes the assignment of error relied on here.

The single question thus presented for decision is whether the verdict and judgment in the former action conclude the plaintiff in error, and bars a further recovery for damages alleged to have been subsequently sustained by the original breach of contract. In that connection it is proper to observe that there is nothing in the pleadings in the first suit to have limited the recovery to damages accruing prior to its institution, and, while the record does not disclose the range taken by the testimony, the verdict and judgment are general in their terms. In other words, the pleadings are sufficiently broad to have entitled the plaintiff to recover damages for

the whole term of five years, and there is nothing in the record to show that the recovery was for a less period. It is an ancient and firmly established rule of law that only one action can be maintained for the breach of an entire contract. 2 Sedg. on Dam. (8th Ed.) § 642; 1 Suth. on Dam. (2d Ed.) § 108.

In Clark on Contracts, at page 705, the author says: "The right of a party to sue for a breach of contract is discharged by the final judgment of a court of competent jurisdiction, either in his favor or against him. In the former case the cause of action merges in the judgment, while in the latter the judgment estops him."

The same author, discussing merger and res judicata, at page 71, remarks: "As soon as it [the judgment] is created, the previously existing rights with which it deals merge or are extinguished in it. For instance, when a person sues another for a breach of contract or for a civil injury, and a judgment is entered either by consent or after trial, neither party has any further rights in respect of the cause of action. The judgment conclusively settles their rights, and the matter is said to be res judicata."

It is clear that the contract under consideration is entire, and not severable. By it the lessor obligated itself to build a factory, equipped with modern appliances for steaming and handling tobacco, by October 1, 1898. It was under no obligation to keep the appliances in repair, but, to the contrary, the contract expressly stipulated that the lessor was to be at no charge during the term, except for insurance and taxes. So that, if it had built and equipped the factory by October 1, 1898, according to contract, its responsibility in respect to it would have terminated. If, on the other hand, there was a failure to comply with the contract in the particular complained of, the breach was complete, and a right of action at once accrued to recover damages for the entire term. The stipulation is not one of a series of obligations, but an entire promise, calling for one performance, and subjecting the lessor to one action only for a total breach.

It is not essential that all the injurious effects which arise from a breach of contract should have been manifested and suffered before suit. The actual effects down to the time of trial are provable, and those which may ensue can be taken into account where they are imminent and reasonably certain. 1 Suth. on Dam. §§ 110, 113. Thus an agreement to support one during life was held to be an entire contract, and upon a total breach thereof the promisee could recover full and final damages; i. e., not only the expenses of support up to the time of trial, but also the prospective expense during life. Schell v. Plumb, 55 N. Y. 592.

"So of any act done or default made which is a breach of any stipulation in a contract. It is a single and entire cause of action, embracing

all ensuing consequences for which compensation is allowed; and, however multifarious may be the stipulations in it, any act which amounts to a total breach constitutes but a single cause of action, unless, perhaps, when the stipulations are so distinct and relate to subjects so disconnected as to have no relation or unity, but such as results from being made at the same time, or contained in one instrument. Nor can an entire claim be severed by partial assignments so as to become the foundation of several suits instead of one." 1 Suth. on Dam. § 113.

It results from the foregoing principles that a demand arising upon an entire contract cannot be divided and made the subject of several suits, and, if several suits are brought for a breach of such a contract, a judgment upon the merits of either will bar a recovery in the others.

For these reasons, the judgment complained of is without error, and is affirmed.

BUCHANAN, J., absent.

(102 Va. 270)

SLAUGHTER v. DANNER.

(Supreme Court of Appeals of Virginia. Jan. 14, 1904.)

PARTNERSHIP—DUTY OF KEEPING BOOKS—CHANCERY PRACTICE—ISSUE OUT OF CHANCERY.

1. One partner, in a suit to settle a partnership, having failed to show that the exclusive duty of keeping the books of the partnership rested upon the other partner, cannot recover where, because of their confused and imperfect condition, a commissioner is unable to make any settlement.

2. Whether or not an issue out of chancery is desirable rests always in the sound discretion of the court; it should not be directed in a settlement of partnership accounts where the evidence and accounts are all before the court.

Appeal from Law and Equity Court of City of Richmond.

Bill by J. L. Slaughter against F. W. Danner. Judgment for defendant, and plaintiff appeals. Affirmed.

Isaac Diggs and Hugh A. White, for appellant. M. M. Gilliam, for appellee.

HARRISON, J. This suit was brought by the appellant, J. L. Slaughter, for a settlement of the affairs of a partnership between himself and the appellee, F. W. Danner. This partnership was formed in April, 1891, for the purpose of conducting the business of merchants and manufacturers of lime, plaster, and cement, in the county of Augusta. The partnership lasted until January, 1894, when it was dissolved by mutual consent.

The appellant claims that he put into the concern \$3,040, and that he is entitled to recover that sum from his copartner. On the other hand, the appellee claims that there

were no assets of the concern with which to pay its debts, and that the firm was indebted to him in about twice the sum claimed by appellant, on account of debts for which he had become personally responsible.

There was no contract reduced to writing setting forth the terms of the partnership agreement, and the parties are utterly at variance in their oral statements of the terms agreed upon. The appellant alleges in his bill that appellee agreed to keep all the books pertaining to the business, and his chief contention is that this obligation imposed upon appellee the duty of showing the results of the partnership business and the rights of each partner with respect thereto, and that, having failed to keep proper books, he is liable to appellant for his in-put.

The appellee in his answer emphatically denies the allegation that he was to keep all of the books, and avers that the appellant was to keep, and did actually keep, at the place of their operations, a large and important part of the books of the firm. Certainly, with the exception of the larger part of the first year, the appellant, during the entire period of the partnership, lived in Augusta, at the place of the partnership operations, and the evidence shows that he there had the exclusive management of the business, and undertook to keep a large and important part of the books. The appellant is not, therefore, entitled to recover upon the ground that the exclusive duty of keeping the books rested upon the appellee.

The commissioner to whom the cause was referred for a settlement of the partnership accounts, and a statement showing all claims, debts, and demands between the partners, filed a report, together with a large mass of evidence, oral and otherwise, produced before him. This report discloses the fact that a commissioner of large experience was, on account of the hopeless confusion of the books and papers submitted to him, utterly unable to make any settlement between the parties that would approximate reliability. He says that the only possibility of finding anything due to appellant would be upon the theory that appellee was, under the agreement, to keep the books, and was therefore responsible for their confused and imperfect condition, but that the evidence fails to prove that appellee was charged with or performed that duty, and shows the contrary to be the fact. As confirmation of the condition of the books and papers of this firm, the commissioner adverts to the report of two expert accountants, filed in the record. These experts say: "We have made a careful examination of the books of the firm of Danner & Co. and the papers in the case of 'Slaughter v. Danner,' and find them in such shape that we cannot possibly make up a statement of profit and loss, or of the interest of each partner in the business. Furthermore, we believe that any statement made up by any accountant, attempting to show these facts, if made

up from the books and papers submitted to us, would be totally unreliable."

Our examination of the evidence and accounts has resulted in no greater light than was shed upon those who have previously dealt with the subject. It is impossible to say that the appellee is indebted to the appellant. Such a conclusion might be far from correct. The appellant having inaugurated the litigation, and it appearing that he was actively engaged in the management of the business and in keeping a large and important part of the books of the firm, the burden was upon him to show his right to recover from the appellee. This he has wholly failed to do, and there can be no other result than that reached by the lower court in dismissing the bill.

Appellee insists that the lower court erred in overruling his motion for an issue out of chancery. The object of an issue out of chancery is to aid the court in reaching a conclusion. Whether or not an issue is desirable rests always in the sound discretion of the court. It is one of the peculiar functions of a court of equity to settle partnership accounts. In the case at bar the evidence had all been taken, and the accounts were all before the court. It is not perceived that a jury, in the condition of the record, could have brought to the court any aid in solving the difficulties presented. It was a case that the commissioner and the court could deal with far more intelligently than a jury.

Upon the whole case we are of opinion that there is no error in the decree appealed from, and it must be affirmed.

BUCHANAN, J., absent.

(102 Va. 224)

WHITE HALL CO. v. HALL

(Supreme Court of Appeals of Virginia. Dec. 10, 1903.)

HUSBAND AND WIFE—ACCOUNT AGAINST HUSBAND—EVIDENCE—ADMISSIONS OF CORPORATION AGENT.

1. The evidence held insufficient to establish that a running account against the husband was to be applied as a payment upon a bond due to the wife.

2. The admissions and representations made by an agent of a corporation, acting within the scope of his authority, and concerning matters intrusted to him, are binding upon the corporation.

Appeal from Circuit Court, Buckingham County.

Bill by Della M. Hall against the White Hall Company. Decree for plaintiff, and defendant appeals, and plaintiff assigns cross-error. Affirmed.

S. S. P. Patteson, for appellant. F. C. Moon, for appellee.

HARRISON, J. The bill in this cause was filed by Della M. Hall to enforce the satisfac-

tion of three claims asserted by her against the appellant company. The first of these is a bond for \$3,000, dated November 25, 1893, secured by deed of trust from the appellant upon certain real estate; second, \$400 and interest from December 7, 1895; and, third, \$859.89 and interest from October 5, 1894. The two last-mentioned claims were not secured, and are eliminated from this controversy by the plea of the statute of limitations.

In its answer to the bill the appellant company sets up as offset to the first-mentioned claim an account against W. E. Hall, the husband of the appellee, Della M. Hall, of sufficient magnitude to satisfy the plaintiff's demand.

The commissioner to whom the cause was referred to ascertain what was due on the deed of trust claim of \$3,000 and interest disallowed the account set up by the defendant company, and allowed as a credit an account, consisting of two items, kept by the company against the appellee, Della M. Hall, amounting to \$526, and reported the balance due on the debt to be \$4,079 as of October 25, 1902. This report was confirmed by the decree appealed from, which we are asked to review.

All of the evidence taken is returned by the commissioner with his report, and we are of opinion that it fully sustains his finding and the action of the circuit court in confirming the same. That the appellee, Della M. Hall, loaned the appellant \$3,000 of her separate estate, and had the same secured by the deed of trust mentioned, is not denied. The offset asserted by the appellant company consists of a running account commenced by W. E. Hall with the company, for family supplies, etc., some time prior to the date of the loan made by his wife. The books of the company show that, while this account was being kept against W. E. Hall, a separate account was kept against the appellee, Della M. Hall, and it is to be presumed that she would be charged on her own account with all that was properly chargeable to her. It further appears that on two occasions the company, through its agent, H. M. White, obtained from the appellee this bond to use as collateral security in borrowing money for its own purposes. The last of these occasions was in August, 1898, when it was used by the company as collateral security for a loan of \$3,000 obtained by it from the Lynchburg Perpetual Building & Loan Company. A large part of this debt is still unpaid, and the Della M. Hall bond is still held by the building and loan company as collateral security therefor. At the time this loan was negotiated by the appellant company, its books showed the larger part of the account now asserted as an offset to be outstanding, and, if it was then understood by the company to be a payment pro tanto on the bond due appellee, the use of that bond without credit as collateral was, to say the least of it, singular treatment of the building and loan company.

Although the account in question had been running on the books of the company against W. E. Hall, who was its vice president, and one of its stockholders, through a period of nearly 10 years, yet no hint of its existence, or that it was intended as a payment on her debt, was ever at any time communicated to the appellee, she having heard of it for the first time after it was filed as an offset in this suit. That the account was never chargeable to Mrs. Hall, nor intended to be used as an offset to her debt, and that its assertion in this suit is an afterthought, is further conclusively shown by the following correspondence.

As late as January, 1902, when the whole account against W. E. Hall was on the books of the company, the appellee, Della M. Hall, addressed H. M. White, the general manager of the company, the following letter: "Please let me know by return mail when you can pay me the interest on my \$3,000.00 mortgage. It is necessary for me to have the money at once." By return mail she received from H. M. White, general manager, the following reply: "Dear Mrs. Hall: Your note dropped in the post office was duly received. Mr. Silvey has arranged to finish paying you the balance on the \$500.00 on account of interest on your \$3,000.00 this week. As to the balance of the interest, we are in no position to pay this in a lump, and cannot do this until we get a settlement from Browning Bros., which Mr. H. B. Hanford, assignee, says should be made some time in April. I believe we can borrow enough money after the Browning matter is settled to pay any balance of interest due you, as well as the \$3,000.00 itself. In the meantime, I would suggest that we pay you the first of each month, commencing February 1st, fifty dollars per month on account of interest, and these payments to continue until we can settle in full. If draft now in the hands of the Building and Loan Co., at Lynchburg, is paid, we will only owe them \$1,430.00, whereas we owed them at first \$3,900.00, so you can see your loan is in better shape than for the last three years. If draft is not paid we owe them \$1,730. I am doing all any one can to pull the company through, and nothing can possibly be gained but a great deal lost by pressing for money at this time. Anything I have you can get at any time."

As secretary and treasurer of the company, the author of this letter would have been fully cognizant of any payments that had been made on the debt in question, and yet the letter is written admitting the entire debt except the \$500 alluded to and promising its payment, without the slightest suggestion that the company claimed as an offset the account now asserted, or any part of it. There is other evidence, record as well as oral, to sustain the action of the lower court; but the solemn and unequivocal admission contained in this letter, in direct response to a demand for the interest, that the whole

principal and the bulk of the interest was unpaid, would seem to be sufficient without prolonging this opinion by a further review of the evidence.

It is contended that this admission cannot bind the company, because H. M. White, the general manager, had no special authority to make it. This position is not tenable. A corporation can only speak through its officers and agents, and their declarations, made in the course of their employment, and relating to the immediate transaction in which they are engaged, are always competent against the corporation. The admissions and representations made by an agent of a corporation, acting within the scope of his authority, and concerning matters intrusted to him, are binding upon the corporation. Cook on Corporations (4th Ed.) § 726.

In the case before us the author of the admission contained in the letter mentioned had been from its inception the general manager and the secretary and treasurer of the company. He was one of its largest stockholders, and the record shows that for all practical purposes he was the company. Its books were kept under his supervision and control. He managed its finances, negotiated loans, disbursed its money, and controlled its affairs generally. The letter in question pertained to the work and duty that its author appears to have been charged with and constantly performed. That one exercising the broad powers that seem to have been confided to this general manager, secretary, and treasurer had the authority to write the letter and make the admission that he did cannot be doubted.

The appellee, Della M. Hall, assigns as cross-error the action of the circuit court in allowing appellant credit for the \$500 alluded to in the letter mentioned. That \$500 is one of the two items mentioned in the account kept by the company against the appellee. As to it, the evidence is conflicting, and we would not feel warranted in disturbing the finding of the commissioner with respect thereto, and the confirmation of that finding by the circuit court.

Upon the whole case we are of opinion that there is no error in the decree complained of to the prejudice of appellant, and it must be affirmed.

BUCHANAN, J., absent.

(102 Va. 263)

RICHMOND TRACTION CO. v. WILLIAMS.

(Supreme Court of Appeals of Virginia. Jan. 14, 1904.)

STREET RAILWAYS—PASSENGERS—POINT OF STOPPING—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

1. It is the duty of the street railway to use extraordinary care and caution to see that passengers are not injured in getting on or off its cars when stopped at a regular point for stopping.

2. If plaintiff undertook to get off a street car while in motion, she was guilty of contributory negligence; but if she retained her seat until the car stopped, and reached the platform before it started, and was thrown, while alighting, by the sudden starting of the car, she was not guilty of contributory negligence.

3. It is not error to refuse instructions when the propositions of law, although correctly stated therein, are sufficiently covered by other instructions which are granted.

Error to Law and Equity Court of City of Richmond.

Action by S. M. Williams against the Richmond Traction Company. Judgment for plaintiff. Defendant brings error. Affirmed.

William L. Royall, for plaintiff in error. Edgar Allan, Jr., for defendant in error.

CARDWELL, J. The defendant in error, Mrs. S. M. Williams, brought her action in the law and equity court of Richmond City, and recovered judgment against the plaintiff in error, the Richmond Traction Company, for the sum of \$500, with interest from the 24th day of April, 1901, as damages for injuries sustained because of the negligence of the defendant, and we are asked to reverse this judgment on the grounds (1) that the court below misdirected the jury as to the law; and (2) because the verdict is contrary to the law and the evidence. The defendant below, plaintiff in error here, owns and operates an electric street railway in the city of Richmond, and one of its tracks lies in Cary street, running east and west; and it crosses at right angles Belvidere street, on which the Richmond, Fredericksburg & Potomac Steam Railroad has a track, upon which steam cars are operated.

An ordinance of the city of Richmond relative to the conduct of street railways operated within the city contains the provision that, "at every point of intersection of either street car line with a steam railroad, the street car company's cars shall come to a full stop before crossing the tracks of the steam road, and the steam road in each case shall have the right of way," etc.; and one of the printed rules of the plaintiff in error reads as follows: "(16) Steam Railroad Crossings. Motormen must bring their cars to a full stop, not nearer than twenty-five feet to the nearest track—meaning, the nearest track of the steam railroad. The motorman must not proceed with his car until the conductor has gone ahead onto the steam railroad track and looked both ways and given a signal to start. The motorman will also observe the utmost watchfulness for approaching trains, and should, in his judgment, danger be imminent from any source he will refuse to start his car until the crossing is clear and free from all danger. When the conductor has gone ahead of car, before starting, the motorman will look back and see that there is no one getting on or off the car. * * * Another of the plaintiff in

error's rules provides: "(39) Approaching Street and Railway Crossings. Approach all street and railway crossings with care, and your car under perfect control; cross the street before stopping."

On the 24th day of April, 1901, the defendant in error was a passenger on one of the cars of the plaintiff in error, having gotten on the car at First and Broad streets, and was going to her home, on Belvidere street, near Cary street. When the car reached the east side of Belvidere street, it came to a full stop, in accordance with the rules of the plaintiff in error, and the conductor went forward to view the steam railroad tracks, to ascertain whether his car could proceed further without danger of collision with the steam cars; and, observing the approach of no steam cars, he signaled the motorman to go forward. In the meantime the defendant in error had left her seat in the car, and was in the act of alighting upon the street, when the car was suddenly started with a severe jerk, throwing her upon the street, causing her the injuries for which this suit was brought. Her contention at the trial was that by custom the place at which she attempted to leave the car had become a regular stopping place for passengers to alight, and that before approaching that point she signaled to the conductor with her hand to stop the car for her to alight, and she supposed he understood and agreed to her signal, whereupon she got up and walked out upon the back platform, supposing that the conductor would be there to assist her off, but when she got upon the rear platform she found that the conductor had gone to the steam road, and, reaching it, and without looking back, he signaled the motorman with his hand to come on, and, the motorman applying the electricity, the car gave a sudden jerk, that threw her to the ground and injured her.

On the other hand, the theory of plaintiff in error was that the defendant in error either attempted to get off the car while moving, thereby contributing to her own injuries, or that, after reaching the rear platform at the steps, instead of getting off of the car, she delayed, and thereby lost her opportunity to get off before the car started. In other words, the contention of the defendant in error was that she received her injuries by reason of the neglect of the plaintiff in error to perform its duty to her, under the law, as a passenger, and in violation of its own rules and regulations, while the theory of the plaintiff in error was that the defendant in error, by her own negligence, contributed to her injuries, whereby she was barred of any recovery in this action.

The defendant in error at the trial asked for two instructions, which the court gave. The second relates to the measure of damages in such an action, and is free from objection, and will therefore not be further noticed. The first instruction is as follows:

"The court instructs the jury that it is the duty of common carriers, such as street railway companies, to use extraordinary care and caution to see that passengers are not injured in getting on or off their cars, and that it was the duty of the defendant company, their servants and employes, to take due and proper precaution to see that no one was in the act of alighting before moving their car ahead after the same had been stopped at a regular point for stopping; and if the jury shall believe from the evidence that the plaintiff, Mrs. Williams, without negligence on her part, was in the act of alighting from said car, and that the defendant company, their servants or employes, failed to perform their duty in this behalf, and by reason thereof the plaintiff was injured, then the jury shall find for the plaintiff."

This instruction, we think, was clearly right, as it presented the rule of law which this court has frequently laid down with reference to the liability of a street car company to use the utmost care and diligence for the safety of passengers. The most recent case on the subject is that of *N. & A. Ter. Co. v. Morris' Adm'r* (Va.) 44 S. E. 719. The evidence tended to show that the defendant in error in this case was seeking to leave the car at a point which, by custom, known to the plaintiff in error, had become a regular stopping place where passengers left the car, and she was on this occasion, as she had frequently done before, alighting from the car near her home.

Plaintiff in error asked for five instructions, marked "A," "B," "C," "D," and "E," of which the court refused to give "D" and "E," and modified "A," "B," and "C"; the court giving the instructions as modified as its own instructions, numbering them Nos. 3, 4, and 5. Instruction "A," modified, was as follows:

"If the jury believe from the evidence that the plaintiff undertook to get off of defendant's car while it was in motion, she is guilty of contributory negligence, and cannot recover in this action."

And in lieu of this instruction the court gave the following:

"If the jury believe from the evidence that the plaintiff undertook to get off the defendant's car while it was in motion, she is guilty of contributory negligence, and cannot recover in this action; but if the jury believe from the evidence that the plaintiff retained her seat until the car had fully stopped, and reached the platform before the car was started forward, and that then, while she was in the act of alighting, by the sudden starting of the car she was thrown to the ground and injured, her conduct cannot be considered as constituting contributory negligence on her part."

If it be conceded that a passenger on a street car is guilty of negligence by leaving his seat while the car is in motion, as to which we express no opinion, instruction "A"

contained a mere abstract proposition of law, which was calculated to mislead the jury in this case; and the court was clearly right in qualifying it by adding thereto, "but if the jury believe from the evidence that the plaintiff retained her seat until the car had fully stopped, and reached the platform before the car was started forward, and that then, while she was in the act of alighting, by the sudden starting of the car she was thrown to the ground and injured, her conduct cannot be considered as constituting contributory negligence on her part." We are further of opinion that this instruction, as given by the court, together with its fourth and fifth instructions, sufficiently covered every proposition of law contended for in the instructions asked for by the plaintiff in error which were refused. The instructions as given submitted more clearly to the jury the issues presented by the testimony in the case, and it is not error to refuse instructions when the propositions of law, although correctly stated therein, are sufficiently covered by other instructions which are granted. *N. & W. Ry. Co. v. Tanner*, 100 Va. 379, 41 S. E. 721.

We shall not attempt to review in detail the evidence in the case. This is a very different case from that of a trespasser, a licensee, or of a person crossing a street, with rights only equal to those of a railroad company. Here it was a passenger towards whom the railroad owed the highest diligence. While the defendant in error may have known that the regular stopping point at which to take on or put off passengers was on the opposite side of Belvidere street, the evidence was ample to show that by custom, well known to plaintiff in error, its cars had been stopping on the east side of Belvidere street, at which point passengers constantly got off. The jury, therefore, was well warranted in finding that the defendant in error was not guilty of negligence merely by the fact that she attempted to leave the car at that point after it had come to a full stop. It was the duty of the employees of the company to be on the alert to see that passengers seeking to alight from the car at that point were not put in peril by doing so, when, by the exercise of ordinary care on the part of these employees, danger to them might be averted. Whether these employees were negligent in the performance of these duties, as well as the question whether or not the defendant in error was guilty of negligence contributing with that of the plaintiff in error, and causing her injury, was a question of fact for the jury; and, these questions having been submitted fairly to them by the instructions given by the court, we cannot say that the verdict of the jury is without evidence or against the evidence.

Upon the whole case, we are of opinion that the judgment should be affirmed.

BUCHANAN, J., absent.

(102 Va. 274)

SAVINGS BANK OF RICHMOND v. POWHATAN CLAY MFG. CO.

(Supreme Court of Appeals of Virginia. Jan. 14, 1904.)

PLEADING — DEMURRER — LIMITATIONS — MECHANIC'S LIEN — SUIT TO ENFORCE.

1. Where a demurrer is not passed upon by the decree, it is to be considered as having been overruled.

2. Where a special limitation is prescribed by a statute creating a new right, the limitation may be taken advantage of by demurrer, unless the complaint shows affirmatively that the prescribed period has not elapsed.

3. Under section 2481, Code 1887, a suit to enforce a mechanic's lien must be brought within six months after the whole claim has become payable, and a bill will be demurrable which does not allege that this period has not elapsed.

Appeal from Chancery Court of Richmond.

Bill by the Powhatan Clay Manufacturing Company against the Southern Railway Company and others. From the judgment, the Savings Bank of Richmond appeals. Reversed.

A. W. Patterson, for appellant. W. O. Skelton, Wyndham B. Meredith, and Wm. Crump Tucker, for appellee.

KEITH, P. The Powhatan Clay Manufacturing Company filed its bill in the chancery court of the city of Richmond, to which it made the Southern Railway Company, the Savings Bank of Richmond, Chesterman, and Powers & Bro., parties defendant.

The Southern Railway Company had entered into an agreement with Chesterman, as general contractor, to build for it a brick depot. On the 1st of October, 1899, Powers & Bro., as subcontractors, agreed to do the brickwork on said building, and the Powhatan Clay Manufacturing Company agreed to furnish bricks, for which it claims there is a balance due to it of \$1,115.78. The depot was completed in August, 1900, and on the 29th of September, 1900, the Powhatan Clay Manufacturing Company filed its claim in the clerk's office of the chancery court of the city of Richmond against the building and so much land therewith as is necessary for its convenient use and enjoyment—an account showing the amount and character of the material furnished, the price charged, and the balance due, verified by affidavit—and claimed a lien under chapter 110 of the Code of Virginia of 1887, and the acts amendatory thereof. This statement is sufficient to bring out the question to be discussed in this opinion.

The Savings Bank, one of the defendants, demurred to the bill because "it did not show when the amount covered by plaintiff's alleged lien became due and payable, nor allege that the suit had been brought within the six-months period prescribed by stat-

¶ 2. See Limitation of Actions, vol. 23, Cent. Dig. §§ 670, 671.

ute for filing same." The decree of the chancery court does not, in terms, pass upon the demurrer, and in such a case it is to be considered as having been overruled. *Miller v. Black Rock Springs*, 99 Va. 747, 40 S. E. 27, 86 Am. St. Rep. 924.

Section 2481 of the Code of 1887 is as follows:

"No suit to enforce any lien perfected under the preceding sections of this chapter shall be brought after six months from the time when the whole amount covered by such lien has become payable."

The lien which the Powhatan Clay Manufacturing Company sought to enforce in this suit is the creature of statute. It had no existence at common law, and was called into being by the "preceding sections" referred to in the section just quoted.

It was held in *Hubble v. Poff*, 98 Va. 646, 37 S. E. 277, that the statute of limitations cannot be taken advantage of in a court of equity by a demurrer to the bill; but that case dealt with a pure statute of limitations—one which affected the remedy only, and which did not touch the right. In a note to that case, to be found at page 558, vol. 6, of the Virginia Law Register, the distinction and the reasons for it are pointed out; and it is said that, where a "special limitation is prescribed by a statute creating a new right, the bill would seem to be demurrable, not only where it shows on its face the expiration of the prescribed period, but unless it shows affirmatively that the prescribed period has not elapsed."

In *McCartney v. Tyrer*, 94 Va. 203, 26 S. E. 421, the court, speaking of the mechanic's lien, says: "If, in the creation of the lien, time has been made of the essence of the right, and a condition of its existence and duration, it would be necessary to allege and prove that the suit was brought within six months from the time when the whole amount covered by the lien became payable. * * * The decision of this particular question, however, is unnecessary, as the defense of the statute of limitations has been disposed of on other principles." See, also, *Manuel v. N. & W. Ry. Co.*, 99 Va. 188, 37 S. E. 957. The great weight of authority seems to sustain this position.

In *Lambert v. Ensign Mfg. Co.*, 26 S. E. 431, the Supreme Court of West Virginia says: "It is true that a statute of limitations, pure and simple, must be relied upon by way of plea, because it is personal, and may be waived or its effects avoided by setting up matters in confession and avoidance. But," continued the court, "here the cause of action did not exist at common law, but is created by statute. The bringing of the suit within two years from the death of the person whose death has been caused by wrongful act is made an essential element of the

right to sue, and it must be accepted in all respects as the statute gives it. And it is made absolute, without saving or qualification of any kind whatever. There is no opening for explanation or excuse. Therefore, strictly speaking, it is not a statute of limitation." This case is full authority for this. It holds that the question may be raised by demurrer to the bill, and that upon demurrer it is fatal.

In *Hill v. Supervisors*, 119 N. Y. 347, 23 N. E. 921, the court uses the following language: "It must be evident that as this action is brought under a special law, and is maintainable solely by its authority, the limitation of time is so incorporated with the remedy given as to make it an integral part of it, and the condition precedent to the maintenance of the action at all."

In *Taylor v. Cranberry Iron & Coal Co.*, 94 N. C. 526, which was a suit brought to recover for the death of plaintiff's intestate, caused by the wrongful act of another, the court said: "This is not strictly a statute of limitation. It gives a right of action that would not otherwise exist, and the action to enforce it must be brought within one year after the death of the testator or intestate, else the right of action will be lost. It must be accepted in all respects as the statute gives it."

In *Finnell v. Southern Kansas Ry. Co. (C.)*, 33 Fed. 428, the court said: "There is also another class of cases in which a cause of action which does not exist at common law is created by the laws of a state. Causes of action of that character only exist in the manner and form and for the length of time prescribed by the statutes of the state which created them."

In *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358, speaking of a similar case, the court said: "The right must be taken subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy, therefore, are to be treated as limitations of the right."

As illustrating various aspects of the same question, see *Ashbey v. Ashbey*, 41 La. Ann. 102, 5 South. 539; *Hudson v. Bishop (C. C.)*, 85 Fed. 820; *Oochran v. Young*, 104 Pa. 333; *Bartlett v. Manor*, 146 Ind. 627, 45 N. E. 1060; *Smith v. Tripp*, 14 R. I. 112; *Anderson v. Hygeia Hotel Co.*, 92 Va. 687, 24 S. E. 269.

We are of opinion that the demurrer to the bill should have been sustained.

BUCHANAN, J., absent.

(102 Va. 222)

DOOLEY & BAYLESS v. CITY OF BRISTOL.

(Supreme Court of Appeals of Virginia. Jan. 14, 1904.)

LICENSE—USE OF CITY STREETS—NONRESIDENTS.

1. An ordinance of a city provided for a license for vehicles carrying freight over the city streets, and a section of the ordinance provided that any person carrying on a business or profession for which a license is required without obtaining it should be fined. *Held* not to apply to merchants doing business out of the state, but delivering merchandise in teams to their customers in such city, and delivering merchandise sold by them and shipped out of the city to the railway stations located in such city.

Error to Corporation Court of Bristol.

Dooley & Bayless were convicted of violating an ordinance of the city of Bristol, and bring error. Reversed.

Peters & Lavinder, for plaintiffs in error.
S. V. Fulkerson, for defendant in error.

BUCHANAN, J. The plaintiffs in error were arrested and fined by the city of Bristol for running a vehicle conveying freight over the streets of the city without a license.

The section of the city ordinance requiring such license is as follows:

"Sec. 78. The license tax for the privilege of running vehicles for conveying passengers or freight over the streets of Bristol shall be as follows: For every one-horse buggy, wagon, dray, cart, or hack, except such buggies and carriages as are kept for pleasure or family use and are not for hire, the license tax shall be two dollars; for every two horse vehicle other than an omnibus three dollars; for every two horse omnibus or hack the tax shall be four dollars; and for every four horse wagon the tax shall be four dollars."

The section relied on as authorizing a fine for its violation is section 80, which provides that "any person conducting a business, occupation or profession for the conduct of which a license is required under this ordinance, without first obtaining such license, shall not be fined less than five dollars nor more than twenty-five dollars for each offense."

Several grounds of error are assigned to the judgment complained of, but, in the view we take of the case, it is only necessary to consider one of them, as the decision of the other assignments of error, no matter how decided, would not affect the result.

The plaintiffs in error are furniture merchants and undertakers, doing business in the city of Bristol, Tenn., and are nonresidents of this state. In conducting their business they use their own wagon and team in delivering merchandise to their customers in Bristol, Va., and in delivering merchandise sold by them and shipped out of the city to the railway stations located in the city of Bristol, Va. They have no place of business in this state, and their wagon and team are kept in the state of Tennessee, except when

engaged in the delivery of goods as above stated. It is not claimed that the defendant in error had imposed, or could impose, a license tax upon them for conducting their business as furniture merchants and undertakers in the state of Tennessee, but the contention is that it had the right to impose a license tax upon them for the use of its streets by their wagon and team in delivering goods sold by them.

Conceding, for the purposes of this case, that the city of Bristol is authorized by its charter to impose a license tax upon persons hauling freight or passengers over its streets, and that section 78 of its ordinance does impose such tax, no penalty is provided for its violation unless the person charged with such violation is engaged in some business, occupation, or profession for the conduct of which a license is required by the defendant in error. The plaintiffs in error, not being engaged in any business or occupation for the conduct of which the defendant in error has imposed upon them a license tax, do not come within the provisions of section 80; and as that is the only section authorizing a fine to be imposed upon persons using the streets of the defendant city in violation of the provisions of section 78, the judgment complained of was unauthorized, and should have been set aside by the corporation court, and the warrant dismissed.

This court will enter such judgment as the corporation court ought to have entered.

(102 Va. 279)

WASHINGTON NAT. BUILDING & LOAN ASS'N v. WENDLING.

(Supreme Court of Appeals of Virginia. Jan. 14, 1904.)

USURY—APPLICATION OF PAYMENT TO INTEREST—RECOVERY.

1. Where a payment by the borrower is applied to usurious interest, it cannot be recovered after the expiration of one year from the date of the payment.

Error to Circuit Court of City of Alexandria.

Action by George R. Wendling against the Washington National Building & Loan Association. Judgment for plaintiff, and defendant brings error. Reversed.

Norton & Boothe, for plaintiff in error.
John M. Johnson, for defendant in error.

HARRISON, J. In January, 1894, the defendant in error, George R. Wendling, borrowed from the plaintiff in error building association, the sum of \$3,000, which he secured by the surrender of 30 shares of stock held by him in the association, and by executing a bond in the penalty of \$6,000, conditioned to pay \$48 per month on such loan, and such fines as might be imposed upon him in accordance with the by-laws of the association. The \$48 payable monthly was composed of \$18 per month dues and \$30 per

month premium. These monthly installments were to be paid for 84 consecutive months, if necessary to fully pay up the 30 shares of stock that had been redeemed, but, if not paid up by the end of that period, no further payment on account of stock or premiums was to be exacted; and from the termination of the 84 months only 6 per cent. per annum on the original amount loaned was to be paid in monthly installments until the stock was matured.

The defendant in error lived up to this contract, and paid the monthly installments, of \$48 each, regularly, from January 1, 1894, until December 31, 1900. These payments were credited on the books of the company, as made, in accordance with the charter and by-laws of the association, which formed a part of the agreement of the parties. The defendant in error, desiring to withdraw from the association, called for a statement of the balance due from him on account of his \$3,000 loan, and on June 3, 1901, discharged that balance, which appeared from the statement made by the association to be \$1,094.78. Before the expiration of a year from the time of its payment, the defendant in error brought an action at law to recover back this \$1,094.78, upon the ground that the transaction was usurious.

There was no material conflict in the evidence, and the usury was admitted. The only question to be determined was the amount of recovery, if any, the defendant in error was entitled to.

The plaintiff in error asked for three instructions, which were rejected, and in lieu thereof one given by the court which authorized a restatement of accounts between the parties, from the beginning of the transaction, and a recovery by the defendant in error of all payments in excess of the original loan and legal interest thereon. Under this instruction the jury returned a verdict for \$1,094.78, the whole of the last payment made, which the lower court refused to set aside.

The statute law of this state relating to the subject of usury, and the decisions bearing thereon, have been fully reviewed and considered by this court in the case of *Munford v. McVeigh*, 92 Va. 446, 23 S. E. 857; and it is there held that "where payments have been made upon a debt upon which a greater rate of interest than that allowed by law is reserved in the contract, or received in order to secure the forbearance of the lender, and the borrower himself applies the payment to the interest, or the lender so applies it with the assent of the borrower, the appropriation so made will not be disturbed, unless within one year thereafter a suit be instituted by the borrower for its recovery, or a suit be brought by the lender within that period, in which case the borrower may set it off against the demand for which he is sued." This doctrine is again reiterated, as the settled law of this state, in the case of *Crab-*

tree v. Building Association, 95 Va. 670, 29 S. E. 741, 64 Am. St. Rep. 818. This last-mentioned case is in every material particular like that under consideration, and is controlling authority in its determination.

Under the law as established by these authorities, each monthly installment paid by the defendant in error must be dealt with as a separate and independent transaction. If, after the first installment was paid, and applied in accordance with the agreement of the parties, one year elapsed without its legality being attacked, that transaction became final, and it could not thereafter be disturbed. And so with the payment of each succeeding installment. It was forever at rest whenever the one year had passed without its legality being questioned. All of these monthly installments having been made and applied in accordance with the agreement of the parties, and no suit having been brought until after the expiration of one year from the date of the last monthly payment, those transactions were finally closed, and could not be disturbed. The only open question left was the usury, if any, in the payment of the \$1,094.78 on the 3d day of June, 1901.

We are of opinion that the instruction given by the court embodied a misapprehension of the law, and should not have been given. We are further of opinion that the three instructions asked for by the plaintiff in error correctly stated the law of the case, and should have been given, as asked, after correcting the typographical error in the last date mentioned in instruction No. 2.

For these reasons, the judgment complained of must be reversed, the verdict set aside, and the cause remanded for a new trial in accordance with this opinion.

BUCHANAN, J., absent.

(102 Va. 290)

WICKS et al. v. SCULL.

(Supreme Court of Appeals of Virginia. Jan. 14, 1904.)

JUDGMENTS — DOCKETING — LAND IN SUBSEQUENTLY INCORPORATED CITY — QUIETING TITLE.

1. Under section 8570, Code 1887, if a judgment is docketed in the county where real estate of the debtor is situated more than 20 days after its rendition, and such real estate is included in the corporate limits of a subsequently incorporated city, in order to be a lien as against a purchaser for valuable consideration without notice, the judgment must be docketed in the clerk's office of the corporation court of the city 15 days before the conveyance to him.

2. A judgment, the validity of the lien of which depends upon the question of actual notice to a purchaser, constitutes a cloud on his title, for the removal of which he may maintain a bill in equity.

Appeal from Corporation Court of Newport News.

¶ 2. See *Quieting Title*, vol. 41, Cent. Dig. §§ 14, 37.

Bill by Allan Scull against D. R. Wicks and others. Decree for plaintiff, and defendants appeal. Affirmed.

John W. Friend and C. Aylett Ashby, for appellants. Jones & Woodward, E. S. Robinson, and A. C. Garrett, for appellee.

KEITH, P. This is a suit in equity, from the record in which it appears that the Old Dominion Land Company conveyed lot 64 in block 101 in the city of Newport News to Enoch Clayton by deed dated March 29, 1899; that Clayton conveyed the same lot to James and Allan Scull by deed dated April 6, 1899; and that on the 18th of November, 1899, James Scull conveyed his interest in this property, by deed, to Allan Scull.

On the 2d of December, 1872, D. R. Wicks recovered in the circuit court of the city of Richmond a judgment against Enoch Clayton for \$1,000. Upon this judgment executions were issued on the 23d day of April, 1873, on the 15th of February, 1893, May 9, 1893, and April 3, 1894. On the 13th of March, 1892, this judgment was docketed in the county court of Warwick county.

On the 20th of May, 1901, Allan Scull filed his bill in the corporation court of Newport News, to which he makes D. R. Wicks, James C. Scull and Prudence Scull (his wife), and Enoch Clayton parties defendant, and in which he avers that the judgment recovered against Enoch Clayton constitutes a cloud upon the title to the real estate which he purchased from Clayton, that said judgment has long since been paid, and that it is barred by the statute of limitations, and prays that the court will cause said judgment to be marked "Satisfied." Wicks, the judgment creditor, filed an answer, in which he asserts that his judgment constitutes a lien upon the real estate in the bill mentioned; prays that his answer may be taken as a cross-bill, and that the lien of his judgment may be enforced. Allan Scull, in his answer to this cross-bill, reiterates his pleas of payment and the statute of limitations; claims that he was a purchaser for value, and without notice of the judgment, and that it does not constitute a lien upon his real estate.

By an act approved January 16, 1896 (Acts 1895-96, p. 74, c. 64), the city of Newport News was incorporated, and was declared to embrace certain territory which had theretofore constituted a part of Warwick county; and it further appears that the lot in controversy lies within the corporate limits of the city of Newport News.

On the 9th of December, 1899, Enoch Clayton filed a petition in bankruptcy in the District Court of the United States for the Eastern District of Virginia, and, from the schedule thereto annexed, it appears that he had at that time no property of any kind, and the only debt which he reports is this judgment for \$1,000 recovered against him in the city of Richmond by D. R. Wicks.

These being the facts, the corporation court of the city of Newport News, being of opinion that the judgment was not barred by the statute of limitations, and that James and Allan Scull were purchasers for valuable consideration, without notice of the said judgment, the same never having been docketed in the clerk's office of the corporation court of the corporation wherein the land mentioned was at the time of its purchase by the said Allan and James Scull, decreed that the plaintiff in the original bill should hold said land free and clear from said judgment. In this decree there is no error.

The judgment had been kept alive by the executions issued upon it. There is no satisfactory evidence of its payment, and the petition in bankruptcy filed by the judgment debtor is an admission that it had never been paid. There is no evidence bringing home actual notice of the existence of this judgment to Allan Scull, and it is plain that, under the circumstances of this case, this judgment, rendered in 1872 by the circuit court of the city of Richmond, and docketed in Warwick county in 1892, does not operate as constructive notice to Allan Scull, who purchased the lot in question in 1899. The city of Newport News, within the limits of which this lot is embraced, was incorporated in January, 1896. Section 3570 of the Code of 1887 is as follows:

"No judgment shall be a lien on real estate as against a purchaser thereof for valuable consideration without notice, unless it be docketed according to the provisions of this chapter in the county or corporation wherein such real estate is, either within twenty days after the date of such judgment or fifteen days before the conveyance of such real estate to such purchaser."

Allan Scull was a purchaser for a valuable consideration. There is no evidence of actual notice to him of the existence of this judgment, and it was not docketed in the corporation of Newport News within 20 days after its date, nor 15 days before the conveyance to him of the real estate upon which it is now claimed to be a lien. Between January 16, 1896, when the city of Newport News was incorporated, and the 6th day of April, 1899, when this lot was purchased from Clayton by James and Allan Scull, D. R. Wicks, the judgment creditor, had ample time within which to have docketed this judgment in the clerk's office of the corporation court of Newport News.

It is very earnestly insisted by counsel for appellant that the decree is erroneous, because, if the judgment is not a lien upon the property of Allan Scull, it did not constitute a cloud upon the title, and the equitable jurisdiction to remove that cloud, which had been invoked by appellee, did not exist. Wicks had obtained a judgment in the circuit court of the city of Richmond, which, until it was paid, or barred by the statute of limitations, or had in some way lost its

validity, constituted a lien upon the real estate of the judgment debtor. It was always competent to show, in a suit upon the judgment, that it had been paid, or that it was barred by the statute of limitations, or that for any legal cause it had lost its force as a lien—as, for instance, that the estate of the original debtor had passed into the hands of a purchaser for value and without notice; but in all these cases the facts relied upon to extinguish the judgment, or to exonerate the property from the operation of the lien thereof, might be matters of controversy. The judgment would serve, therefore, to constitute a cloud upon the title, which might deter purchasers and impair the market value of the property. Where the incumbrance or defect in the title is real, and not merely apparent, it cannot be removed, except by satisfying the incumbrance or supplying the defect, but the case before us belongs to that class where the statute gives to the judgment a prima facie validity. It cannot be said that the claim that the judgment in question constituted a lien upon the land was on its face absolutely without foundation, and that no extrinsic evidence was necessary to show its invalidity, or, to speak more accurately, that extrinsic evidence might not have shown its validity and binding force. On the contrary, here is a judgment which was a lien upon the land in the hands of Allan and James Scull, if they took it with notice of the existence of the judgment; that is to say, unless they were purchasers for value and without notice. Upon the proof of notice by extrinsic testimony depended the entire controversy. If the party claiming under the judgment could have proved notice upon them, the land could be subjected in their hands; and, as long as such an issue could be made, the result of which depended upon extrinsic evidence, so long would that judgment constitute a cloud which would have been a serious injury to plaintiff's title, and greatly deprecate its value. See 3 Pomeroy's Equity (2d Ed.) § 1899.

The decree is affirmed.

BUCHANAN, J., absent.

(102 Va. 235)

HOUSE v. HOUSE.

(Supreme Court of Appeals of Virginia. Jan. 14, 1904.)

DIVORCE—EVIDENCE—CRUELTY OF WIFE.

1. In an action for divorce brought by a husband on the ground that he had reasonable ground to fear serious bodily hurt from the hands of his wife, evidence of witnesses that, from their knowledge of the character of the wife, they did not believe the husband could safely live with her, was inadmissible, as opinion evidence.

2. Evidence held insufficient to authorize divorce of husband for cruelty of the wife.

Appeal from Circuit Court, Russell County.

Bill by one House against one House, his

wife, for divorce. Decree for plaintiff for divorce, and for wife for alimony, and plaintiff appeals from that portion of the decree granting alimony. Decree reversed and bill dismissed.

Finney & Gilmer and J. C. Gent, for appellant. Routh & Routh, for appellee.

BUCHANAN, J. The appellant filed his bill against his wife (the appellee) to obtain a divorce from bed and board upon the ground that she had attempted to take his life, and he had reasonable ground to fear serious bodily hurt. His wife filed an answer, in which she denied the material charges in the bill, and also filed her cross-bill, in which she charged cruelty and abandonment on the part of her husband, and prayed for alimony. The appellant answered the cross-bill, denying its allegations. Proof was taken by both parties, and upon a hearing of the cause the court was of opinion that the husband had shown himself entitled to a divorce from bed and board, and that the wife was entitled to alimony, and so decreed. From that decree the husband obtained this appeal upon the ground that the court erred in granting alimony to the wife, and seeks to have that portion of the decree reversed.

The wife, under rule 9 (45 S. E. vi), assigns as cross-error that the court erred in rendering a decree of separation from bed and board, and asks to have the decree, to that extent, reversed.

The husband attempted, in part, to sustain the allegations of his bill by introducing witnesses who knew little or nothing about the conduct of the parties toward each other. These witnesses testified, from their knowledge of the character or reputation of the parties, that they did not believe that the husband could with safety cohabit with his wife.

Such evidence is not admissible. The general rule is that witnesses must state facts, not opinions. In order to entitle the husband to a divorce, it was necessary for him to prove facts from which the court could determine or legally infer that the fact in issue had been established. Whether or not the husband was in danger of bodily injury from his wife was a question for the court, upon all the facts proved. 2 Bish. on M. & D. § 769; Richards v. Richards, 37 Pa. 225.

The evidence introduced by both parties is of the most unsatisfactory character. The witnesses who lived in the home, and had the best opportunities to know how the husband and wife conducted themselves toward each other, appear from their own testimony and from that of other witnesses to be entitled to little credence. The other witnesses testify to little that is material to the issues involved. No good purpose could be subserved by discussing the evidence at length.

It appears that the parties, who had been married for ten years or more, had for two or three years before the institution of this

suit lived very unhappily. Both parties, as one of the husband's witnesses testifies, and as is apparent from the record, were in fault—the wife, however, much more than the husband. The evidence shows that she is a woman of violent temper and quarrelsome disposition; that occasionally, in fits of passion, she had threatened to take the husband's life, and had once or twice slapped him in the face with her hand. But it does not show satisfactorily that she had attempted or really intended to do her husband bodily harm, or that he had reasonable ground to apprehend danger of life, limb, or health. Though the complaint of cruelty or fear of bodily harm usually comes from the wife, yet the husband is entitled to protection if he really needs it. 2 Minor's Insts. 281, 282, and cases cited. But in either case the charge should be clearly proved, for marriage is a contract formed with a view not only to the benefit of the parties themselves, but for the benefit of their offspring and the moral order of society, and should not be dissolved in whole or in part unless the ground for it is satisfactorily made out. 2 Bish. M. & D. § 762.

Neither does the evidence sustain the wife's claim for alimony. She was more to blame than the husband for the unhappy manner in which they lived. She provoked by her misconduct the alleged mistreatment upon which she relies for alimony. To give her alimony under the facts of this case would be to reward her for her own wrongdoing. It may be that the parties cannot live happily together, but that is no sufficient reason for granting to either the relief sought.

"The law," as was said by Sir William Scott in *Evans v. Evans*, 1 Hagg. Cons. R. 35, and quoted with approval in *Latham v. Latham*, 30 Grat. 307, 321, 328, "has said that married persons shall not be legally separated upon the mere disinclination of one or both to cohabit together. When people understand that they must live together, except for a few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off. They become good husbands and good wives from the necessity of remaining husbands and wives, for necessity is a powerful master in teaching duties which it imposes." Again he says the suffering party "must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance or prudent conciliation; and, if this cannot be done, must suffer in silence. And if it is complained that by this inactivity of the courts much injustice may be suffered and much misery produced, the answer is that courts of justice do not pretend to furnish cures for all the miseries of human life."

We are of opinion that neither party is entitled to the relief sought, and that the decree complained of must be reversed and the bill dismissed.

(102 Va. 219)

TOMPKINS v. DYERLE et al.

(Supreme Court of Appeals of Virginia. Jan. 14, 1904.)

JUDICIAL SALES—APPLICATION OF PURCHASE MONEY—RESALE—BOND OF COMMISSIONER.

1. The purchaser of land at a judicial sale made by a special commissioner is, under the direct provisions of sections 3398-3402 of Code of 1887 protected in making payment to such special commissioner if the latter has actually given the bond required by law, or has appended to his advertisement of sale the clerk's certificate that such bond has been given. If this certificate is not appended, he is put upon inquiry as to the authority of the special commissioner.

2. A special commissioner to sell lands does not have a right to resell the land without giving bond to cover such resale, unless his first bond was sufficiently broad for that purpose.

Cardwell and Harrison, JJ., dissenting.

Appeal from Circuit Court, Montgomery County.

Action by one Tompkins, receiver, against A. J. Dyerle and others. Judgment for defendants, and plaintiff appeals. Reversed.

A. A. Phlegar, for appellant. R. E. Scott and W. W. Moffett, for appellees.

BUCHANAN, J. At the May term, 1884, of the circuit court for Montgomery county, a decree was entered in the case of Northcross v. Davis' Heirs, directing James C. Taylor and George G. Junkin, who were appointed commissioners for the purpose, to sell certain real estate, and providing that either or both of them might act, but before doing so they should execute bond in the penalty of \$500, conditioned as the law directs. They advertised the land directed to be sold, appending to their advertisement of sale the clerk's certificate that the bond required had been given. One parcel of the land was purchased by George T. Gross, who paid the cash payment required and executed bonds for the deferred payments, with A. T. Gross and A. J. Dyerle as his sureties. This sale, with another made under that advertisement, was reported to and confirmed by the court at its November term, 1884. At the same term of the court George G. Junkin, one of the commissioners to sell, was appointed receiver to collect all sale and rent bonds due under the proceedings in that cause, and was required to give bond in the penalty of \$10,000. The receiver failed to give bond.

At the May term, 1887, of the court, the receiver reported to the court that Gross was in default in the payment of the purchase money due from him, and that notices had been served upon him and his sureties for a resale of the land purchased by him. At the same term of the court a decree was entered, directing George G. Junkin, as commissioner, to resell the Gross land at the risk and charges of Gross and his sureties, on the terms of one-fourth cash and the residue on a credit of 6, 12, and 18 months, after advertising as

required by the original decree for sale. That decree did not require Junkin to give bond before selling.

The land was advertised and sold by Junkin, as commissioner, and A. J. Dyerle, one of the sureties on Gross' purchase-money bonds, and John H. Northcross, became the purchasers, paid the cash payment, and for the residue executed bonds with sureties. This sale was reported to the court, and confirmed at its November term, 1887. No order was made for the collection of those bonds until the May term, 1895, of the court, when the appellant was appointed receiver and directed to collect them. It subsequently appeared that the said Junkin had, before the appellant's appointment as receiver, collected from Dyerle and Northcross the whole of the purchase money due from them, and had failed to account for a large part thereof to the parties entitled.

After various proceedings had, which it is unnecessary here to state, the court held that the payments made by Dyerle and Northcross to Junkin were valid payments, and discharged them and the land purchased by them from further liability to the extent of such payments. From that decree this appeal was granted upon the petition of the receiver.

Two errors are assigned, but they both raise the same question, and that is the propriety of the court's action in holding that the payments to Junkin by Dyerle and Northcross were valid payments.

Unless the appellees come within the provisions of the act of February 25, 1884 (Acts 1883-84, pp. 213, 214, c. 164), now found in chapter 167 of the Code of 1887 (sections 3398 to 3402, inclusive), their payments to Junkin, who had no authority, either as commissioner or as receiver, to collect the purchase-money bonds due from them, were clearly invalid. That act was construed in part by this court in *Pulliam v. Tompkins*, 99 Va. 602, 604, 605, 39 S. E. 221—a controversy growing out of the same case as does this appeal. The first section of the act provides that no special commissioner appointed by a court to make sale of land shall execute the decree until he shall have given bond in such penalty as the court shall fix, with security to be approved by the court or clerk thereof; and that no such commissioner shall advertise the sale of land without first obtaining from said clerk a certificate that the bond required by law or by the decree has been executed, and appending such certificate or a copy thereof to the advertisement. The second section provides that when such certificate has been published with an advertisement of sale, any person purchasing such land in pursuance of such advertisement shall be relieved from all liability for the purchase money, or any part thereof, which he may pay to any special commissioner, as to whom proper certificate shall have been appended to such advertisement. The fifth section provides that the commissioner or commissioners appointed to

make the sale shall receive and collect all the purchase money unless by decree of court some other person is appointed to collect the same, in which event the clerk is required to issue notice of such appointment to the purchaser, to be served as other notices are served, provided that, if any payment is made to a special commissioner making the sale before the purchaser has notice of the appointment of another person, such special commissioner and his sureties shall be responsible for the money so paid and the purchaser shall not be responsible therefor.

In order for a purchaser of land sold by a commissioner of court under a decree which directed the sale to be advertised to bring himself within the provisions of that act so as to be protected from paying a second time where he has paid his purchase money to a person not empowered to receive it, and who has failed properly to account for it, he must show that there was appended to the advertisement of the sale at which he purchased the certificate of the clerk showing that the bond required by law or the decree of the court had been given. No bond was required by the decree directing the resale. Whether this was because the court was of opinion that the bond required by the decree of the May term, 1884, appointing Taylor and Junkin or either of them to sell, was sufficient to authorize a resale by Junkin, commissioner, or that the bond he was required to give as receiver to collect would protect all parties on the resale, or the not requiring a bond was a mere oversight of the court, is not material. The fact that no certificate was appended to the advertisement of the sale at which Dyerle and Northcross purchased ought to have, and in contemplation of law did, put them on inquiry as to the authority of Junkin to collect the purchase-money bonds executed by them. The act of February 25, 1884, was not intended to protect, and does not protect, purchasers of lands at judicial sales in their payments of purchase money to persons not authorized to receive it, and who fail properly to account for it, unless the facts exist upon which this protection is by the act made to depend.

The fact that the sale at which Dyerle and Northcross purchased was a resale does not protect them. The language of the act applies to all judicial sales made by special commissioners appointed by decree or order of court to sell land. It is just as important that the parties in interest should be protected by a proper bond on a resale as on an original sale. In saying this, however, it is not to be understood that the court may not require the special commissioner appointed to make the original sale to give bond sufficiently broad to cover not only the original sale but any resale made by him. This is the practice in some of the circuits of the state. If such bond be required and given under the original decree of sale, there would be no difficulty in the clerk making the required cer-

tificate and in the special commissioner appending it to his advertisement of resale.

The appellees' counsel insist that, if Dyerle had paid the purchase-money bonds of Gross, upon which he was surety, to Junkin, commissioner, without a resale of the land, the payment would have been valid, under the decision in Pulliam v. Tompkins, Receiver, supra, and that, as the resale at which the appellees purchased was to collect the same debt, its payment after the resale must also be valid, since the said commissioner was expressly authorized to "receive and collect."

Conceding that, if Dyerle had paid his principal's debt to Junkin, commissioner, without a resale, his payment would have been valid, it by no means follows that a payment of the resale purchase-money bonds by the appellees to Junkin, commissioner, was valid. One of the vices of the appellees' contention is that Junkin, commissioner, was authorized to "receive and collect" purchase-money bonds given by Gross, and upon which Dyerle was surety. Junkin was not authorized to receive and collect either the purchase-money bonds given at the original sale or those given at the resale. By the terms of section 5 of the act of February 25, 1884, the commissioner to sell is authorized to receive and collect all the purchase money, unless by decree or order some other person be appointed to collect the same, in which case the court shall require of such person bond in such penalty as it may see fit. In this case Taylor and Junkin, commissioners, had no authority to "receive and collect" the purchase-money bonds for the land sold by them, because the court at the very term at which it confirmed the sales made by them appointed Junkin receiver to collect those bonds. After the decree was entered appointing Junkin receiver, neither Taylor and Junkin, as commissioners, nor either of them, had any authority as such to receive and collect said bonds. The decision in Pulliam v. Tompkins, receiver, was not based upon the ground that Junkin, commissioner, had any authority or right to collect the Barnett bonds, but upon the grounds that the certificate of the clerk that bond had been given as required by law was appended to the advertisement of the sale at which Barnett, Pulliam's vendor, had purchased, that the purchase price was paid to one of the special commissioners who made the sale, and that neither Barnett nor Pulliam had notice that Junkin had been appointed receiver to collect the purchase money. The purchaser of land at a judicial sale made by a special commissioner, whether it be an original sale or a resale, must ascertain, before paying the purchase money to such special commissioner, either that the special commissioner has actually given the bond required by law or that he appended to his advertisement of sale the clerk's certificate that such bond had been given. If the purchaser can show that either of these facts exist, then he is fully protected in paying to such special commissioner until he has notice that some oth-

er person has been appointed to collect on the same.

Again, this contention proves too much. If it were true that a special commissioner to sell has the right to resell the land without giving bond to cover such resale, because he has authority to "receive and collect" the original purchase price, it would follow that if at the resale the land did not bring a sufficient sum to pay the original purchase price, and it became necessary to get judgment for the deficiency, and to sell other lands of the purchaser or his sureties to pay such deficiency, the special commissioner could sell that land and collect the purchase price without giving a new bond, and thus bind his sureties on the original bond for any default which he might make. In addition, notwithstanding Dyerle's denial that he had notice that Junkin had been appointed receiver, it quite clearly appears from the record that he must have known that Junkin, commissioner, was not authorized to receive and collect the money due from him, either as surety for Gross or as purchaser of the land when resold. The decree which appointed Junkin receiver removed Dyerle as receiver in the cause, gave a personal judgment in favor of Junkin, the new receiver, against Dyerle, and directed him to turn over all rent bonds in his hands, or proceeds thereof, to Junkin, the new receiver. By the report of Commissioner Harless settling the account of Junkin as commissioner and receiver it appears that Dyerle, receiver, obtained credit as of May 11, 1886, for \$128.94 paid or turned over to Junkin, receiver, under the decree removing the one and appointing the other receiver. But, whether he had notice or not, neither he nor his co-purchaser, Northcross, was justified in paying their purchase-money bonds to the said Junkin, nor are they entitled to credit therefor on the purchase price of their land, further than the money so paid was properly accounted for by him.

The decree appealed from must therefore be reversed, and the cause remanded to the circuit court for further proceedings to be had in accordance with law, and not in conflict with this opinion.

CARDWELL, J. I cannot concur in the conclusion reached by a majority of the court in this case. From my understanding of the record the learned judge who entered the decree under review was plainly right in the view stated in his written opinion, made a part of the record, that the fact that Dyerle, who was a surety for Gross, paid the amounts that he paid after a resale of the land instead of before did not exclude him from the benefit of the principle announced by this court in Pulliam v. Tompkins, Receiver, 99 Va. 602, 39 S. E. 221.

The bond executed by Taylor and Junkin, commissioners, pursuant to the decree of the May term, 1884, authorizing either of them to act upon the giving of the bond, omitting

the formal part and the signatures and seals thereto, is as follows:

"The condition of the above obligation is, whereas the above bound James O. Taylor and Geo. G. Junkin, hath been appointed commissioners of Montgomery Circuit Court to sell land in suit of *E. P. Northcross v. W. H. Davis' heirs*:

"Now, if the said J. C. Taylor and Geo. G. Junkin shall faithfully discharge the duties of their office or trust as commissioners as aforesaid, then the above obligation is to be void, else to remain in full force and virtue."

Upon the execution of the bond and the attachment to their advertisement of the sale of the land the required certificate of the clerk that the bond had been given, Taylor and Junkin, or either of them, were authorized to receive all the purchase money for the land sold until by decree in the cause some other person was appointed to collect the same, and notice of such appointment served upon the purchaser as required by the statute; the statute expressly providing that, if any payment be made to a special commissioner making the sale before the purchaser has notice of the appointment of another person to collect it, such special commissioner and his sureties shall be responsible for the money so paid, and the purchaser shall not be responsible therefor. Acts 1883-84, p. 213, c. 164.

At the sale by Taylor and Junkin, commissioners, pursuant to the decree of the May term, 1884, one of the parcels of land sold was purchased by J. W. Barnett, who made his cash payment and executed his bond for the three deferred payments. The decree of the May term, 1887, recognized P. B. Pulliam as substituted purchaser of part of the land bought by Barnett, and directed Junkin, as commissioner, to unite with Barnett and wife in a deed to Pulliam. Pursuant to this decree, Junkin, commissioner, and Barnett and wife conveyed the land to Pulliam, reserving to Junkin, as receiver, a vendor's lien for unpaid purchase money. The entire purchase price of the land was paid by Barnett and Pulliam, the cash payment to Taylor and Junkin and the deferred payments to Junkin.

In *Pulliam v. Tompkins*, Receiver, supra, in which it was sought to have Pulliam repay so much of the purchase money for the land he bought through Barnett as was necessary to make up for the default of Junkin in not accounting for the money received of Pulliam and others, the court, reviewing the act of February 25, 1884 (Acts 1883-84, p. 213, c. 164), entitled "An act to provide for the protection of purchasers at, and other persons in, judicial sales," held that, as the sale by Taylor and Junkin, commissioners, under the decree of the May term, 1884, was after the passage of the act of February 25, 1884, supra, and the required copy of the certificate from the clerk appended to and published with the advertisement of their sale of the lands, and the purchase price of the land bought by Barnett, subsequently

transferred to Pulliam, having been paid in full by Barnett and Pulliam to one of the special commissioners who had made the sale, and the payments made without notice of another person having been appointed to collect them, Pulliam was relieved from all liability; "otherwise," says the opinion, "the law which was intended for his protection would be converted into a trap for his destruction." In other words, the opinion in that case, after reviewing the statute, holds that Commissioners Taylor and Junkin, having complied with the statute as to the bond required of them, and appended to their advertisement of the sale of the land by them a copy of the certificate of the clerk that the bond had been given, they were authorized to receive the whole purchase money until the purchaser was notified, as the statute required, that some other person had been appointed by the court to collect it; and that a payment to these commissioners, or either of them, by a purchaser, without such notice, was a valid payment, and absolved him from further liability therefor.

It will be observed, therefore, that the only features in the case at bar differentiating it, if at all, from that just quoted from, are (1) the decree of the resale of the Gross land as a means of collecting the purchase money due by Gross and his sureties therefor, remaining unpaid, one of the sureties being Dyerle, appellee here; and (2) the provision in the decree of the November term, 1884, removing Dyerle as receiver in the cause, charged only with the duty of collecting certain rents, and requiring him to turn over to Junkin, appointed receiver to collect both rent and purchase-money bonds, the rent and money bonds then in the hands of Dyerle.

The statute, now section 3398 of the Code of 1887, is: "No special commissioner appointed by decree or order of court, or of a judge in vacation, to sell or rent any property, shall advertise the property for sale or renting, or sell or rent the same until he has given bond," etc.; and the decree of the May term, 1887, does not appoint a special commissioner to sell the Gross land, but merely directs Junkin, as commissioner appointed by the decree of the May term, 1884, and authorized to collect all of the purchase money for lands sold under that decree until some one else was appointed to collect it and notice of the appointment of such person served on the purchasers, to resell the Gross land for the unpaid purchase money due for it, and "at the risk and charges of Gross and his sureties," who were liable for the unpaid purchase-money bonds given for the deferred payments at the original sale. The payment of the purchase money at this resale, evidenced as to the deferred payments by three bonds, not payable to Junkin as receiver, but as "commissioner of the circuit court of Montgomery county in the suit of *Northcross v. Davis' Heirs*," was but a payment of the purchase-money bonds due on the original sale of this land, which Junkin, commission-

er, was undoubtedly authorized to collect; it not being pretended that Dyerle, who was bound as surety therefor, had been served with the required notice of the appointment of Junkin as receiver in the cause. As said by the learned judge below, if Dyerle had paid the bonds to Junkin, upon which he was bound as surety for Gross, before the resale, such payment would have been good. *Pulliam v. Tompkins, Receiver, supra.*

It has not been the practice in this state, so far as I am advised, to require a commissioner already appointed and qualified to receive the whole of the purchase money for land sold in a cause, to give a bond before proceeding to execute a decree merely directing him to resell the land for the unpaid purchase money due therefor, and only as a means of collecting it. The learned judge who entered the decree of the May term, 1887, of long experience on the bench, considered it unnecessary to require a new bond of Commissioner Junkin, who was thereby directed to resell the Gross land.

How it can be said in the opinion of the court that payments made to Junkin, commissioner, by Dyerle, before notice to him, as required by the statute, of Junkin's appointment as receiver in the cause, were not valid payments absolving Dyerle from further liability therefor, when payments made to Junkin by Pulliam under the same circumstances were held in *Pulliam v. Tompkins, Receiver, supra*, to be valid payments absolving Pulliam from further liability therefor, I am wholly unable to comprehend. Nor can I agree that because the decree of the November term, 1884, appointing Junkin receiver to "collect all rent and sale bonds due under the proceedings in this court," removed Dyerle as receiver to collect the rents only from the lands under the control of the court before their sale, and required him to turn over to Junkin the rent and rent bonds then in his hands, this case is differentiated from that of *Pulliam v. Tompkins, Receiver, supra*, when in the last-named case the deed to Pulliam from Junkin and others, as we have seen, reserved to Junkin, as receiver, a vendor's lien on the land conveyed for unpaid purchase money, which was afterwards paid to Junkin as commissioner, and held by this court to be valid payments, notwithstanding Junkin never gave the bond required of him as receiver; the decision absolving Pulliam from liability to repay the same resting on the ground that Pulliam was protected by the provisions of the statute of February 25, 1884, *supra*.

The object of the statute was to protect purchasers at judicial sales from the hardship to which they had been so often subjected of having to pay their purchase money twice. It was the purpose of the Legislature, clearly expressed in the statute, to avoid such injustice by laying down the only terms upon which a purchaser should be held to pay again his purchase money. If the express provisions of the statute may be avoided, be-

cause of a decree of resale of land as a means of collecting unpaid purchase money due therefor, or because of inferences drawn from an old decree in the case, that Dyerle, who was a surety for the unpaid purchase money for the land resold, must have known that Junkin had been appointed a receiver to collect the unpaid purchase money for the lands sold under the decree of the May term, 1884, and required to give a bond as such receiver, or because Commissioner Junkin gave no bond as the commissioner to resell the Gross land, none being required of him by the decree of resale, then the door is thrown open, and not only the letter, but the entire spirit, of the statute may be rendered nugatory; and it would be better for the purchaser if the statute had not been enacted, for it is thus made to operate as a snare, rendering it necessary for the purchasers to examine records and decrees (as of old), and determine for themselves, at their peril, whether or not they can safely pay.

HARRISON, J., concurs.

(102 Va. 244)

CARSON LIME CO. v. RUTHERFORD'S ADM'R.

(Supreme Court of Appeals of Virginia. Jan. 14, 1904.)

NEGLIGENCE—PRIVATE BRIDGE—UNSAFE CONDITION—INVITATION TO USE.

1. Defendant erected a private bridge on its own land for its own use, placed gates at either end, and posted a notice forbidding persons to enter thereon without permission. When these gates were broken open or the sign torn down, defendant replaced them. For 18 months prior to the collapse of the bridge, it had been disused, except for foot passengers and empty vehicles, and then only used by defendant's employes. Defendant, having sold some goods, arranged with its vendee to have them hauled by another route, and the vendee's teamsters were so instructed both by the vendee and by defendant's manager. There was evidence that an employe of defendant, who had no authority in the premises, had failed to object when told that the teamsters were about to use the bridge, but this he denied. After the teams had entered on the bridge, it collapsed, and one teamster, a youth of 15, was killed. *Held*, that defendant was not liable; there being no invitation, express or implied, to the teamster to use the bridge.

Error to Circuit Court, Warren County.

Action by James Rutherford, as administrator of the estate of Joseph Rutherford, deceased, against the Carson Lime Company. Judgment for plaintiff, and defendant brings error. Reversed.

R. E. Byrd and C. W. Forsyth, for plaintiff in error. Downing & Richards, for defendant in error.

CARDWELL, J. This action was brought by James Rutherford, personal representative of his son Joseph Rutherford, deceased, against the Carson Lime Company, a corporation, to recover damages for the death of the deceased, caused, as alleged, by the negligence of the defendant company. There

was a verdict in the lower court in favor of the plaintiff for \$1,750, and a judgment thereon, to which judgment a writ of error was awarded by a judge of this court.

The demurrer to the declaration was not insisted on in the argument here, and the error assigned to the ruling of the court in refusing to set aside the verdict and grant a new trial because of the insufficiency of the evidence to establish negligence on the part of the defendant company is mainly relied upon for a reversal of the judgment.

In our view of the case, that is the only question that requires consideration. The Carson Lime Company, plaintiff in error, was at the time of the accident engaged at Riverton, Warren county, in the manufacture of and sale of lime for building and agricultural purposes. For many years the entire works of the company were situated on the northern bank of the Shenandoah river, and some years ago the company bought a tract of land, known as the "Marshall Tract," which is opposite and across the Shenandoah river from the main works, and on the south side of the river. Upon this tract the plaintiff in error erected a stavemill, and later a kiln; and, as a means of approach to these premises, it constructed a private road, leading from the Southern Railway at Riverton Junction, to the stavemill and limekiln, or near thereto, and at a point where this road crossed Happy creek, which flows between the kiln and the stavemill and the tracks of the Southern Railway, and, as a part of this private road, built over the creek a wooden bridge 169 feet in length, and about the height of 35 feet from the bed of the stream. There was also a switch connecting the railroad track with the stavemill and kiln. The bridge was wholly upon the property of plaintiff in error; and was closed at both ends by gates, and there was also a sign thereon, certainly up to within a few months before this accident, which prohibited the use of the bridge, except by permission from the office of the plaintiff in error. It had never been dedicated to the public, nor had the public been expressly or impliedly invited to use it. This private road, of which the bridge was a part, was primarily built for the purpose of egress and ingress from and to the stavemill on the Marshall tract, the kiln thereon not having been built till 1898; and the stavemill was totally abandoned in December, 1898, nearly two years before the accident. In the years 1899 and 1900 no building lime was burned at all at the kiln on the Marshall tract, and the kiln was only operated for about two months in each year, burning lime suitable only for agricultural purposes, and it had not been in operation for ten months before the accident. The only business, therefore, of any sort carried on by the plaintiff in error on the Marshall tract for more than a year prior to the accident, was crushing rock, which was furnished for ballast to the South-

ern Railway Company, and all this rock was hauled over the switch by the railroad company; and all the agricultural lime which was burned on the infrequent occasions mentioned, and which plaintiff in error sold, with perhaps the exception of a few lots hauled from the kiln by wagons in 1899, was also hauled over this switch by the railroad, wherefore, at the time of the accident, and for some time prior, there was no business of any sort conducted on the Marshall tract which required the use of the bridge by the public, nor was there any inducement to the public or to any customer of the plaintiff in error to use it, and plaintiff in error was purchasing nothing on the opposite side of Happy creek from its main works, and was selling nothing which required the use of the bridge by its customers.

In the early part of the year 1900, W. E. Carson, the general manager for plaintiff in error, discovered that the bridge was unsafe for heavy loads, but safe for light loads and foot passengers; and the only use made of it thereafter by plaintiff in error was by the men who worked at the crusher on the Marshall tract walking over it to and from their work, or to cross over with light loads or empty vehicles. As before stated, the bridge was inclosed by gates, one at its northern and one at its southern extremity; and the gate on the inside of the bridge was laced with iron, which swung to a post, and was caught with a hasp to keep it closed; a weight being affixed thereto, so that it continually pulled the gate closed. On the southern side, towards the railroad, there was a double gate, to which was fixed a hasp to close it, and a place at the bottom with a bolt to keep it closed. In addition to the sign on the bridge, the plaintiff in error, up to within a few months, at least, of the accident, kept the gates locked, and on innumerable occasions the locks were replaced when broken by persons in the effort to use the bridge without plaintiff in error's consent. The sign had been broken down on several occasions, but was replaced, and there is evidence that it probably went down with the bridge when it fell in. At the side of the limekiln on the Marshall tract a quantity of refuse lime had been thrown, and had laid there for some time, and was useful only for agricultural purposes. Mr. Henry Downing, of Warren county, owned a farm southeast of the Marshall tract, and only separated therefrom by the land of Mr. Bush Maddox; and on several occasions Carson, the general manager of plaintiff in error, suggested to Mr. Downing the purchase of this refuse lime for use on his farm. In these negotiations, which begun some time in 1899, and resulted in the sale of the lime in August, 1900, it was understood that the lime was to be hauled by a route over the Maddox land, which was by far the shortest route to Mr. Downing's farm, and the latter co-operated with Carson in obtaining the consent of Mad-

dox that the lime might be hauled over his land. The agreement or understanding between Mr. Downing and Carson as to the route by which the lime was to be hauled was renewed on August 12, 1900, when Mr. Downing announced that he was ready to take the lime, and would begin hauling it the next day, at which time Carson was to send some of his men to aid in making any needed repairs to the road over which the hauling was to be done. On the next day (Monday, August 13, 1900) Carson went to the Marshall tract, and found Mr. Downing's two teams there, ready to begin hauling the lime. The men in charge of the teams stated to him that they had come by the Maddox route, and that, while the road was rough, it was all right, except there were some weeds in it. Thereupon Carson, instead of sending men to work the road, or to help to work it, as he had agreed to do, put two of his men to help load the lime on the wagons; telling the teamsters, of whom defendant in error's intestate was one, that they were to haul by the Maddox route, which instruction was but a repetition of the order which Mr. Downing himself had already given his teamsters. After so instructing the teamsters, Carson left the limekiln, and, when the wagons were loaded, instead of returning by the Maddox route, the teams returned to Mr. Downing's farm by the route which carried them over the bridge across Happy creek; but there is no proof that plaintiff in error assented to this, or knew of it. The second load made on Monday and the first load made on Tuesday following were carried by the Maddox route, but when the second load, which was the fourth, was gotten on Tuesday, August 14th, the teamsters determined to go again by the route over the bridge; and upon approaching the bridge they found the gates closed, but not locked, and one of the men with the teams opened the gate at the entrance, whereupon the two teams—the one right after the other—were driven upon the bridge; the first team, of four mules, being driven by defendant in error's intestate, who was upon the saddle mule, followed immediately by a team of two horses driven by another of the crew; the result being that a span of the bridge gave way under the front team, precipitating it and the defendant in error's intestate into the creek below, causing him injuries from which he died several days thereafter.

The first question presented upon this state of facts is, was plaintiff in error guilty of any negligence which rendered it liable in damages to the defendant in error; in other words, were the injuries to the deceased the result of a failure to perform a duty which the plaintiff in error owed to the deceased? The only duty suggested as owing from the plaintiff in error to the deceased was that it should have kept the bridge in good and safe repair; that is, in good and safe repair for use by loaded wagons. Such a duty might have rested upon the plaintiff in error, if an

invitation, expressed or implied, had been given the injured man to cross the bridge with loaded wagons; but obviously there was no express invitation, since it is conceded that it was understood between Mr. Downing, whose servant the injured man was, and the general manager for plaintiff in error, that the lime should be hauled over the Maddox route. In addition, the deceased, as well as all others in charge of the teams with which the lime was being hauled, was instructed, not only by his employer, but by the general manager of plaintiff in error, before any of the lime had been moved, that it was to be hauled over the Maddox route.

It is equally clear, we think, that there was no implied or general invitation to the deceased or to the public to haul with loaded wagons over the bridge. The bridge was on the private property of the plaintiff in error, and for months prior to this accident every effort had been made by it to prevent its use by the public. It had made persistent efforts to keep the gates locked, and the public was notified by a sign, easily to be read, posted on the bridge, not to cross the bridge, except by permission from the office of plaintiff in error. For 18 months before the accident the public had done no hauling over the bridge—certainly not with loaded wagons; and plaintiff in error's business was transacted with the general public on the north side of the Shenandoah river alone, where its main works were located. We see nothing whatever in the evidence showing that the plaintiff in error had reason to expect that the deceased would attempt to cross the bridge with wagons heavily loaded with lime, in violation of the express instructions clearly appearing to have been given him by his employer, and which had been repeated in his presence by Carson before any of the lime had been moved. The deceased was nearly 15 years of age, and is shown to have been a young man of at least ordinary intelligence, and there appears no reason why plaintiff in error should have been on its guard lest he would violate the instructions which had been given him as to the route by which the lime was to be hauled; and hence the plaintiff in error was without reason to consider it necessary for it to take any further precaution against the use of the bridge by Mr. Downing's teamsters in hauling the lime. One of the witnesses for defendant in error, who was among the teamsters with Mr. Downing's wagons on the day of the accident, but not on the day before, testifies that one St. John, an employé of the plaintiff in error, was present at the limekiln when the teams were about to start by the route over the bridge just before the accident occurred, and that witness said to St. John that they were going by the bridge, as the road over the Maddox route was such they could not go that way, etc., to which St. John made no response; but St. John denies that any such statement was made in his presence,

and there is not the slightest evidence that he had any authority whatever to authorize a disregard of the understanding between plaintiff in error's general manager and Mr. Downing that the lime was to be hauled over the Maddox route, or to give the assent of the plaintiff in error that the teams might pass over the bridge. His uncontradicted statement, in substance, is that his employment with plaintiff in error was as foreman at the rock crusher, with only the additional duty of looking after the limekiln when in operation, to keep an account of the loads of lime carried from the kiln, and to make report to the office; that he was at the limekiln on this occasion with the view of performing the latter duty; and that he had no connection or concern with the other works or business of the plaintiff in error at that time or at any time theretofore.

Whether the understanding between Mr. Downing and General Manager Carson that the lime was to be hauled by the Maddox route was due wholly, as is contended, to the consideration that the Maddox route was much shorter than the other, or to the unsafe condition of the bridge, does not alter the case. With that understanding, the lime was sold to Mr. Downing, and plaintiff in error had every reason to expect that it would be carried out; and there is not the slightest testimony that the plaintiff in error had notice of any purpose on the part of those in charge of Mr. Downing's teams to violate that understanding. As to whether Mr. Downing's teamsters were warned of the unsafe condition of the bridge, according to the testimony of Carson and another witness for plaintiff in error, there is conflict of evidence, but that there was the understanding between Mr. Downing and Carson as to the route by which the lime was to be hauled is not controverted; nor is it controverted that both instructed the teamsters that they were to haul by the route agreed on, and before any of the lime had been moved.

"An essential ingredient to any conception of negligence is that it involves the violation of a legal duty which one person owes to another—the duty to take care for the safety of the person or the property of the other; and the converse proposition is that, where there is no legal duty to exercise care, there can be no actionable negligence. Therefore it is reasoned that a plaintiff who grounds his action upon the negligence of the defendant must show not only that the conduct of the defendant was negligent, but also that it was a violation of some duty which the defendant owed to him." Thompson's Com. on L. of Neg. (2d Ed.) §§ 3, 945; Bishop's Noncon. L. § 446.

The party who affirms negligence must establish it, and this rule is never to be lost sight of. Bailey on P. I. § 1674.

In our view of the case at bar, it never got to the point where the contributory negligence of the deceased became a matter for

consideration, as the evidence of the defendant in error fails to establish any negligence on the part of the plaintiff in error rendering it liable in damages in this action.

It is therefore wholly unnecessary for us to discuss other questions presented in the record, and the judgment of the circuit court complained of must be reversed, the verdict of the jury set aside, and the cause remanded for a new trial.

BUCHANAN, J., absent.

(102 Va. 295)

FIDELITY & DEPOSIT CO. v. BEALE,
Judge.

(Supreme Court of Appeals of Virginia. Jan. 14, 1904.)

COUNTIES—DEFAULTING DEPUTY TREASURER
—MOTION FOR JUDGMENT ON BOND—JURIS-
DICTION OF COUNTY COURT.

1. Code 1887, § 910, provides that, if the deputy of any officer commit any default or misconduct in office for which his principal is liable, such principal, on motion, may obtain a judgment against the deputy and his sureties "for the full amount for which such principal * * * may be so liable." Section 912 provides that such a motion may be made in the county court. In other instances the jurisdiction of the county court is limited to \$100. *Held*, that such court had jurisdiction of such a motion by a county treasurer for judgment for \$1,800 on the bond of his deputy, though it only covered embezzlements and larcenies, and though the deputy might have been liable for other delinquencies, so that there might be one measure of recovery against the deputy, and another against the sureties.

Error to Circuit Court, Westmoreland County.

Petition for a writ of prohibition by the Fidelity & Deposit Company against Judge Beale, to restrain the county court of Westmoreland county from taking further jurisdiction in proceedings by R. H. Stuart against A. C. Brown and the petitioner. Judgment denying the writ, and the petitioner brings error. Affirmed.

Leake & Carter and R. C. Mayo, for plaintiff in error. J. W. Chinn, Jr., and T. J. Downing, for defendant in error.

KEITH, P. R. H. Stuart was the treasurer of Westmoreland county. A. C. Brown was his deputy, who gave a bond, with the Fidelity & Deposit Company as his surety, conditioned to reimburse the principal, to the extent of \$4,000, such pecuniary loss as he might sustain by any act of larceny or embezzlement upon the part of A. C. Brown in the performance of his duties as deputy treasurer of R. H. Stuart, treasurer of Westmoreland county, for the year beginning October 22, 1900, and ending October 22, 1901. On the 13th of November, 1902, R. H. Stuart caused a notice to be served upon his deputy, A. C. Brown, that he would move the county court of Westmoreland county to give judgment against him and the surety for a sum not exceeding \$1,800, for which Brown had

failed to account, being part of the taxes for the year 1900. The Fidelity & Deposit Company having accepted service of the notice of this motion, certain proceedings were had, which need not now be considered. Thereafter the Fidelity & Deposit Company gave notice to A. C. Brown and R. H. Stuart that it would on the 23d day of January, 1903, apply to the judge of the circuit court of Westmoreland county for a writ to prohibit and restrain the county court of Westmoreland county and the parties to the proceeding from taking further jurisdiction over the Fidelity & Deposit Company in the motion pending in said court under the style of R. H. Stuart v. A. C. Brown and the Fidelity & Deposit Company. In pursuance of this notice, a formal petition, praying that the writ of prohibition issue, was filed. R. H. Stuart appeared, demurred, and answered, and upon these pleadings the judge of the circuit court, in vacation, denied the writ; and to that order a writ of error was awarded by one of the judges of this court.

It is claimed upon the part of the Fidelity & Deposit Company that, inasmuch as judgment is asked for more than \$100, the county court has no jurisdiction to entertain the motion, while defendant in error relies upon sections 910 and 912 of the Code of 1887, which are as follows:

"If any deputy of a sheriff, sergeant, or other officer commit any default or misconduct in office, for which his principal or the personal representative of such principal is liable, or for which a judgment or decree shall be recovered against either, such principal or his personal representative may, on motion, obtain a judgment against such deputy and his sureties, and their personal representatives, for the full amount for which such principal or his personal representative may be so liable, or for which such judgment or decree may have been rendered. But no judgment shall be rendered by virtue of this section for money for which any other judgment or decree has been previously rendered against such deputy or his sureties or their personal representatives."

"Any motion under either of the two preceding sections may be made in the court of the county or corporation, or in the circuit court of the county or corporation, in which the default or misconduct of the deputy occurred or was committed."

The office of the writ of prohibition is not to correct error, but the sole question is whether the proceeding sought to be prohibited is in excess of the jurisdiction of the court or judge to whom it is directed. *Hogan v. Gulgon*, 29 Grat. 705.

If the county court had jurisdiction to enter any judgment upon the notice presented for its consideration by R. H. Stuart, the petition for a writ of prohibition was properly rejected.

Counsel for plaintiff in error relies upon that clause in section 910 of the Code which

says that, in case of default of the deputy, the principal may obtain a judgment against him and his sureties "for the full amount for which such principal or his personal representative may be so liable," and points out that the contract of indemnity in this case is not for the faithful performance of duty by A. C. Brown as deputy treasurer of Westmoreland County, but that the guaranty company only undertakes to provide indemnity for the principal for acts of larceny or embezzlement upon the part of the employé in the performance of his duties as deputy treasurer. It is true that the surety or guarantor can only be held by the express terms of his contract, and it may be that there would be one measure of recovery against the principal under this notice, and another measure of recovery against the guarantor or surety. Derelictions of duty on the part of the deputy which could not be classified as acts of larceny or embezzlement would not be within the undertaking on the part of the Fidelity & Deposit Company, but this consideration is wholly independent of the general jurisdiction of the tribunal in which the principal, R. H. Stuart, seeks redress for the default of his deputy. It grows out of the contract between the parties. The law did not require Stuart to take any bond from his deputy. In his effort to protect himself against the delinquencies of his deputy, he was at liberty to take a bond with such conditions as to him seemed best. He could have required the surety to indemnify him against all default in the performance of his duties, but he contented himself with taking indemnity only against his acts of larceny and embezzlement. It is not perceived that this can affect the jurisdiction of the tribunal in which he seeks to secure such indemnity as he is entitled to demand by virtue of his contract. If the county court has jurisdiction over the subject, it would proceed in the same manner, be controlled by the same mode of procedure, be governed by the same law, in ascertaining the rights of the parties, and enter the same judgment as would under like conditions have been rendered in the circuit court. Section 912 expressly provides that any motion under section 910 or section 911 may be made in the county court of the county or corporation, or in the circuit court of the county or corporation, in which the default or misconduct of the deputy occurs or was committed. That section has been construed by this court in *Hall v. Ratliff*, 93 Va. 327, 24 S. E. 1011, in which the jurisdiction of a county court over a motion by a county treasurer against his deputy and sureties is fully sustained. "Whether or not the deputy has committed any default or misconduct in office, and to what extent, if any, his sureties are liable to the principal," are questions which, as counsel for defendant in error has well said, "can only be determined by the evidence introduced on the trial of the motion, of which

the bond upon which it is sought to hold the surety liable would form a part."

The general jurisdiction of county courts in respect to pecuniary matters is limited to \$100. When, therefore, it was determined to give those courts jurisdiction over controversies between sheriffs, sergeants, or other officers, and their deputies, on account of their default or misconduct in office, it was provided that the judgment might be "for the full amount" in controversy. It seems plain that this language was used, not as a limitation upon the jurisdiction of the county courts, and as operating to confine their jurisdiction within a class of cases in which the liability of the deputy and his sureties would be coextensive, but was necessary and proper by reason of the fact that under the general law the jurisdiction of county courts with respect to matters merely pecuniary was limited to sums not greater than \$100, whereas, with respect to matters embraced in section 910, it was the purpose of the Legislature that the county courts should have jurisdiction over them without respect to the amount involved.

There is no error in the judgment of the circuit court, and it is affirmed.

BUCHANAN, J., absent.

(102 Va. 314)

FULKERSON et al. v. TAYLOR et al.

(Supreme Court of Appeals of Virginia. Jan. 14, 1904.)

VENDOR AND PURCHASER—DEFECT IN TITLE—
CONSTRUCTIVE NOTICE—CORPORATIONS—
RAILROADS—JUDGMENT—DOCKETING—INDEX—
LIEN—EXECUTION—COLLATERAL ATTACK.

1. Under Code 1887, § 3561, requiring every judgment to be indexed in the judgment docket in the name of each defendant, the word "Same," occurring immediately below the name of a judgment debtor on the index, constitutes a sufficient index of the judgment next listed against him.

2. An execution which is voidable but not void, cannot be attacked in another case in which the judgment on which it is based is sought to be enforced.

3. Where one purchases land by parol, and is put in possession, he is not protected, to the extent of the purchase price paid, as to judgments against the vendor, until he has acquired a perfect equitable title by paying the entire price.

4. Where an examination of the records would have shown an infirmity in the title to a right of way granted to a railway company, it is bound by notice of the defect.

5. In view of Code 1887, §§ 1079, 1083, providing how a railroad corporation may acquire perfect title to land needed for its purposes, it is, in the absence of charter provisions to the contrary, subject to the same rules in acquiring title to land and making improvements thereon as private individuals.

6. Where a railway company has acquired a portion of its right of way by a defective title, of which it had constructive notice, a court may decree that the land be sold, with the portion of the roadbed thereon, to satisfy a judgment against the company's vendor.

Appeal from Circuit Court, Lee County.

Suit by Eliza A. Taylor and others against L. D. Fulkerson and others. From a decree in favor of plaintiffs, defendants appeal. Reversed in part.

C. T. Duncan and H. B. Sewell, for appellants. R. T. Irvine and L. T. Hyatt, for appellees.

BUCHANAN, J. This case has been appealed twice. The decision of the court in the former appeal is reported in 100 Va. 428-437, 41 S. E. 863, and the proceedings had in the case prior to that time are set out in the opinion of the court.

The first assignment of error upon this appeal is that the court erred in holding that J. M. Wheeler, Sr., at the time he purchased and paid for the 113.80 and 51 acre tracts of land in the proceedings mentioned, had actual notice of the judgment of C. B. Baylor against L. D. Fulkerson.

The appellees assign as cross-error, under rule 9 (45 S. E. vi), that the court erred in not holding that Wheeler had constructive notice, even if he did not have actual notice, of that judgment. If this be true, it will be unnecessary to consider the question of actual notice.

Upon the former appeal, it appeared that the judgment had been properly docketed upon the judgment lien docket, as provided by section 3560 of the Code of 1887, but it did not appear that the docketing had been indexed as required by section 3561. The case was remanded to the circuit court without passing upon that question. After the case went back, the deposition of the clerk of the county court of Lee county was taken, and with his deposition was filed extracts from the index of the judgment lien docket. One of these extracts is as follows:

"Fulkerson L. D. Cur. & et al. ads. Emma Harber, p. 168.

"Same ads. A. L. Pridemore, p. 168.

"Same ads. Rosetta Harber, p. 168.

"Same ads. Bays Children, p. 168.

"Same ads. Chas. E. Baylor, p. 168."

The circuit court was of opinion that the use of the word "Same" in the index in the place of the full name of the judgment debtor was not a compliance with the provisions of section 3561 of the Code of 1887, which requires that every judgment shall be, as soon as it is docketed, indexed by the clerk in the name of each defendant, and shall not be regarded as docketed as to any defendant in whose name it is not so indexed.

It is true, as contended, that the name of L. D. Fulkerson, the judgment debtor, is not written out in the index to the docket in which the Baylor judgment is docketed, yet the word "Same" follows the name of L. D. Fulkerson in such connection that it could refer to and mean nothing else than "L. D. Fulkerson." If it does not mean that, it is without any signification whatever. "Same" is no one's name. If not the usual, it is

a very common, method of indexing both recorded deeds and docketed judgments. To hold that such a mode of indexing is invalid would unsettle many titles, and might result in much injustice. The object of the provision of the Code for docketing and indexing abstracts of judgments is to apprise third persons—as, for instance, intending purchasers—of the existence and character of the judgment if they exercise ordinary care and intelligence. *Cooke v. Avery*, 147 U. S. 377, 13 Sup. Ct. 346, 37 L. Ed. 209. In the case cited, which involved the construction of a statute similar to the one under consideration, the Supreme Court of the United States said: "The only ground upon which this abstract and index could be held insufficient was that the names of the plaintiffs were not given in full in either abstract or index. Was this omission fatal to the lien? The circuit court did not think so, and we concur in that view. *Willis v. Smith*, 66 Tex. 31 [17 S. W. 247]. 'The object of the statute is not to incumber the register with full information, but to excite inquiry and indicate the source of full information.' It appears to us that the source of full information was so indicated in this instance that no reasonably prudent or cautious inquirer could go astray." To hold that the index to the docketed judgment in this case is sufficient, it is not necessary for us to go as far as did the Supreme Court in the case cited. It is always safest, however, for clerks, in the performance of their duties in indexing recorded writings and docketed judgments, to comply with the letter of the statute imposing such duties upon them.

The refusal of the court to quash the execution which had been issued upon the Baylor judgment in violation of the agreement of the parties is assigned as error.

The administratrix of L. D. Fulkerson, in an answer filed on the 8th day of June, 1901, set up the plea of the statute of limitations to the judgment of Baylor, upon the ground that more than 10 years had elapsed between the date of its rendition and the institution of this suit, and that no valid execution had ever issued thereon. She filed with her answer a notice served upon the personal representative of the judgment creditor, that she would on the 7th day of that month move the circuit court to quash the execution in question upon the ground that it was prematurely issued. Upon the same day upon which the answer was filed, a decree was entered in this cause overruling a motion made by the administrator of L. D. Fulkerson. What that motion was is not disclosed by the record. If it was the motion to quash the execution, it does not appear to have been made on the day named in the notice, and, besides, could not have been legally made in this case.

Conceding that the execution was improperly issued, it was not void, but only voidable. Until it is avoided it must be regarded

as a valid execution, and could not be avoided by plea or proof in this, a collateral suit. *Fulkerson v. Taylor*, *supra*.

In *Beale's Adm'r v. Botetourt Justices*, 10 Grat. 278, the execution issued more than a year and a day from the date of the decree, without any proceeding by way of *scire facias* or otherwise to authorize the same. In that case it was held—though the conclusion may not have been necessary to a decision of the case—that the validity of the execution could not be attacked in that, a collateral proceeding. The reasoning, however, of Judge Moncreux in that case, and the authorities cited by him, sustain the doctrine that an execution issued improperly, which is voidable, but not void, upon a judgment or decree rendered in one case, cannot be attacked in another case in which such judgment is sought to be enforced, but that, if such execution is to be avoided, it must be done in some independent proceeding instituted for that purpose.

The appellees also assign as cross-error that the circuit court erred in decreeing that the sum paid by J. M. Wheeler on the purchase price of the 113 and 51 acre tracts of land prior to the rendition of the Baylor judgment should be a lien on these tracts of land prior to the Baylor judgment.

If it be true, as insisted by counsel for Wheeler's heirs, that his contract of purchase from Fulkerson was in parol; that Wheeler had been put in possession under it, and paid part of the purchase price before the Baylor judgment was rendered and docketed—it does not, to the extent of such payment, give them priority over the lien of the Baylor judgment. In order for a purchaser, under a contract which is not required to be recorded, to be protected as to subsequent judgments against his vendor, he must, before the date of such judgment, have become invested with a perfect equitable title. *Withers v. Carter*, 4 Grat. 407, 412, 50 Am. Dec. 78; *Floyd, etc., v. Harding*, 28 Grat. 401, 414, 416; *March, Price & Co. v. Chambers*, 30 Grat., at page 303; *Long v. Hagerstown Agricultural Co.*, 30 Grat. 665; *Brown v. Butler*, 87 Va. 621, 13 S. E. 71; *Powell v. Bell's Adm'r*, 81 Va. 222. Wheeler did not have at that time a perfect equitable title, as he had only paid a part of the purchase price.

Prior to the Code of 1887, a subsequent purchaser under a contract not required to be recorded was not protected against a prior unrecorded conveyance unless he had paid the whole purchase price before he received notice of the unrecorded conveyance. 4 Minor's Inst. 968, and cases there cited. Now, under section 2472 of that Code, such a purchaser is protected to the extent of the payments made when he receives notice of the prior unrecorded deed or writing, and has a lien on the property purchased for so much of the purchase money as he had paid before notice. But this highly equitable provision has no application to judgment cred-

itors. The word "writing," in that section, refers to contracts in writing by which a party acquires some interest in, not to judgments by which a party acquires a mere lien upon, land.

The action of the court in decreeing a sale of the improvements made by the Louisville & Nashville Railroad Company on the Vanoy Railroad strip, and especially without compensating the railroad company for said improvements, is assigned as error.

The Vanoy strip of land conveyed to the railroad company, and upon which it had constructed its improvements, it is conceded by the assignment of error, was liable for the liens for which it was decreed to be sold, but the contention is that the improvements placed thereon by the railroad company are not liable. This contention is based upon two grounds: First, that the railroad company made its improvements in good faith, believing that it had good title to the strip of land; second, that the same principles of law do not apply to allowances for improvements when made by a public improvement company or corporation like a railroad as apply when made by private individuals.

As to the first ground, that the railroad company made its improvements in good faith, believing that it had good title to the land: This contention is not sustained by the facts. The railroad company, when it purchased the land and made its improvements thereon, knew, or ought to have known, that it was not acquiring a good title. An examination of the records would have shown this, and that judgments against Fulkerson, theretofore or thereafter rendered, in the then condition of the title, would bind the land in its hands. Under these circumstances, it is immaterial whether or not it had actual notice of the infirmity of the title. It had the means of knowledge, and means of knowledge with the duty of using them is equivalent to knowledge itself. *Jameson v. Rixey*, 94 Va. 342-348, 28 S. E. 861, 64 Am. St. Rep. 726, and cases cited.

As to the second ground, that a railroad or other quasi public corporation is not governed by the same principles as are private individuals, in claiming for compensation for the value of improvements: Code 1887, §§ 1079, 1083, provide how such corporations may acquire perfect title to lands needed for their purposes, and transfer any controversy as to the title to the lands, or as to incumbrances upon them, to the damages assessed in the condemnation proceedings. *C. & W. Railroad Co. v. W. C. & St. L. Ry. Co.*, 99 Va. 715, 723, 40 S. E. 20. Where such a corporation attempts to acquire title to lands by purchase from the occupant or supposed owner, we know of no rule of law which exempts it from the ordinary principles of law applicable to private individuals purchasing under like circumstances. A corporation, except where it is otherwise provided in its charter, expressly or by clear implication, in

the acquisition and use of its property, the exercise of its powers, and the transaction of its business, stands upon the same footing as private individuals. See *R. & F. R. Co. v. City of Richmond*, 26 Grat. 83; *Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939; *Hope v. N. & W. R. Co.*, 79 Va. 283.

It is further insisted that, even if the railroad company is not entitled to compensation for the value of the improvements it placed upon the land, the court erred in decreeing a sale of the strip of land with the improvements thereon. A number of cases are cited to sustain this contention. Conceding that it is true, as these cases, or some of them, at least, hold, that detached portions of the roadbed of a railroad cannot be sold to satisfy judgment or other liens upon its property for debts of the company, it does not follow that, where a railroad company has constructed a part of its roadbed upon lands which are subject to liens of judgments against the persons from whom it acquired the lands, such lands cannot be sold to satisfy such liens. The lien creditor has no claim against the railroad company. It can pay the debt, if it chooses, and relieve the property of the lien, but the creditor cannot compel it to do so. Where a railroad is in the hands of a receiver of the court, as was the case of *Wheeling Bridge & Terminal Ry. Co. v. Reymann Brewing Co.*, 90 Fed. 189, 32 O. C. A. 571, cited and much relied on by appellants' counsel, the court might, as was suggested in that case, direct the liens to be paid out of the earnings of the railroad, or it might, if the railroad was insolvent, direct a sale of the entire property of the railroad company, and a satisfaction of the liens out of the proceeds of sale. But where the railroad company is solvent and not in the hands of a receiver, as in the case at bar, how can the court control its earnings, or order a sale of its entire property to satisfy a debt which it does not owe?

In the case of *Hope v. N. & W. R. Co.*, supra, where the same arguments of public policy and inconvenience were urged as in this case against interference with the operations of a railroad company by depriving it of a part of its roadbed, it was said by Judge Lewis, in delivering the opinion of the court, "that questions of inconvenience discussed by counsel cannot be considered by the court. The fact is that the defendant unlawfully withholds possession of the plaintiff's property, to which it has acquired no title, and for which he has received no compensation. It is competent, however, for the company, if it cannot acquire the land by private agreement, to condemn it; and thus it is hardly probable that public inconvenience will result from a reversal of the judgment complained of. But be that as it may, the plaintiff has not shown himself entitled to recover, and the judgment must be reversed." If a plaintiff in an action of unlawful detainer is entitled to a writ of possession, as was ad-

judged in that case, for a detached portion of the bed of the railroad, clearly the judgment lien creditor in this case can subject the detached portion of the railroad upon which he has a lien to its payment by a sale thereof.

We are of opinion that the circuit court did not err in decreeing a sale of said strip of land, including the improvements thereon. The Baylor judgment, having, as we have seen, been properly docketed, is a prior lien upon all the lands directed to be sold by the decree appealed from, including said railroad strip, and is also a lien upon the strip of land purchased by the said railroad company from J. M. Wheeler, together with its improvements, and the circuit court erred in not so holding.

The decree appealed from must be reversed in so far as it is in conflict with the views expressed in this opinion, and affirmed in other respects, and the cause will be remanded to the circuit court for further proceedings to be had in accordance with law, and not in conflict with this opinion.

(102 Va. 547)

FLANARY et al. v. KANE et al.

(Supreme Court of Appeals of Virginia. Jan. 14, 1904.)

LIENS—JUDGMENT CREDITORS—DEED—NOTICE TO GRANTEE—CONSTRUCTION—LIMITATIONS—STATUTES—RAILROADS—RIGHT OF WAY—IMPROVEMENTS—SALE—PUBLIC POLICY—EQUITY—MAXIM—JUDICIAL SALE—CAVEAT EMPTOR—APPEAL AND ERROR—SUPREME COURT—JURISDICTION—CONSTITUTIONAL LAW.

1. One paying the purchase price of land under contract with the grantor, but having the conveyance made to a third person, is the equitable owner of the land at the time conveyed.

2. Facts disclosed by a deed, which is a link in the chain of title under which right to possession is claimed, are binding on one asserting title by reason of such deed.

3. Where there is no exception to the report of a commissioner on a question of fact, objection cannot be made for the first time on appeal.

4. Where a deed conveyed a right of way to lands "lying in the county of Wise" the conveyance will be limited to his lands in Wise county, though the grantor owns lands in other counties, title to right of way through which, under the terms of the deed, without the limitation, would pass to the grantee.

5. Code 1887, § 2915, limiting the time within which suit may be brought to recover land, has no application to the suit of a judgment creditor to enforce his lien against the land.

6. Code 1887, § 3573, providing that no suit shall be brought to enforce the lien of a judgment on which the right to issue an execution or bring a scire facias or action is barred under other sections of the Code, does not affect the validity of a decree of sale of lands by a court of equity in a proceeding brought within the time for issuance of execution or bringing a scire facias or action.

7. It is not against public policy to decree a sale of a portion of a roadbed of a railroad to satisfy prior liens on the land.

8. Enforcement of judgment lien against grantees of judgment debtor does not involve the equity maxim that he who comes into equity must do equity.

9. The rule of caveat emptor applies to judicial sales.

10. After a judgment creditor has docketed his judgment, grantees of the judgment debtor put improvements on the lands at their peril.

11. Const. § 88, providing that the Supreme Court of Appeals may have jurisdiction in civil cases involving not less than \$300, does not proprio vigore confer that jurisdiction.

Appeal from Circuit Court, Lee County.

Suit by I. P. Kane and others, as creditors of James P. Barron, to subject land owned by the latter or conveyed to others by him to the payment of judgments. From a decree in favor of plaintiffs, C. E. Flanary and others, grantees of Barron, appeal. Modified and affirmed.

Bullitt & Kelly and Duncan & Sewell, for appellants. R. T. Irvine, for appellees.

BUCHANAN, J. This is a creditors' suit to subject the lands now owned by James P. Barron and certain lands formerly owned or claimed to have been owned by him to the payment of the judgments asserted in this case.

C. E. Flanary, one of the petitioners for appeal, assigns as error the action of the court in holding the Hall tract of land, now owned by him, liable to said judgments.

The ground of his contention is that Barron never had any such interest in the Hall land as could be subjected to his debts, or, if he did, that he (Flanary) was a bona fide purchaser for value, without notice of such interest.

Flanary claims that about the 2d of December, 1891, Barron offered to sell the Cove Hill tract of land to J. A. G. Hyatt at the price of \$7,000, who declined at first to purchase it, but afterwards purposed to do so if Barron would accept in payment thereof certain property, among which was the Hall tract of land, valued at \$2,000. Barron declined Hyatt's proposition, but afterwards returned to Hyatt's house and accepted it. On both occasions when Barron was negotiating with Hyatt he was accompanied by W. N. G. Slemm, from whom Barron was endeavoring to purchase the tract of land known as the "Bruce Tract." After the first interview between Barron and Hyatt, Slemm proposed to Barron that, if he and Hyatt traded, he would take the Hall tract of land in part payment of the purchase price of the Bruce tract, and with this understanding Barron returned to Hyatt's, and accepted his proposition, and also entered into a contract with Slemm for the purchase of the Bruce land. Barron executed a title bond to Hyatt, by which he sold and agreed to convey to him the Cove Hill tract of land upon the payment of the consideration stated above. In that title bond it is provided that "the said Hyatt is then to convey said Barron at the price of \$2,000 the Hall tract of land." At the same time Barron executed a title

bond, by which he sold the Hall tract of land to Slemph at the price of \$2,000, and bound himself to make or cause to be made a good title thereto. It was then agreed that deeds should be prepared—one by which Barron and his mother should convey the Cove Hill land to Hyatt, another by which Slemph and wife should convey the Bruce land to Barron, and a third by which Hyatt and wife should convey the Hall tract to Slemph. Hyatt prepared all the deeds, and on or about the 11th of that month they were executed. There was no tripartite agreement between Hyatt, Barron, and Slemph, as Mr. Flanary insists, by which Slemph purchased the land from Hyatt or Hyatt sold it to Barron for Slemph. Slemph was no party to the agreement between Barron and Hyatt. Hyatt was not a party to the agreement between Barron and Slemph. Barron paid Hyatt the consideration for the Hall land, and by his direction Hyatt conveyed it directly to Slemph. Barron was clearly the equitable owner of the Hall tract of land when, by his direction, it was conveyed to Slemph. Mr. Flanary insists that, even if this be so, he had no notice of it when he purchased and paid for the Hall land, and that he is entitled to protection as a bona fide purchaser for value, and without notice. There is no evidence that Mr. Flanary had actual notice that Barron was ever the equitable owner of the Hall tract of land, but the recorded deed from Hyatt to Slemph of December 11, 1891, contains a statement which shows that Barron had an interest in the land. That statement is as follows: "Witnesseth, that the parties of the first part, for and in consideration of a deed executed by James P. Barron and Louisa J. Barron for 200 acres of land on Cove Hill, being lots Nos. 4, 5, 6 and 7 as partitioned among B. F. Harber's heirs, to the parties of the first part, in which the following conveyance was taken and is considered at the price of two thousand dollars, the parties of the first part doth by these presents grant, bargain, sell and convey unto the said W. N. G. Slemph, at the instance of the said James P. Barron, the following described tract or parcel of land, being the lot deeded to Joannah Hall and her husband, John Hall, by the heirs of John W. Slemph, and by them deeded to said J. A. G. Hyatt, which tract of land is bounded as follows." Then follows a description of the land by metes and bounds. This deed was a link in the chain of title under which Flanary claimed. It was his duty to examine it before purchasing. Means of knowledge, with the duty of using it, is equivalent to knowledge itself. *Jameson v. Rixey et al.*, 94 Va. 342, 26 S. E. 861, 64 Am. St. Rep. 726, and cases cited; *Fulkerson v. Taylor* (decided at this term of court) 46 S. E. 309.

The second error assigned by C. E. Flanary is that the court erred when it decreed said land (Hall tract) to be sold, in not sub-

stituting or subrogating W. N. G. Slemph to the sum of \$2,000, which was the purchase price of said land, and which he had paid to Barron for Hyatt, and which Hyatt had held for Barron towards the purchase price of the Bruce land. This assignment of error seems to be based upon the view that Slemph was a party to the agreement by which Barron purchased the Hall land from Hyatt. As we have before seen in discussing the first assignment of error, Slemph was no party to the agreement between Barron and Hyatt of December 2, 1891. He did not pay Hyatt \$2,000, the purchase price of the Hall land, for Barron. Barron paid the purchase price thereof himself, and had the land conveyed directly to Slemph in part payment of the purchase price of the Bruce land.

The third and last assignment of error made by C. E. Flanary is that, if he is wrong in the first and second assignments of error, then he is advised the court erred in decreeing a sale of the entire Hall tract, but should only have decreed the sale of one-half thereof.

It is true that the mother of J. P. Barron united with him in his deed to Hyatt conveying the Cove Hill land, and that said land was paid for in part by the Hall land; but there is nothing in the record to show that she claimed any interest in the Hall land. Flanary, in his answer, does not raise this question. The commissioner, in his report of liens and of the lands which are liable to their payment, reports that the Hall land is liable to the payment of all the liens in Statement C, except as to certain named judgments. There was no exception to this report upon the ground that Mrs. Barron, the mother, owned any interest in the land. That question was not raised in the circuit court, and it is too late now to raise it here after the report of the commissioner that the entire tract was liable to the judgments was confirmed without exception on that ground.

The Virginia & Southwestern Railway Company, B. S. Clarke, and Thomas Clyde assign as error the action of the court in holding that certain judgments against James P. Barron were liens upon the right of way of said railroad company, with the improvements thereon, through lots Nos. 21 and 22 of the W. N. G. Barron, Sr., land, lying in Lee county.

Whether or not the said strip of land is subject to the judgments for the payment of which the court decreed its sale depends upon the construction of a deed executed by W. N. G. Barron, Sr., and wife to the Bristol Coal & Iron Narrow Gauge Railroad Company on the 6th day of January, 1881. The deed describes the land conveyed as lying in Wise county. This description, it is contended by appellants, is a false description, and will be regarded as mere surplusage, since the deed as a whole shows that a right

of way was intended to be conveyed through Barron's whole farm, which was located in both Lee and Wise counties.

The motives of the parties in entering into the contract evidenced by the deed, as set out therein, and the description of the land affected by it, are as follows:

"Whereas, it is proposed by the Bristol Coal and Iron Narrow Gauge Railroad Company to lay out and construct and to operate their road from Bristol-Goodson, in Washington county, through and across the lands of W. N. G. Barron and Anna Barron, of the county of Wise and Lee, and state of Virginia, by way of Estillville and Spears Ferry, in Scott county, to a point at or near Big Stone Gap, in Wise county, Virginia, and to extend its line from any point on the same to Cumberland Gap, at any time when a majority of the stockholders shall deem it to the interest of said company to do so.

"And, whereas, for these purposes, the said railroad company propose and desire to purchase of the said Barron and wife a belt of land fifty (50) feet in width along, and lying equally on either side of, the center line of their railway track, as the same may be finally located and established, with the privilege of any increase of such width at any point of the line as may be required to embrace deep cuts and fills, waste and borrowing pits, as needed in the construction of the said railway through his said land.

"And, whereas, the said W. N. G. Barron and wife believe an appreciation in the value of his property will arise by the construction of the said road, and his estate so materially benefited by the same, now, therefore,

"This indenture, made this 6th day of Jan., 1881, between the said Wm. N. G. Barron and Anna Barron, his wife, and the Bristol Coal and Iron Narrow Gauge Railroad Company,

"Witnesseth, that the said Wm. N. G. Barron and Anna Barron, his wife, for and in consideration of one dollar (\$1.00) to them in hand paid by the said Bristol Coal and Iron Narrow Gauge Railroad Company, the receipt of which is hereby acknowledged, have given, granted, bargained and sold, and by these presents do give, grant, bargain, sell and convey, in fee simple, and with general warranty, to the said Bristol Coal and Iron Narrow Gauge Railroad Company, all right, title, interest and estate in and to a piece or lot of land fifty (50) feet in width, along the line of said company's railroad, as the same may be finally located and established, measuring twenty-five (25) feet at right angles from the center line of the same on either side, and extending for the entire length of the said railroad through the land and premises of the said Wm. N. G. Barron; the same lying in the county of Wise; and also such additional width of land on each side of the said twenty-five (25) feet as may be required to construct any deep cut or filling found necessary in the grading of the said road,

and such land as may be necessary for waste and borrowing pits, and any other purpose necessary, and also sufficient timber for cross-ties, stringers, and for other purposes as the same may be needed in the construction of the said railroad through his said land."

It is well settled that where the subject-matter of a deed or will is sufficiently and clearly ascertained, though there be added particulars of description which are found to be false or mistaken, effect will be given to the grant or devise notwithstanding, and these false or mistaken particulars of description will be rejected. In such a case the maxim, "*falsa demonstratio non nocet cum de corpore constat*," applies. *Wootton v. Redd's Ex'r*, 12 Grat. 196, 208; *State Savings Bank, etc., v. Stewart*, 93 Va. 447, 451, 25 S. E. 543. But, in order to bring a case within the influence of the principle invoked, it must appear that the other words of the grant or devise give a clear, certain, and unambiguous description of the subject granted or devised, and that the particulars given are but words of suggestion and affirmation superadded as further description of a subject otherwise and sufficiently described. If, on the other hand, such particulars are restrictive in their character, if they serve to narrow and limit the extent of the subject pointed out by the other words, they can never be rejected. *Wootton v. Redd's Ex'r*, 12 Grat. 211; *State Sav. Bank v. Stewart*, 93 Va. 451, 452, 25 S. E. 543; 2 *Minor's Inst.* (4th Ed.) 1063-1065.

Applying these principles of construction to the deed under consideration, it seems to us clear that the words of the deed describing the land conveyed as "lying in the county of Wise" cannot be treated or rejected as superfluous. The other parts of the deed are very general. The railroad had not then been located, and was not located until several years afterwards. Where it would run was not known. The grantor owned lands, as appears from the record, in the counties of Scott, Lee, and Wise. Without the words describing the land as "lying in the county of Wise," the language of the deed was sufficiently broad to cover any tract of land of the grantor through which the railroad company or its successors might locate the road. The super-added words cannot be regarded as merely words descriptive of a subject already sufficiently described, but must be regarded as words of restriction. To reject them would be to construe the deed as conveying the Lee county land as well as the Wise county land. "If the words," as was said by Judge Lee in *Wootton v. Redd's Ex'r*, *supra*, "be restrictive, they can never be rejected; and it must be equally clear that they cannot be rejected if it be doubtful, as they stand, whether they are descriptive merely or descriptive and restrictive. For while there is such doubt it can never be said that the subject is clearly and sufficiently described. Nor, in such a case, will the law intend error or falsehood."

To reject them would violate another well-settled rule of construction that every part of a writing must be so construed, if possible, as to take effect. By holding that the deed only conveyed a right of way through such part of the grantor's land as lies in Wise county, we give some effect to every part of the deed.

The railroad company, Clarke, and Clyde assign as error the court's action in decreeing a sale of the said right of way, because the railroad company and those under whom it claims have had the actual adverse possession of the property for more than 10 years prior to the commencement of this suit.

The statute of limitations invoked has no application to this case. This is clear from the language of that statute (section 2915 of the Code of 1887) and of the statute (section 3573) which limits the time within which judgment liens may be enforced in equity.

Section 2915 applies only to the right to make an entry or to bring an action to recover land. The suit of a judgment creditor to enforce his lien against land is not a suit to recover it. He has no right to the possession of the land. "The principle on which the statute of limitations is founded," as was said by Mr. Justice Miller, speaking for the Supreme Court of the United States, in *Pratt v. Pratt*, 98 U. S. 704, 24 L. Ed. 805, "is the laches of the plaintiff in neglecting to assert his right. If, having the right of entry or the right of action, he fails to exercise it within the reasonable time fixed by the statute, he shall be barred forever. But this necessarily presupposes the right of entry or the right to bring suit. There can be no laches in failing to bring an action when no right of action exists."

Section 3573 provides that no suit shall be brought to enforce the lien of a judgment upon which the right to issue an execution or bring a *scire facias* or action is barred by sections 3577 and 3578. This implies, as has been frequently decided, that, as long as the right to issue an execution or bring a *scire facias* or action thereon exists, the lien may be enforced in equity, and this is so not only when the lands subject to the lien of the judgment are in the hands of the judgment debtor, but also in the hands of subsequent purchasers, whether they had actual notice or not, if the judgment was duly docketed. *Taylor v. Spindle*, 2 Grat. 44; *Leake v. Ferguson*, Id. 419; *Borst v. Nalle*, etc., 28 Grat. 423; *Hutcheson v. Grubbs*, 80 Va. 251; 4 *Minor's Inst.* (4th Ed.) 314, and cases cited.

They also claim that, although the strip of land in question was subject to the judgment liens, as the court held, it erred in decreeing a sale of the strip, because a railroad company is a quasi public corporation, and it is against public policy to sell a portion of a railroad track. This question was considered and passed upon in the case of *Fulkerson*, etc., v. *Taylor*, etc. (decided at this term of the court) 46 S. E. 309, and a con-

trary conclusion reached. It is unnecessary, therefore, to do more than to refer to the opinion in that case for the reasons which induced us to reach a conclusion adverse to the contention of the appellants.

They further assign as error the action of the court in holding that the improvements on the land, as well as the land itself, are liable to the lien of the judgments.

It is conceded, and properly so, that the provisions in chapter 124 and chapter 125 of the Code on the subject of improvements, have no application to a judgment creditor seeking to enforce his lien upon the land, upon which improvements have been made. The language of the statutes referred to, when considered as a whole, clearly shows that their provisions for allowing compensation for improvements only apply to actions of ejectment, or to cases in which a decree or judgment is rendered against a defendant for land. This was the construction placed upon them by President Moncure, if not by the whole court, in *Graeme v. Cullen*, 23 Grat. 286-295; by Judge Staples in *Wood*, etc., v. *Krebbs*, 33 Grat. 685-691; and by Judge Lewis in *Effinger v. Hall*, 81 Va. 94-107.

The contention of appellants is that where a purchaser, without knowledge of a defect in his title to land, puts improvements thereon, a creditor who afterwards comes into a court of chancery to enforce his judgment will be required to allow for the improvements put upon the property, upon the principle that he who asks equity must do equity. The maxim that he who asks equity must do equity only applies, says Mr. Pomeroy (volume 1, § 386), where a party is appealing as actor to a court of equity in order to obtain some equitable relief.

In *Wood v. Krebs*, supra, at page 689, Judge Staples says it seems to be well settled that, where the legal title is in one person, who has made improvements in good faith, and the equitable title is in another, who is compelled to resort to a court of equity in support of his equitable claim, that court, acting upon the principle that he who seeks equity must himself do what is equitable, will require as a condition of such relief that the true owner shall make compensation for such improvements. See *Graeme v. Cullen*, supra, at pages 296 to 301; *Effinger v. Hall*, 81 Va. 103, 104.

A judgment creditor, who comes into a court of equity to enforce his lien upon land, is not asserting an equitable right or seeking equitable relief. His judgment is a legal lien.

In *Gordon*, etc., v. *Rixey*, etc., 76 Va. 704, Judge Staples, speaking for the court, said: "In *Borst v. Nalle*, 28 Grat. 430, and in *Price v. Thrash*, 30 Grat. 515, it was held that the lien of a judgment is an express absolute statutory lien on the debtor's real estate, and the right to resort to the courts to enforce it is a legal right, without terms and condi-

tions imposed." *Leake v. Ferguson*, 2 Grat. 419; 2 Minor's Inst. 314, 315.

The right of the judgment creditors to subject the strip of land held by the railroad company to the lien of their judgments recovered after the judgment debtor had parted with his interest therein results from the failure of his vendee to comply with the registry acts, which provide that every contract in writing made for the conveyance or sale of real estate for a term of more than five years, and any deed conveying any such estate or term, shall be void as to subsequent purchasers for valuable consideration without notice and creditors until and except from the time that it is duly admitted to record in the county or corporation wherein the property embraced in such contract or deed may be. Code 1887, §§ 2463, 2465; *March, Price & Co. v. Chambers*, 80 Grat. 299, 303, 304.

As against the creditors of the judgment debtor, such writing is a mere nullity. As to them it has no existence in contemplation of law, and their rights must be determined as if it had never been executed. *Bankers', etc., v. Blair*, 99 Va. 606, 610, 39 S. E. 231, 86 Am. St. Rep. 914. The strip of land in question must, therefore, as to such appellee creditors, be treated as if James P. Barron were still the owner of it. If he be still the owner of the land in contemplation of law, he is owner of the improvements also, for it is a general rule of the common law, subject to some exceptions—as in the case of fixtures—that everything annexed to the freehold becomes a part thereof. *Graeme v. Cullen*, 23 Grat. 287; *Effinger v. Hall*, 81 Va. 103. If the creditors have the right, by virtue of the registry laws, to subject the land, of which the improvements are a part, to the payment of their judgments, how can a court of equity, in enforcing their legal rights, compel the creditors to account to the railroad company for the value of the improvements, by charging the same upon the land as a prior lien to their judgments? Counsel have not cited us to a case, nor have we found one in our own researches, which, in the absence of statute, holds that a creditor, in enforcing the lien of his judgment, must account for the improvements placed upon the land by an allenee who acquired his interest by a writing which is void under the registry laws.

As to the suggestion made by the appellants that they are protected because they derive title through a judicial sale, it is sufficient to say that the rule of caveat emptor applies to judicial sales, and that they only acquired such title as the parties had who were before the court. The judgment creditors are not shown to have been parties to that suit, and their rights are not impaired by said sale. *March, Price & Co. v. Chambers*, 80 Grat. 305.

As to the contention that the judgment creditors were guilty of laches in asserting their claims, it is only necessary to say that

a judgment creditor's right to enforce his lien under the registry acts is not affected by his knowledge of the fact that the property has been aliened and that the allenee is making improvements thereon. When he docketts his judgment as provided by statute, he has done all he is bound to do, and parties dealing with the property do so at their peril, and in complete subjection to the lien. *Graeme v. Cullen*, 23 Grat. 286, 307; *Wood v. Krebbs*, 83 Grat. 685, 692.

As to the assignment of errors by the appellant John Gilly:

He insists that the court erred in holding that his 34½-acre tract of land was liable to the lien of the judgments, for whose payments it was decreed to be sold—First, because the evidence does not show that James P. Barron ever had any interest in that land; and, second, because, if Barron ever owned it, the record does not show that appellant had actual notice of it.

The commissioner found upon the evidence, which was conflicting, that the 34½-acre parcel of land was assigned in the partition of the real estate of W. N. G. Barron, Sr., to the heirs of Joseph Barron, one of whom was the wife of W. N. G. Slemp; that Slemp became the purchaser and had conveyed to him all the land except the interest of his wife, who died intestate, leaving five children, all infants, for all of whom their father was appointed guardian; that some time prior to August, 1888, Slemp sold the land to the mother of James P. Barron, and executed to her a title bond, which was never recorded; that Slemp, as guardian of his children, by suit had the sale made by him confirmed by the circuit court for Lee county, and a commissioner appointed to convey the interest of the said children in the land to Barron and his mother; that the conveyance was made September 30, 1892, and recorded June 3, 1895; that on September 14, 1888, Slemp and wife and James P. Barron executed a deed of trust upon the land to secure to J. M. Flannery the payment of the sum of \$1,000, which was admitted to record October 2, 1888; that on June 14, 1890, J. P. Barron resold his interest in the land to Slemp by agreement which was not properly recorded; that by deed dated December 1, 1891, Slemp and wife conveyed the land to the appellant Gilly; that James P. Barron's mother either purchased the land for her son, or he took the purchase off her hands and paid all the purchase money; that the appellant Gilly, from the facts and circumstances proved, must have known of Barron's former interest in the land when he purchased it from Slemp. The court approved the commissioner's finding upon this question, confirmed his report, and held that the land was subject to certain judgments against James P. Barron. In this there was no error, as the commissioner's conclusion is fully sustained by the evidence.

Judgments numbered 4, 6, 7, and 8, held to

be liens upon the 34½-acre tract of land, had been assigned to W. N. G. Slemp, the grantor of Gilly, who had conveyed the land with covenants of general warranty. The court held that so much of the proceeds of sale of that tract of land as was applicable to the payment of said judgments 4, 6, 7, and 8 should be paid to Gilly. Gilly insists that the court should have gone further, and decreed that so much of the proceeds of the Hall land, which was liable before the 34½-acre tract, as was applicable to the payment of the judgments 4, 6, 7, and 8, should be paid to him (Gilly) instead of to C. E. Flanary, the purchaser of the Hall tract from W. N. G. Slemp, who had also warranted generally the title to the Hall land. This contention cannot be sustained. Gilly has no right to any part of the judgments assigned Slemp, except to the extent that the proceeds of the sale of his land are applicable to their payment. There was no error in the court's decree holding that Flanary and Gilly should each receive the proceeds arising from the sales of their respective lands so far as applicable to the payment of the judgments assigned Slemp, except that the sums so received should not exceed the contract price when they respectively purchased from Slemp.

The appellees assign as cross-error, under rule 9, the action of the court in not thus limiting the amount to be paid to C. E. Flanary out of the proceeds of the Hall land to John Gilly out of the proceeds of the 34½-acre tract, and out of the proceeds of the 8-acre tract known as "Lot No. 10," and also to Malissa E. Slemp out of the proceeds of the 4-acre tract known as "Lot No. 14." This cross-assignment of error must be sustained, and the decree corrected in that respect.

John Gilly also assigns as error the action of the court in directing the sale of the Big Stone Gap lot, purchased by him, and in refusing to allow him the benefit of the improvements thereon.

The judgments for whose payment the court directed this lot to be sold were properly docketed before Gilly purchased it and made his improvements. His contention is without the least merit, as he bought the lot and made his improvements with notice of the liens thereon.

Sallie R. Flanary and Robert W. Flanary assign as error the refusal of the court to allow them the sum of \$133.33 and interest, the amount paid by them for James P. Barron on the purchase price of the Big Stone Gap lot. This assignment of error is based upon a mistake of fact. The court did allow that debt as a prior lien upon Barron's interest in the lot, and the sum of \$150, which the court decreed to be paid Mrs. Flanary, is the sum named in the assignment of error, with its interest. This is clearly shown by the deposition of R. W. Flanary and the exhibits filed therewith.

They also assign as error the refusal of

the court to allow compensation for the improvements made upon the lot by them.

W. T. Goodloe conveyed the lot to R. W. Flanary and James P. Barron February 15, 1890, by deed which was recorded May 17, 1890. Barron conveyed his undivided one-half interest in the lot to E. F. Taylor by deed dated September 5, 1890, and recorded June 12, 1893. Taylor and wife conveyed their interest to R. W. Flanary by deed dated July 1, 1891. Flanary put the improvements on the lot in the years 1893-1894, and he and his wife conveyed the lot to Taylor by deed dated November 12, 1895, who, with his wife, conveyed the lot to Mrs. Sallie R. Flanary, wife of R. W. Flanary, on the day following. Two of the judgments for whose payment the Barron interest in said lot was directed to be sold were obtained at the September term, 1891, and the other at the September term, 1892, of the circuit court for Wise county, and all docketed before the deed from Barron to Taylor was recorded. In the former part of this opinion it has been held that such a purchaser is not entitled to compensation for improvements as against such judgment creditors. But the appellants Flanary and wife insist that, even if this be so, they, or rather the wife, as tenant in common with Barron, had the right to put improvements upon the lot, and in a partition thereof is entitled to have assigned her that portion of the lot upon which the improvements are, or in case of sale to be allowed the value of the improvements out of the proceeds.

This contention is also based upon a mistake of fact. At the time the improvements were placed upon the land by R. W. Flanary, he, as between himself and Barron, was the sole owner of the lot. The half interest acquired from Barron through Taylor was subject, of course, to the lien of said judgments. No tenancy in common has existed in the land since July 1, 1891, when Taylor conveyed the Barron interest to R. W. Flanary.

R. E. Bratton assigns as error the disallowance of his judgment as a lien because the docketing of his judgment was not indexed as required by law.

As the amount involved is less than \$500, this court had no jurisdiction at the time the case was submitted for decision. Section 88 of the Constitution, which provides that this court shall not have jurisdiction in civil cases where the matter in controversy, exclusive of costs and interest accrued since the judgment in the court below, is of less value than \$300, except in certain classes of cases named, does not *proprio vigore* confer jurisdiction upon this court. Under the Constitution (section 88) this court had the capacity to receive jurisdiction in cases involving not less than \$300, but, until the Legislature saw fit to confer it, this court could not exercise such jurisdiction. *Prison Association, etc., v. Ashby*, 93 Va. 667, 671, 25 S. E. 893, and cases cited.

The decree appealed from must be affirmed after amending it so as to provide that no greater amount shall be paid to C. E. Flanary, John Gilly, and Malissa E. Slemp, respectively, on account of the judgments assigned to W. N. G. Slemp, than the purchase price which they respectively paid Slemp for the land purchased by each.

(102 Va. 224)

TURNER et al. v. BARRAUD et al.

(Supreme Court of Appeals of Virginia. Jan. 14, 1904.)

INFANTS—GUARDIAN AD LITEM—APPOINTMENT—DECREE—RECOGNITION BY COURT—JURISDICTION—RECORD—RECITALS—PRESUMPTION—PARTITION—LIFE TENANTS AND REMAINDERMEN.

1. When the record states the evidence or makes an averment with reference to a jurisdictional fact, it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred.

2. An appointment of a guardian ad litem "to infant defendants" by the clerk of the court has reference to the infant defendants named in the memorandum of suit, and not to those named in the bill.

3. Where one has never been appointed a guardian ad litem for an infant defendant, so far as the record shows, his assuming to act as such in his answer in the suit cannot make him guardian ad litem unless the court afterwards treats him as such.

4. Where the only mention of B., an infant defendant, as shown by the record, is in the bill and in the caption of the answer of a guardian ad litem appointed for other infant defendants, whose interests are adverse to B.'s, the use by the court of the phrase "infant defendants" in its decrees is not a recognition or treatment of B. by the court as a party to the suit.

5. There can be no partition between life tenants and remaindermen.

6. Where the scope of the pleadings in an action did not involve the interests of remaindermen, a decree of sale of the remainder is beyond the jurisdiction of the court, and therefore a nullity.

Appeal from Circuit Court, Norfolk County.

Action by Henry L. Turner and others against P. St. Geo. Barraud and others. From a decree for defendants, plaintiffs appeal. Affirmed.

Heath & Heath and W. W. Old, for appellants. W. L. Williams, A. C. Braxton, and F. H. Busbee, for appellees.

HARRISON, J. D. C. Barraud, Sr., of the city of Norfolk, died in 1867, leaving a will, by which he gave to his grandson, D. C. Barraud, Jr., a life estate in the Barrons farm in Norfolk county, with remainder to his lawful issue, if he should die leaving any, and, if he should die without lawful issue, then such remainder to pass, under the residuary clause of the will, to the persons there named. In addition to this specific bequest, the tes-

tator gave to this grandson an undivided interest in the estate passing under the residuary clause of his will.

Upon the death of the testator, the life tenant took possession of the Barrons farm. He rapidly exhausted his interests under the will of his grandfather, and soon had those interests, which were chiefly in lands, including his life estate in the Barrons farm, heavily incumbered by deeds of trust and judgments taken against him.

In 1874, D. C. Barraud, Jr., and others united as plaintiffs in a chancery suit against R. C. Marshall and others to subject his interests in his grandfather's estate to the satisfaction of his debts. The object of this suit is stated in the bill filed as follows: "The object and intent of this bill is to construe the said will, to fix and determine the rights and interests of the various parties interested therein, to protect and provide for the annuities, and to make partition in kind of the said real estate so devised by the said D. C. Barraud, deceased, to and among the parties entitled thereto, according to their respective shares and interests, so that the part or share of your orator, the said D. C. Barraud, therein, may be set apart in kind, if practicable, or so far as practicable, and sold for the benefit of the creditors under the said deeds of trust and the judgment creditors aforesaid." In May, 1875, a decree was entered in this cause directing a sale of the entire fee in the Barrons farm (remainder as well as life estate). November 26, 1878, a consent decree was entered, confirming a private sale of this farm to William H. Turner at the price of \$5,300. This decree ascertained the remainder interest in the proceeds of sale to be \$1,150.10, and directed the same to be deposited in bank to await the death of the life tenant. Three days later, on November 29, 1878, a final decree was entered, confirming an account of disbursements, and striking the case of Barraud, etc., against Marshall, etc., from the docket.

William H. Turner, the purchaser at the sale mentioned, died in 1885, and the present suit was instituted in February, 1901, by his son, Henry L. Turner, in his own right and as next friend of two infant grandchildren of William H. Turner, against P. St. Geo. Barraud and his four brothers and sisters, the children of D. C. Barraud, Jr., seeking a decree quieting their title to a portion of the Barrons farm claimed by them under the will of their ancestor.

This bill reviews the proceedings in the suit of Barraud, etc., against Marshall, etc., and alleges that under those proceedings William H. Turner, the ancestor of complainants, acquired a perfect fee-simple title to the Barrons farm, and that they have, therefore, a fee-simple title to that portion of the same involved in this suit; that the defendants deny their title, and claim that they own the Barrons farm under the will of their grandfather, D. C. Barraud, Sr., subject to the life

estate therein of their father, D. C. Barraud, Jr., and insist that William H. Turner only acquired title in the suit of Barraud against Marshall to the life estate of their father. Complainants further allege that they desire to sell the land in question, and that the claim of defendants is a cloud upon their title, seriously impairing its value, which a court of equity will remove.

To this bill the five Barraud defendants—three adults, and two infants by their guardian ad litem—file answers. These answers deny the material allegations of the bill, and fully set out the case of the defendants, and exhibit as a part thereof the entire record of the suit of Barraud against Marshall. The defendants deny that the complainants own title to the land in fee, but aver that they only own the life estate therein of their father, D. C. Barraud; that under the pleadings in the suit of Barraud against Marshall the court had no power to sell the remainder in fee, to which they were entitled under the will of their ancestor, the elder Barraud; that the defendant P. St. Geo. Barraud, who alone of the appellees was in esse at the time of the institution of the suit of Barraud against Marshall, was never in any way known to the law made a party to the suit of Barraud against Marshall, and that no one of the five children of D. C. Barraud were ever before the court in that case, and could not, therefore, be bound by the decrees therein. The defendants ask that their answers be treated as cross-bills, and pray that all of the proceedings in Barraud against Marshall, in so far as such proceedings affect their rights as owners of a contingent remainder in fee in and to the tract of land known as "Barrons Farm," be declared to be void ab initio; that the title held or claimed by the complainants be declared to be a title during the life of D. C. Barraud, and no longer, with remainder in fee to the defendants, or such of them as shall survive their father, D. C. Barraud, who is now living.

This cause was regularly matured upon the original bill and the cross-bills, and, in September, 1902, the circuit court for Norfolk county rendered the decree appealed from, holding, among other things, that P. St. Geo. Barraud was never made a party defendant to the suit of Barraud against Marshall; that no guardian ad litem was appointed for him; that no jurisdiction was ever acquired over him in that suit; and that all the decrees therein, so far as they purport to affect P. St. Geo. Barraud and those claimed to be represented by him, were null and void.

It is apparent that the case now before us involves a collateral attack by the appellees upon the decrees in the suit of Barraud against Marshall in so far as those decrees undertake to bind or affect them. The record in the case of Barraud against Marshall is replete with errors and irregularities, but for such errors and irregularities the proceedings therein cannot be successfully attacked

collaterally. It is an established rule, founded in wisdom, and necessary to the repose and well-being of society, that "a superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to act rightly. All intendments of law in such cases are in favor of its acts. It is presumed to have jurisdiction to give the judgments it renders until the contrary appears. And this presumption embraces jurisdiction not only of the cause or subject-matter of the action in which the judgment is given, but of the parties also. The former will generally appear from the character of the judgment, and will be determined by the law creating the court or prescribing its general powers. The latter should regularly appear by evidence in the record of service of process upon the defendant or his appearance in the action. But when the former exists the latter will be presumed. This is familiar law, and is asserted by all of the adjudged cases." *Parker v. McCoy*, 10 Grat. 594; *Pennybacker v. Switzer*, 75 Va. 671; *Smith v. Henkel*, 81 Va. 524; *Lemmon v. Herbert*, 92 Va. 653, 24 S. E. 249; *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959. In the last-mentioned case, from which the foregoing statement of the law is taken, Mr. Justice Field further says: "But the presumptions which the law implies in support of the judgments of superior courts of general jurisdiction only arise with respect to jurisdictional facts concerning which the record is silent. Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. They have no place for consideration when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred. If, for example, it appears from the return of the officer or the proof of service contained in the record that the summons was served at a particular place, and there is no averment of any other service, it will not be presumed that service was also made at another and different place; or if it appears in like manner that the service was made upon a person other than the defendant, it will not be presumed, in the silence of the record, that it was made upon the defendant also. Were not this so, it would never be possible to attack collaterally the judgment of a superior court, although a want of jurisdiction might be apparent upon its face. The answer to the attack would always be that, notwithstanding the evidence or the averment, the necessary facts to support the judgment are presumed."

While these salutary principles should not be lost sight of, it must also be remembered that no judicial proceeding can deprive a man of any part of his property without giving

him an opportunity to be heard, and, if judgment is rendered against him without such opportunity to be heard, it is absolutely void.

In the case of *Underwood v. McVeigh*, 23 Grat. 409, Judge Christian says: "The authorities on this point are overwhelming, and the decisions of all the tribunals of every country where an enlightened jurisprudence prevails are all one way. It lies at the very foundation of justice that every person who is to be affected by an adjudication should have the opportunity of being heard in defense, both in repelling the allegations of fact and upon the matter of law; and no sentence of any court is entitled to the least respect in any other court or elsewhere when it has been pronounced *ex parte*, and without opportunity of defense."

The only method known to our law for bringing an infant before a court is by guardian ad litem, who is appointed to conduct the defense of the infant, who has no discretion to select an attorney to represent him. "So necessary is the appointment of a guardian ad litem esteemed, that, although the process against an infant is issued and executed against him just as against an adult, and the declaration or bill setting forth the complaint is framed and filed in like manner, yet, after the declaration or bill is filed, no rule or any proceeding whatever can be had lawfully until a guardian is designated; and any step that is taken will be void as to the infant." *Minor's Inst.* (2d Ed.) vol. 1, p. 432.

In the interest of the infant it is provided by statute that no "judgment or decree shall be stayed or reversed for the appearance of either party, being under the age of twenty-one years, by attorney, if the verdict (when there is one), or the judgment or decree, be for him and not to his prejudice." Code 1878, c. 177, § 3.

The question now to be determined is: Did the court in the case of *Barraud against Marshall* obtain jurisdiction over the appellees, or any of them, by the appointment of a guardian ad litem?

At the time of the institution of that suit the appellee P. St. Geo. Barraud was four years old, and was the only child of D. C. Barraud then living. In 1878, when the sale of their interest in the Barrons farm was made to William H. Turner, the appellees St. Julian Barraud and Myra Rosa Barraud were also in esse, the former being then three years old and the latter six months old. The two remaining appellees were born subsequently to the proceedings we are now considering. It is conceded that the appellees were not before the court by the "virtual representation" of their father, the life tenant. In the nature of things, they could not be, as his interest was hostile to theirs, as shown by the bill. Nor is it contended that a guardian ad litem was ever appointed for any of these infants except P. St. Geo. Barraud. It is, however, insisted that he "virtually represented" his brothers and sis-

ters. Without stopping to consider whether or not, under the doctrine of "virtual representation," P. St. Geo. Barraud could be said to represent his brother and sister, who were in being when the sale was made, we will proceed at once to the inquiry whether or not a guardian ad litem for P. St. Geo. Barraud was ever appointed or recognized by the court.

The bill in the cause of *Barraud against Marshall* in its recital states that P. St. Geo. Barraud is the only child of the complainant, D. C. Barraud, and in its prayer asks that he be made a party defendant. The prayer of the bill also asks that Myra W. Barraud, an infant cousin of the appellees, and four infant Hanson children, be made parties defendant (these five last-named infants will, for brevity, be hereinafter referred to as the "Hanson children"), and asks that a guardian ad litem may be appointed to defend the infants named.

The first step taken in the cause of *Barraud against Marshall* was the written memorandum of suit made by the plaintiffs' counsel, in which all the names of the plaintiffs and defendants are set forth, including the five infant Hanson children; but in this memorandum of suit the name of P. St. Geo. Barraud does not appear. To this memorandum of suit is appended this further memorandum by plaintiffs' counsel: "Appoint W. A. Todd guardian ad litem for the infant defendants." The five Hanson children being the only infant defendants mentioned in connection with the suit up to that time, they were the only "infant defendants" who could possibly have been referred to in the memorandum directing the appointment of a guardian ad litem. The memorandum of suit is the chart by which the clerk is to be guided in maturing the cause for hearing, so far as parties are concerned. Accordingly, the subpoena, following the memorandum of suit, was issued against all the defendants by name, including the five infant Hanson children, and the name of P. St. Geo. Barraud does not appear therein. In the entry by the clerk of the case on the rule docket he set forth the names of all the plaintiffs and each of the defendants, which was necessary in order that he might take the rules against and mature the case as to each defendant. The defendants so set forth on the rule docket included the five infant Hanson children, but did not mention the name of P. St. Geo. Barraud. The next step taken was the filing of the bill at the August rules, in which the name of P. St. Geo. Barraud appears in the cause for the first time, he being named therein, as already seen, as a party defendant. The filing of the bill was noted on the rule docket, and at the same rules the docket shows the following entry: "W. A. Todd appointed guardian ad litem to infant defendants." Appellants contend that the words "infant defendants" here used refer to the infant defendants named in the bill,

and not those named in the memorandum for suit, in the subpoena, and on the rule docket; that, inasmuch as it is necessary for one to be made a defendant by the bill in order to be a party to the suit, it is to be presumed that the clerk looked at the bill to ascertain who the infant defendants were, and that in appointing "W. A. Todd guardian ad litem to infant defendants" he had in mind those named in the bill. This contention is not tenable. It is not the duty of the clerk to read the bill. That pleading is addressed to the judge, and not to the clerk. As already seen, the clerk's chart is the memorandum of suit made by counsel for the plaintiff, and it is his duty in issuing processes, appointing guardians ad litem, and maturing cases, to follow the written instructions of the plaintiff's counsel in the memorandum for suit, and not to be attempting to reconcile differences between the bill and those instructions. Any such differences would be the fault of the plaintiff, and not that of the clerk. It cannot be presumed that the clerk read the bill when it was not his duty to do so, but it must be presumed that he performed his duty, and that in appointing "W. A. Todd guardian ad litem to infant defendants" he had reference alone to those infant defendants named in the memorandum for suit, in the subpoena issued by him, and entered by him as defendants on the rule docket in his office. These are official records, and are presumed to show accurately what the clerk has done in the matter of maturing the case as to parties. *Galpin v. Page*, 18 Wall. 366, 21 L. Ed. 959.

The answer filed, a formal paper of a few lines, purports to be the answer of the five infant Hanson children and of the infant P. St. Geo. Barraud, by Westwood A. Todd, their guardian ad litem. It has been shown that W. A. Todd had never been appointed, so far as appears from the record, guardian ad litem for P. St. Geo. Barraud, and his assuming in this answer to act as such cannot make him so unless the court afterwards recognized and treated him as such.

The first decree in the cause of Barraud against Marshall is dated October 7, 1894. It brings the cause on to be heard upon the bill taken for confessed as to some of the defendants, upon the answers of others, and upon the answer of the infant defendants by their guardian ad litem, with general replication to the answers, and upon the exhibits filed. As already seen, no guardian ad litem had been appointed for P. St. Geo. Barraud, and the case at the time of this decree, so far as infants were concerned, had only been matured as to the five infant Hanson children who were named in the memorandum for suit, in the subpoena, and upon the clerk's rule docket. P. St. Geo. Barraud not having been at this time made a party, it cannot be affirmed or presumed that the court, by the use of the words "infant defendants," meant any other infant defend-

ants than those named in the subpoena and upon the rule docket, as to whom the cause was then matured, or intended its action in that regard as a recognition by it of the answer in question as the answer of any other person than parties to the suit. *Galpin v. Page*, supra.

The view that the court did not intend to include in the expression "infant defendants" P. St. Geo. Barraud, who was not then a party to the suit, is greatly strengthened, if not concluded, by the pregnant fact that in the caption to this first decree, which is as much a part of the decree as any other part of it, the name of each plaintiff and defendant is set forth in extenso by the court, and the names of the defendants so set forth correspond with those named in the memorandum for suit, in the subpoena, and in the rule docket. The infant defendants thus named and set forth in the caption of its decree are the five infant Hanson children, the name of P. St. Geo. Barraud not being mentioned either in the caption or in the body of the decree. It further appears that the names of each plaintiff and each defendant, as disclosed by the memorandum for suit, the subpoena, and the rule docket, are set forth at length in every subsequent decree in the cause, except four unimportant ones; and that in each instance the five infant Hanson children are named as the infant defendants, and the name of P. St. Geo. Barraud does not once appear in the caption or the body of a single decree.

Under these circumstances it cannot be doubted that when the court referred in its decrees to "infant defendants" it had reference to and intended only to include the five infant Hanson children immediately before set forth by name in the caption of its decree, who had been named in the memorandum for suit, the subpoena, and in the rule docket, as to whom the cause had then been properly matured, and did not intend to enlarge or extend the operation of those records by including another infant who was not then a party to the suit. Nowhere in the record do we find that W. A. Todd was ever recognized or treated by the court as the guardian ad litem of P. St. Geo. Barraud. On the contrary, any such recognition is excluded by the facts appearing of record. *Myers v. Myers*, 6 W. Va. 369. The only mention of the name of P. St. Geo. Barraud in the entire record is, as we have seen, in the bill and in the caption of the answer of a guardian ad litem appointed, as shown, for the five infant Hanson children, whose interests were, as appears from the record, antagonistic to those of P. St. Geo. Barraud.

It is contended by the appellants that one cannot be a party to a suit unless named in the bill. *Moseley v. Cocke*, 7 Leigh, 224. This is true, but, for much stronger reasons, merely naming him as defendant in the bill is not sufficient. As already pointed out, he must be brought within the jurisdiction of

the court by citation, voluntary appearance, legal representation, or by some means recognized by the law as sufficient. He must have the opportunity of being heard. Underwood v. McVeigh, *supra*; De Wolf v. Mallett's Adm'r, 3 Dana, 214; Estill's Heirs v. Clay, 2 A. K. Marsh, 497. If, however, it were conceded that P. St. Geo. Barraud had been made a party, by guardian ad litem, to the cause of Barraud against Marshall, the result would still be the same, because under the pleadings therein a sale of the remainder interest in the Barrons farm was foreign to the object of that suit. The suit was not, as suggested, for the partition of the Barrons farm. Under the will of the elder Barraud the Barrons farm was made the subject of a specific devise, the life estate therein being given to D. C. Barraud, Jr., and the remainder to the issue of the life tenant. There could be no partition between the life tenant and the remaindermen. Each owned a separate estate, wholly independent of the other, and neither had any interest in the estate of the other. D. C. Barraud, Jr., owned a joint estate with others in the large residuum of his grandfather's estate, and it was this interest that he sought to subject to the payment of his debts by a partition thereof between himself and the joint owners with him. There was nothing to prevent the creditors of D. C. Barraud, Jr., from subjecting his life estate in the Barrons farm to the satisfaction of their liens. The object of the suit was to reach his undivided interest in the residuum of his grandfather's estate. One difficulty in the way of this consummation was the life estate therein of the widow of the elder Barraud. She, however, united in the suit in order to signify thereby her consent to a partition of the residuum forthwith among those entitled thereto, regardless of her life estate therein. The bill in the suit of Barraud against Marshall sets forth that the plaintiff D. C. Barraud, Jr., claimed the entire fee in the Barrons farm, to the exclusion of the remaindermen, and prays for a construction of the will in that respect; but there is no other prayer therein which remotely affects the interests of the remaindermen. The bill does not contain the slightest suggestion that the interest of the remaindermen in the Barrons farm was subject to any charge, nor does it contain the slightest hint that a sale of such interest was contemplated. So far as the pleadings show, the interest of appellees, as remaindermen, in the Barrons farm, was in no way involved. There was nothing in the bill to which they could have responded, except the charge that they did not have a remainder in the Barrons farm. This charge was so groundless, in view of the plain language of the will, that its decision could have been

safely left to the court without answer. The court, however, expressly declined to pass upon that question, went beyond any matter submitted to it by the pleadings, and decreed a sale of the remainder in the Barrons farm, together with the life estate. By this action it exceeded its jurisdiction. It is elementary that no court can travel outside the controversy presented to it to touch other rights or relations not involved. 1 Black on Judgments, § 1, p. 2. At section 242 et seq., the same author says: "Besides jurisdiction of the person of the defendant and of the general subject-matter of the action, it is necessary to the validity of a judgment that the court should have had jurisdiction of the precise question which its judgment assumes to decide, or of the particular remedy or relief which it assumes to grant. In other words, a judgment which passes upon matters entirely outside of the issue raised in the record is, so far, invalid. Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in a given case. To constitute this, there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and, third, the point decided must be, in substance and effect, within the issue."

In view of these well-settled principles, the action of the court in selling, under the circumstances disclosed by the record, the remainder estate of the appellees in the Barrons farm, was in excess of its jurisdiction, and contrary to the established law. *Moseley v. Cocke*, 7 Leigh, 224-226; *Wade v. Hancock*, 76 Va. 625; *Seamster v. Blackstock*, 83 Va. 232-234, 2 S. E. 36, 5 Am. St. Rep. 262; *Anthony v. Kasey*, 83 Va. 338, 5 S. E. 176, 5 Am. St. Rep. 277; *Bigelow v. Forrest*, 9 Wall. 351, 19 L. Ed. 696; *Windsor v. McVeigh*, 93 U. S. 282-283, 23 L. Ed. 914.

In conclusion, we are of opinion that no guardian ad litem was appointed, or recognized by the court as such, for P. St. Geo. Barraud in the case of Barraud against Marshall; that not one of the appellees has ever had the opportunity to be heard in that case; that the action of the court in selling the remainder interest of appellees in the Barrons farm was beyond the scope of the pleadings, and hence in excess of its jurisdiction; and therefore that the decrees and other proceedings in the cause of Barraud against Marshall, so far as they affect the rights of the appellees in and to the land in controversy, are null and void.

For these reasons the decree appealed from must be affirmed.

BUCHANAN, J., absent. KEITH, P., not participating.

(102 Va. 356)

MILLER v. ARTHUR et al.

(Supreme Court of Appeals of Virginia. Jan. 21, 1904.)

DOWER—JUDICIAL SALE—DECREE—DETERMINATION OF DOWER—CONSTRUCTION OF DECREE—LIENS—PAYMENT BY ONE LIABLE—TAKING OF ASSIGNMENT—EXTINGUISHMENT OF LIEN.

1. A wife purchased at judicial sale lands of her husband subject to certain liens. The decree confirming the sale recited, in setting forth the terms: "For the sum of \$12,000 subject to dower, and \$15,000 without dower. This last price to apply to those creditors who are entitled to the sale without dower;" and the deed to the wife recited that the sale was so made to fix dower. The wife failed to pay her purchase money. *Held*, in a controversy as to the balance due from her, that her dower in the equity of redemption should be determined by deducting from \$15,000 the paramount liens and taking one-fifth of the residue.

2. Subsequent to an assignment for the benefit of creditors, the assignor borrowed money from a bank, and thereafter his wife made payments to the bank on the interest due the bank on notes given by a third person as surety for the loan to the husband. The bank at that time held certain bonds of the wife which were a part of the trust estate under the assignment. In a suit by the assignee against the wife she claimed that it was agreed between her and the surety that her payments should be credited on her bonds. *Held*, that the credit could not be allowed, as the matter was one in which the creditors of the trust fund had no interest.

3. The owner of land subject to liens could not, by taking receipts in his wife's name, on payment of the liens by him from his own estate, keep them alive in her favor.

Appeal from Circuit Court, Shenandoah County.

Suit by one Arthur and others against Sallie M. Miller. From decrees in favor of plaintiffs, defendant appeals. Affirmed.

John E. Roller and Winfield Liggett, for appellant. Walton & Walton and Conrad & Conrad, for appellees.

HARRISON, J. J. W. Miller and D. F. Kagey were partners conducting a banking business at Luray, Va., under the firm name and style of D. F. Kagey & Co., and also conducting a mercantile business at Mt. Jackson, Va., under the firm name and style of J. W. Miller & Co. Having failed for a very large amount, these two firms, on December 22, 1890, united in a deed of assignment, conveying all their social and individual assets to trustees to secure numerous creditors, whose aggregate claims amounted to over \$200,000. A protracted and complicated litigation followed upon this assignment, involving a number of suits, which have been heard together, volumes of evidence, oral and documentary, and numerous reports of commissioners settling accounts and undertaking to bring order out of the general confusion.

Prior to the date of the assignment mentioned, J. W. Miller, one of the grantors, had purchased under the decree in the cause of the Cecil National Bank against J. W. R.

Moore a tract of land in Shenandoah county, known as the "Moore Farm." Among the assets dedicated to creditors, this Moore farm was conveyed, subject to the unpaid purchase money due thereon. Shortly after the date of the assignment an account was taken in the cause of Cecil National Bank against Moore, showing that J. W. Miller still owed on this Moore farm \$8,212.89 as of January 1, 1890.

On the 31st day of August, 1894, the trustees in the general deed of trust sold to Sallie M. Miller, the appellant, the Moore farm. This sale was confirmed by decree of September 10, 1894, and a deed was made to the purchaser. Appellant having failed to pay her purchase money, the farm was resold, and bought by G. W. Lantz at the price of \$18,000. The balance due from the appellant on account of her purchase is the subject of the present controversy.

The commissioner to whom the cause was referred ascertained that, after allowing all proper credits, including the proceeds of the sale to Lantz, there was a balance due from the appellant on account of her purchase of \$1,352.44 as of February 1, 1899. This report was confirmed by one of the decrees appealed from.

The first assignment of error involves a construction of the terms of appellant's purchase. The contention is that, instead of being charged with \$15,000 as the price agreed to be paid by her for the farm, she should only be charged with \$12,000 as the purchase price, and with the further sum of \$897.43 as the value of her contingent dower in the equity of redemption.

The decree confirming the sale of the Moore farm to the appellant uses the following language in setting forth the terms of her purchase: "For the sum of \$12,000 subject to dower, and for the price of \$15,000 without dower. This last sale or price is to apply to those creditors who are entitled to the sale of the farm without dower." The deed to the appellant, which was also confirmed, is to this effect: "At the price of \$15,000 without dower, and the price of \$12,000 with dower; the sale being made in this way to fix the dower in said lands." In an elaborate opinion, which is made a part of the record, the learned judge of the circuit court, after setting forth the terms of the purchase, as shown by the decree and the deed mentioned, proceeds as follows: "Her dower right is not, therefore, to be ascertained according to the usual method, but it is made part of the terms of her contract of purchase. The only question to be considered is the proper interpretation of her contract. I adopt the construction that \$3,000 is fixed as the value of the dower in the whole farm, which is valued at \$15,000, and that her dower in the equity of redemption is proportionately less. As her dower right is fixed at one-fifth of the whole, her dower in the equity, after the payment of the par-

amount liens, would be one-fifth of its value. To ascertain the value, deduct from the \$15,000 the paramount liens, and take one-fifth of the residue." This construction is not only reasonable, but it is the only construction that can be fairly given to the language employed to express the terms of the purchase by appellant. The commissioner, following, it is presumed, this construction, ascertained the value of the dower to be \$2,093.29. The account stated, by which this sum was arrived at, is not in the record, and this court cannot, in its absence, hold that the conclusion is erroneous, in opposition to the finding of the commissioner and the approval of that finding by the court. The commissioner properly found, as shown by the extract from his report, which is in the record, that the \$2,093.29 belonged to the National Bank of Baltimore, under a deed of assignment of this dower right by Mrs. Miller to the bank for the indemnity of T. W. Allen. The bank is not here complaining of the amount ascertained to be due on account of dower, and it is not perceived that appellant has any interest in that subject, as the proceeds of the dower belong to the bank, and can in no event reduce the amount due from her on account of purchase money.

The second ground of error assigned is that the court refused to allow appellant credit for three payments of \$450 each claimed to have been made by her to the National Bank of Baltimore.

It appears that in the spring of 1893 Kagey and Miller borrowed a large sum of money from the National Bank of Baltimore, with a view to buying up their indebtedness at a heavy discount. T. W. Allen became surety for this debt, and on the 7th of April, 1893, Mrs. Sallie M. Miller, the appellant, conveyed to the National Bank of Baltimore, among other claims, her dower interest in all of her husband's real estate, and particularly her dower rights in the Moore farm, to indemnify and save harmless T. W. Allen, who had become security for the large sum borrowed by her husband and D. F. Kagey. In May, 1894, when this indebtedness was reduced to \$15,000, Allen was compelled to give his three notes of \$5,000 each therefor, and to secure the same on a valuable farm owned by him, which was subsequently sold to satisfy the same. It satisfactorily appears from the evidence that the three payments of \$450 each which appellant now insists should be credited upon her purchase money, which belongs to the creditors in this case, were the proceeds of notes discounted for the purpose of paying the National Bank of Baltimore the semiannual interest due to it on the Allen notes, amounting to \$15,000; that the remittances were directly to the bank, and applied at the time in the manner indicated. This transaction by Kagey and Miller with the National Bank of Baltimore was an outside matter with which the creditors of the

trust fund had no connection, and in which they had no interest. These payments contributed nothing to the trust fund to which appellant's purchase money belonged, and they should not be permitted to diminish it. The learned judge of the circuit court, in disposing of this question, says: "It is insisted by Mrs. Miller that it was agreed between Allen and herself that she was to have credit on her bonds, which were held by the bank as collateral for this loan. I have refused to sanction this transfer of these bonds in the nature of a collateral, and I cannot see how the court can in any way recognize the loan on which Allen was security. It is not pretended that the bank was any party to the agreement alleged between Mrs. Miller and Allen. On the contrary, it clearly appears that under the direction and with the knowledge of all concerned the bank applied the payments to the discount due on the Allen notes. The money was paid to the bank for that purpose, and I must hold that the alleged understanding between Mrs. Miller and Allen is not a proper subject of inquiry in this litigation." The bonds of Mrs. Miller constituted part of a trust estate to which the creditors of Kagey and Miller were entitled. The debt to which the payments in question were applied was an outside transaction, contracted in the name of Allen subsequent to the date of the deed of trust, and not one of the debts entitled to participate in the trust assets. These payments thus made and applied to the accruing interest on the Allen notes were properly rejected as credits upon the purchase money due the trust creditors from the appellant.

The third and last ground of error suggested is that appellant was not allowed credit upon her purchase money for certain liens against the Moore farm, alleged to have been acquired by her.

These claims constituted part of the paramount liens which existed upon the Moore farm at the time of its purchase by J. W. Miller, and were paid by him during the time that he was in the possession, use, and enjoyment of the farm. J. W. Miller was authorized by decree to pay these liens directly to the parties entitled thereto, and the evidence is conclusive that he paid the claims in question from the proceeds of the farm while he owned it, and from the proceeds of his business, as agent for the sale of fertilizer. The record shows that at the time these claims were paid the appellant owned no separate estate which could have been applied to their payment. There is no contention that she owned any estate until her purchase of this farm, which was after the claims had been paid. The evidence of the appellant shows that J. W. Miller made the money and paid the liens; and further shows that at the time of her purchase of the farm she was not aware that her husband pretended to have bought for her any claims against it. When J. W. Miller paid the

claims in question, he took receipts in his wife's name, and it is contended that he could thus keep them alive as liens upon the farm for her benefit. This position is not tenable. "It is a well-settled principle that payment by one who is primarily liable to one entitled to collect the debt is an extinguishment of the debt and all liability thereunder. However held, or however transferred or assigned, it is ever afterwards a mere nullity." *Smith v. Waugh*, 84 Va. 808, 6 S. E. 132; *Citizens' Bank v. Lay*, 80 Va. 436; *Daniel on Neg. Instruments*, §§ 1221, 1222.

In the case at bar the one who owed these claims paid them with his own means directly to the several parties entitled to collect, and it is clear from all the evidence bearing upon the subject that the appellant is not entitled to credit upon her purchase money due the creditors in this case for the claims under consideration.

Upon the whole case we are of opinion that there is no error in the decrees appealed from, and they must be affirmed.

KEITH, P., and CARDWELL, J., absent.

(102 Va. 350)

**PERSINGER'S ADM'X v. ALLEGHANY
ORE & IRON CO.**

(Supreme Court of Appeals of Virginia. Jan. 21, 1904.)

MASTER AND SERVANT—INJURIES—NEGLIGENCE—ANTICIPATED DANGERS.

1. A contrivance for washing ore consisted of a large box containing machinery, and there unnecessarily projected into the box the end of an engine shaft on the end of which was a small "jagger," or point of iron about an eighth of an inch by three-sixteenths of an inch in size. A servant, who had been in the box repairing some of the machinery, was leaving the box, when his clothing caught on the "jagger," and, the shaft being in motion, he was killed. The point where the repairs were being made was 32 inches from the end of the shaft, and the space between the side of the box and end of the shaft, which space he had to pass through on leaving the box, was 3½ feet. *Held*, that the master was not liable, as the accident was not a probable consequence of the conditions.

Error to Circuit Court, Botetourt County.

Action by the administratrix of W. D. Persinger against the Alleghany Ore & Iron Company. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

Benjamin Haden, for plaintiff in error. A. A. Phlegar and P. H. C. Cabell, for defendant in error.

BUCHANAN, J. This is an action to recover damages for the killing of William D. Persinger, caused, as his administratrix claims, by the defendant company's negligence.

Upon the trial of the cause in the circuit court the defendant, without introducing any testimony, demurred to the plaintiff's evidence. The court sustained the demurrer,

and rendered judgment for the defendant. To that judgment this writ of error was awarded.

The material facts are the following: The defendant owns and operates, among other things, machinery for washing ore, and Mr. Persinger was employed by the defendant to oil the machinery and to do such other work as he might be directed to perform. The part of the washer in which Mr. Persinger was killed was at least 6 feet wide and about 30 feet long, as counsel seem to agree. The depth of the box does not appear from the record. Extending through this box lengthwise were two logs, parallel to each other, 1 foot each in diameter, and about 30 inches apart. To these logs were attached spiral flanges or paddles about 8 inches long. The logs ran east and west, and to the west end of each log was attached an iron gudgeon, which rested on the end of the box. Upon these gudgeons were fixed gear wheels, which were driven by means of a main shaft by a steam engine located on the south side of the box. The ore as it came from the mines was dumped into the box, through which flowed a stream of water. The logs revolved in opposite directions. The paddles on them stirred up the ore, and by reason of their spiral arrangement forced the ore to one end of the box, the water carrying off the dirt to the other end. On the south side of the box, and 32 inches from the west end of it, was a pulley on the engine shaft, over which was a band which operated the washer. This shaft from the engine projected into the box, unnecessarily, 28 inches, the end of it reaching an inch or two beyond the north side of the nearest log. In the end of the shaft was a key set or groove for fastening the pulley or wheel which might be placed thereon. On one of the corners of the key set, and on the inner side thereof, was a little "jagger," or point of iron, about one-eighth of an inch by three-sixteenths of an inch in size, and made apparently by a blow from a hammer on the end of the shaft. From the end of the shaft to the north side of the box was about 3½ feet.

On the day of the accident one of these logs broke, and Mr. Persinger was ordered to aid other employes in removing the logs from the bed when not engaged in oiling the machinery of the washer, which continued its work except in that bed. In order to remove these logs, it was necessary to take the gear wheel off the west end of the log, over which the engine shaft projected. There was some difficulty in getting the key out which held the wheel in its place. Three other men, at least, had attempted to get it out. Two of them had gone out of the bed to get a more suitable implement to work with. The other employe, Rock, and Mr. Persinger attempted to get the key out, and were unable to do so with the key drift which they had. They determined to go out of the box also, and get a more suitable key drift, Rock leav-

ing first. As Mr. Persinger was going out, his overall jacket caught upon the "jagger" on the end of the main shaft, which was making from 75 to 100 revolutions per minute, and was wrapped around it, and he was dragged or whirled around the shaft and killed.

The plaintiff charges that the defendant was negligent in unnecessarily and improperly allowing the main shaft to extend into the bed where the accident occurred, and in permitting the "jagger" to remain on the end thereof, and in operating the shaft while its employes were removing the logs and repairing the bed in which they were.

The rule is well settled that it is the duty of the master to exercise ordinary care in providing a reasonably safe place in which his servants are to work. *Robinson's Adm'r v. Dininny*, 96 Va. 41, 42, 30 S. E. 442; *McDonald's Adm'r v. N. & W. R. R. Co.*, 95 Va. 98, 105, 27 S. E. 821; *Bertha Zinc Co. v. Martin's Adm'r*, 93 Va. 791, 22 S. E. 869; *N. & P. R. R. Co. v. Ormsby*, 27 Grat. 455.

Ordinary care depends upon the circumstances of the particular case, and is such care as persons of ordinary prudence would, under the circumstances, have exercised. *N. & W. Ry. Co. v. Cromer's Adm'r*, 99 Va. 763, 764, 40 S. E. 54; *Bertha Zinc Co. v. Martin's Adm'r*, 93 Va. 791, 22 S. E. 869; *N. & P. R. R. Co. v. Ormsby*, 27 Grat. 455.

If the accident which occurred was one at all likely to happen—if it was a probable consequence that an employe working in the bed would be injured or killed by having his clothing caught upon the little "jagger" on the end of the revolving shaft, as was the plaintiff's intestate—the trial court erred in sustaining the defendant's demurrer to the evidence. But can the accident be said to be one which ordinarily prudent men would have been likely to anticipate?

The revolving shaft, which extended into the bed further than was necessary, was fully exposed to sight. The "jagger" on which the clothing of the deceased caught was in size not over one-eighth of an inch by three-sixteenths of an inch, was on the inner side of the key set, and so small that you had to look closely to see it. The gear wheel which Mr. Persinger and other employes were trying to remove from the log was 32 inches from the end of the shaft, and the space through which he had to pass in going out of the box north of the end of the shaft was 3½ feet. It is insisted by counsel for the plaintiff that the box was only some 40 inches deep, and that the cover or floor on top of it made it necessary for the employes working in it to move about in a stooping position, and prevented them from going out of the box except through the space between the ends of the paddles upon the logs, which was only about 14 inches wide and very near the end of the shaft.

The evidence does not sustain this contention. It is apparent from the questions ask-

ed the witnesses, as well as from their answers, that the top or floor over the box did not, in its then condition, interfere with the employes in doing their work, or in going in or out of the box.

One of the witnesses—and the only one who testifies upon the point—states that he had been foreman of the washer for about 15 months, and that he would not have thought that jagger would catch clothing, or that it was likely to do so, but for the fact that it had done so, and but for the accident he would not have thought that it was necessary to have boxed the end of the shaft to have avoided any probability of harm. After the accident happened, it could be readily seen how the accident could have been avoided by boxing the end of the shaft; and that was done. But, as was said by Judge Cooley in *Sjogren v. Hall*, 53 Mich. 274, 278, 18 N. W. 812, 814: "The fact that it [the accident he was considering] was avoidable does not prove that there was fault in not anticipating and providing against it. If a farm laborer falls from the haymow, the fall does not demonstrate that the farmer was culpable for not ralling the mow in. A man stumbling in a blacksmith shop might have his hand, or even his head, thrown under the triphammer; but it would not follow that there had been any neglect of duty on the part of the blacksmith in leaving the hammer exposed. So far as there is a duty resting upon the proprietor in any of these cases, it is a duty to guard against probable dangers; and it does not go to the extent of requiring him to render accidental injury impossible. * * * If the fact that prevention was possible is to render the employer liable, then he may as well be made an insurer of the safety of those in his service in express terms, for to all intents and purposes he would in law be insurer, whether nominally so or not."

It is right that the master should be required to anticipate and guard against consequences that may reasonably be expected to occur, but it would violate every principle of justice or law if he should be compelled to foresee and provide against that which reasonable and prudent men would not expect to happen.

We are of opinion that the evidence does not show that the death of the plaintiff's intestate was the result of the defendant's negligence. The judgment of the circuit court must therefore be affirmed.

KEITH, P., and CARDWELL, J., absent.

(102 Va. 280)

SMITH et al. v. MOORE.

(Supreme Court of Appeals of Virginia. Jan. 14, 1904.)

APPEAL AND ERROR — AMOUNT — DECREE AGAINST DISTRIBUTEES—WILLS—CHARGE ON LAND—LIMITATIONS.

1. A decree against distributees for a debt of their decedent is substantially a decree against

the decedent's estate, and, where the aggregate amount exceeds the minimum jurisdictional sum, an appeal lies on behalf of the distributees.

2. A charge by a testator of his debts on his lands creates an equitable lien for their payment, to which there is no statutory bar.

3. The statute of limitations does not begin to run in favor of a personal representative against the distributees until an order of a court having jurisdiction directing a delivery of the estate to the distributees.

Appeal from Circuit Court, Clarke County.

Suit by Annie M. Smith and others against A. Moore, Jr. Decree for defendant, and plaintiffs appeal. Affirmed.

F. B. Whiting, Blackburn Smith, and M. McCormick, for appellants. A. Moore, Jr., in pro. per.

CARDWELL, J. William A. Castleman qualified on January 23, 1854, in the county court of Clarke county, as executor of the will of Jacob Isler, deceased; giving bond for \$50,000, with six sureties, including Treadwell Smith. In 1873 Champ Shepherd and others, legatees and devisees, or otherwise interested, under the will of Jacob Isler, filed their bill in the county court of Clarke county against Castleman, executor of Jacob Isler, such of his sureties on his executorial bond as were then living, the personal representatives of such as were dead, including R. R. Smith and Charles H. Smith, executors of Treadwell Smith, who had died leaving a will charging his real estate with the payment of his debts, the object of which suit was to have a settlement and distribution of Jacob Isler's estate. At the August term, 1873, of the county court of Clarke county, the cause was by decree removed to the circuit court of that county; and at the February term, 1874, of the circuit court, it was referred to Commissioner Louthan to state, among other things, the executorial accounts of Castleman, executor, etc., so as to show what amount was in his hands, due to his testator's estate; and Commissioner Louthan having filed his report, to which there were no exceptions, ascertaining that Castleman, as executor, was largely indebted to his testator's estate, a decree was entered on November 27, 1874, against him and his sureties, or their personal representatives, for sundry sums of money in favor of Jacob Isler's legatees or their assigns, including A. Moore, Jr., who, as substituted trustee in the place of R. E. Byrd, recovered \$1,050.16, with interest on \$596.98 from June 1, 1874, by virtue of a deed of trust executed on April 2, 1860, by G. H. Isler, a son of Jacob Isler, deceased, conveying to R. E. Byrd, trustee, his interest in his father's estate, for the purpose of securing the payment of certain debts named in the deed. At the February term, 1877, of the said court, this decree, as to A. Moore, Jr., substituted trustee, was revived against Castleman, executor, and his sureties; and

on March 5, 1877, an execution of f. fa. was issued against them, which was returned, "No property found."

In 1878 Annie M. Smith, one of the devisees of Treadwell Smith, deceased, filed her bill in the cause out of which this appeal arises, asking, among other things, that the debts of Treadwell Smith be ascertained; that they be held a charge under his will on his lands in the hands of each devisee, according to such devisee's interest therein, these devisees having in 1874 made partition of the lands among themselves, and each one having taken possession of the part assigned him. This cause was by decree of February 6, 1883, referred to one of the commissioners of the court, who was directed to ascertain and report, among other things, the indebtedness of the estate of Treadwell Smith, deceased; and, while the cause was pending before the commissioner, David Craufurd's administrator presented a large claim against the estate, which was earnestly contested by the executors and devisees of Treadwell Smith, the litigation over it continuing until October 1, 1896, when it was finally ended by the decision of this court in Craufurd's Adm'r v. Smith's Ex'r, 93 Va. 623, 23 S. E. 235, 25 S. E. 657.

By a decree entered October 30, 1875, in this cause (Annie M. Smith v. Treadwell Smith's Ex'r, etc.), reciting that there had been no convention of the creditors of Treadwell Smith, deceased, and no settlement, except ex parte, of the accounts of his executors, the cause was again referred to a commissioner to state and report (1) the accounts of Treadwell Smith's executors; (2) an account of the debts against his estate remaining unpaid, to whom due, etc., and the priority of any liens on the estate; and (3) what real estate of which Treadwell Smith died seised is subject to the payment of his debts, and, if the land of which he died seised had been partitioned among his devisees, how much of the unpaid debts was chargeable to each share.

Responding to this decree, Commissioner Kownslar filed his report on May 22, 1897, setting forth that one of the executors of Treadwell Smith had informed him that the executors had received no funds since their previous settlement, and reporting certain debts outstanding against Treadwell Smith's estate, including the debt asserted by A. Moore, Jr., substituted trustee, stating that this debt as reported was in any event due from Smith's estate, but, as he was a co-surety, in case the amount due by any one or more of the other sureties was not paid the liability of Smith's estate would be increased, as it was ultimately liable for the whole debt. He further reported that, by his will, Treadwell Smith charged his real estate with the payment of his debts, and that the whole of the estate had been divided among his devisees; setting forth the quantity and de-

scription of the real estate received by each devisee in this division. The report of Commissioner Kownslar was several times re-committed to him because of exceptions there-to filed by Treadwell Smith's executors and devisees or others—among other things, to take such evidence as might be adduced before him in support of and against the claim of Jacob Isler's legatees, and make report upon the evidence taken; the claim referred to being the claim here under investigation, and asserted by A. Moore, Jr., substituted trustee, against Treadwell Smith's devisees. In obedience to this direction of the court, Commissioner Kownslar filed his report of May 7, 1899, in which he restated the debt in question, and returned with his report all the evidence adduced for and against the claim, consisting of exhibits, depositions, and agreements of counsel; and by decree of November 17, 1898, the cause was again re-committed to Commissioner Kownslar, with the direction, among others, to take such further evidence as the parties interested might lay before him in support of or against this claim. Responding to this decree, the commissioner filed his report, again restating the debt, and returning therewith the further evidence adduced before him by the parties interested; and upon a final hearing of the cause the decree appealed from to this court was entered, by which it was adjudged that A. Moore, Jr., substituted trustee, do recover of the devisees of Treadwell Smith ("there being no personal estate out of which the amounts hereby decreed can be paid") the sum of \$952.58, with interest on \$596.98 from December 1, 1898, to be paid one-fifth by Chas. H. Smith, one-fifth by Annie M. Smith, one-fifth by Chas. H. Smith, administrator of Emily Smith, one-fifth out of the proceeds of the sale of the land of R. R. Smith, one-tenth by Sarah J. Crown, and one-tenth by J. Rice Smith.

It is contended by appellee that the appeal should be dismissed as improvidently awarded, because the amount decreed to be paid by each of the devisees is below the minimum jurisdictional limit of appeals to this court. Were not the executors of Treadwell Smith, as well as his devisees, appealing, this contention could not be sustained. "Where for a debt of a decedent there is no decree in solido against his personal representative, but severally against each distributee for his proportion of the debt which exceeds \$500, substantially it is a decree against the decedent's estate; and, as it exceeds in the aggregate the minimum jurisdictional sum, an appeal lies from the decree on behalf of the distributees." *Udike's Adm'r v. Lane*, 78 Va. 132.

The opinion in that case with reference to the motion to dismiss the appeal because the amount decreed against each of the distributees was less than \$500 disposes of the question as follows. "As to the point raised,

it is sufficient to say, though there is not a decree against the administrator in form, yet in substance it is as much a decree against the decedent's estate, and for the full amount of \$768.87 then due on his bond, as if the decree had been for that sum in solido; the apportionment being specified in the decree for mere convenience." See, also, *Ryan's Adm'r v. McLeod*, 32 Grat. 367, where the opinion by Stables, J., says that, "upon a principle universally conceded and repeatedly acted upon by this court, lands of all the devisees should bear their ratable proportion of the debts in the first instance, instead of decreeing against one, and turning him around upon the others for contribution."

It is clear from these authorities that it is well settled that where there are no assets in the hands of the personal representatives of the debtor, out of which a debt asserted against a decedent's estate may be satisfied, as is the case at bar, it is proper to decree against each of the distributees or devisees for his proportion of the debt, which is substantially a decree against the decedent's estate, and, the debt in the aggregate exceeding the minimum jurisdictional sum, an appeal lies from the decree to this court in behalf of the distributees or devisees.

Appellants' 1st, 2d, and 9th assignments of error raise the question whether or not their pleas of payment, laches, and the statute of limitations filed before Commissioner Kownslar, and overruled by the court below, should have been sustained.

As to the plea of payment, the only evidence in support of it is the deposition of R. R. Smith, one of the executors of Treadwell Smith; and he does not pretend to claim that the debt has been paid, or state any circumstances from which the presumption of payment could be drawn. When asked if he had in his possession receipts for all money paid out by him as one of Treadwell Smith's executors, and, if not, what became of them, his answer was: "I don't know of any receipts that I have. I lost some of my papers, and may have lost some receipts among them." And upon cross-examination he was asked if he had ever made a settlement of his accounts as executor of Treadwell Smith, to which he replied: "I put all my accounts in the hands of Capt. Nelson for settlement, and suppose it was done." This settlement by Capt. Nelson, commissioner of accounts for Clarke county, appears in the record, and shows that no credit was given on account of any payment to appellee or on his claim. There appears in the record a list of the debts, and the order of their priority, to be paid out of the funds to which appellee was making claim; and, because it further appears that he has paid one or more of the debts out of their order of priority, it is contended that all other debts having priority over those paid by appellee must be presumed to have been paid.

In answer to this contention, it is sufficient to say that, if appellee has misapplied the funds that may have come to his hands, it is a matter between him and those whose funds have been so misapplied, and does not concern appellants, or affect their liability for the debt in question.

With reference to the question of laches, the most that can be said is that there is apparent tardiness in the prosecution of the claim; but, in view of the circumstances surrounding the settlement of Treadwell Smith's estate, the number and character of the debts asserted against it, and the long drawn out litigation over one of them, at least—that of David Crawford's administrator—it cannot be said that this apparent tardiness on the part of appellee amounts to inexcusable delay, or has placed appellants in such a position that a court of equity should relieve them from the payment of his claim.

As has been observed, the will of Treadwell Smith charged his real estate with the payment of his debts, and this charge constitutes an equitable lien on the lands now in the possession of appellants, his devisees, to which lien there is no statutory bar, unless the debt is barred as against the estate of Treadwell Smith. It is true that the liability of Treadwell Smith for the debt here in question originated as far back as 1854, when he became one of the sureties of Castleman as executor of Jacob Isler; but as there appears no order by a court having jurisdiction of the accounts of the executor, acting upon a settlement of his accounts, and directing a delivery of the estate to the distributees of Jacob Isler, deceased (section 2921 of the Code of 1887), no cause of action against Treadwell Smith's estate or his devisees arose until the decree of November 27, 1874, in *Champ Shepherd, etc., v. Jacob Isler's, Ex'r, etc., supra*, whereby it was ascertained that Castleman, as executor, was largely indebted to his testator's estate, and a liability fixed upon the sureties on his official bond, including Treadwell Smith, for the debt now asserted by appellee. This decree was conclusive of the question whether or not the debt was barred by the statute as against Treadwell Smith's estate, and determine that it was not.

In *Crawford's Adm'r v. Smith's Ex'r, supra*, it was held that the suit, if not when brought a creditors' suit, became such by the entry of the decree therein of February 6, 1883, *supra*, and the statute of limitations then ceased to run against the creditors of Treadwell Smith's estate. From some cause, undisclosed by the record, unless it was by reason of the litigation over the large claim of David Crawford's administrator, asserted against Treadwell Smith's estate, above referred to, the decree of reference of February 6, 1883, was not executed; and another decree was made in October, 1895, to con-

vene the creditors of Treadwell Smith's estate, during the pendency of which before Commissioner Kownslar appellee appeared and asserted his claim. It was then, for the reasons stated, not barred by the statute of limitations, and therefore appellants' plea of the statute was rightly overruled.

Of the remaining assignments of error, a number of them relate to the action of the circuit court in recommitting the report of Commissioner Kownslar for further proof of appellee's claim, but, beside the fact that appellants excepted to the reports of the commissioner, demanding further proof of the claim, they were in no way prejudiced by the cautious action of the court in allowing the fullest opportunity for proof in support of and against the claim.

Appellants further contend that the circuit court erred in considering the decree of November, 1874, in *Champ Shepherd and others v. Castleman, Ex'r, etc., supra*, as evidence against them; but, as has been observed, under the will of Treadwell Smith the lands in the possession of his devisees stand charged with the payment of his debts, which constitutes an equitable lien on the lands, to which there is no statutory bar; the debt not being barred as against the estate of the testator, and the suit in which the decree was entered being for a settlement of the accounts of Castleman as executor of Jacob Isler, in which it was proper to decree against him in favor of those entitled to his estate; and the claim asserted by appellee being founded upon a decree therein in favor of G. H. Isler, one of the distributees of Jacob Isler, under whom appellee claims, so long as the decree remained unreversed it had full force and effect, as well against Treadwell Smith, the surety, as against Castleman, the executor. *Franklin's Adm'r v. Depriest, 13 Grat. 257; Crawford v. Turk, 24 Grat. 176; Supervisors, etc., v. Dunn, 27 Grat. 608; Carr et al. v. Meade's Ex'r, 77 Va. 142.*

The remaining assignment of error requiring consideration is on the ground that appellee has failed to show that all parties interested under the deed of trust from G. H. Isler to R. E. Byrd, trustee, were before the court when he was substituted in the place of Byrd as trustee. As has been pointed out, the substitution of appellee as trustee in the place of Byrd was in the suit of *Champ Shepherd and others v. Jacob Isler's Ex'r and others, supra*, to which Treadwell Smith's executors were parties; and the decree is to be given full force and effect, it not having been reversed. It cannot be attacked by the appellants collaterally. *Franklin's Adm'r v. Depriest, supra.*

Upon the whole case, we are of opinion that the decree appealed from must be affirmed.

BUCHANAN, J., absent.

(102 Va. 339)

WEST v. RICHMOND RY. & ELECTRIC CO.

(Supreme Court of Appeals of Virginia. Jan. 21, 1904.)

APPEAL AND ERROR—CERTIORARI—DIMINUTION OF RECORD—BILL OF EXCEPTIONS—NECESSITY.

1. A writ of certiorari can issue only when diminution of the record is suggested.

2. The evidence is not a part of the record unless made so by bill of exceptions.

3. Unless a proper bill of exceptions is taken, setting forth specifically and definitely the allegation of error relied on and so much of the evidence as is necessary to enable the appellate court to pass intelligently upon the question raised, the judgment of the trial court must be sustained.

Error to Circuit Court, Henrico County.

Action by West against the Richmond Railway & Electric Company. Judgment for defendant. Plaintiff brings error. Affirmed.

H. R. Pollard and E. M. Long, for plaintiff in error. Christian & Christian and M. M. Martin, for defendant in error.

WHITTLE, J. This is the second appeal in this case. Upon the first trial there was a verdict and judgment for the plaintiff in error, who was the plaintiff in the court below, which judgment was reversed by this court on the ground of a material departure in the testimony from the case made by the declaration. The case was remanded to the circuit court for a new trial, with leave to the plaintiff, if so advised, to file an amended declaration. Richmond Railway & Elec. Co. v. West, 100 Va. 184, 40 S. E. 643.

At the new trial, upon an amended declaration, the jury returned a verdict in favor of the defendant, upon which the judgment now under review was rendered. Upon that trial the circuit court excluded all the testimony adduced by the plaintiff, or rather instructed the jury to disregard the testimony of the plaintiff, because the amended declaration charged one act of negligence, while the evidence tended to prove another. In other words, in the opinion of the circuit court there was on the second trial, as on the first, a fatal variance between the allegations of the declaration and the evidence relied on to support them. The plaintiff excepted to the ruling of the court, and doubtless intended to embody the testimony in the bill of exceptions; but the record, as copied and certified by the clerk, contains no part of the evidence. It is true there is printed in the same pamphlet with and immediately following the transcript of the record certified by the clerk what purports to be a stenographic report of the evidence at the trial, and it is insisted here that there was an agreement between counsel in the lower court that the report so produced might be treated as part of the record, as if the same had been regularly made a part thereof. That statement, however, is

controverted, and an issue is thus raised the merits of which this court cannot undertake to determine. In this connection it appears that the stenographic report of the evidence in question was not lodged with the clerk of the circuit court until months after he had made out and certified a copy of the record and the case was on the argument docket of this court. It is also insisted that upon the foregoing facts this court ought to award a writ of certiorari to compel the clerk of the circuit court to certify the report of the evidence produced as part of the record. But the facts relied on to warrant the issuance of a writ of certiorari not only do not suggest a diminution of the record, but, to the contrary, show affirmatively that the report of the evidence constitutes no part of the record. It is apparent, therefore, that this court has no power to relieve existing conditions, either by certiorari or otherwise. It is settled practice that the evidence is not a part of the record, unless made so by bill of exceptions, and, if copied into the record by the clerk, it cannot be considered by this court.

In *Cunningham v. Mitchell*, 4 Rand. 189, Judge Green says: "The certificate of the clerk that these papers were the evidence upon which the judgment was founded cannot be received as part of the record. His certificate to that effect can have no more effect than that of any other individual. He can certify that such records exist in his office, but not what use was made of them. That ought to have been shown by the record, and it was the duty of the party wishing to avail himself of the fact to have made it a part of the record." *Preston v. The Auditor*, 1 Call, 471; *Bowyer v. Chesnut*, 4 Leigh, 1; *Roanoke Land & Improvement Co. v. Karn & Hickson*, 80 Va. 589; *Johnston v. Norton Land & Improvement Co.*, 90 Va. 267, 18 S. E. 86.

All presumptions are in favor of the correctness of the judgment of the court below and against the exceptor, and, unless a proper bill of exceptions is taken, setting forth specifically and definitely the allegation of error relied on and so much of the evidence as is necessary to enable the appellate court to pass intelligently upon the question raised, the judgment of the trial court must be sustained. The plaintiff in error having failed to observe that requirement by having the evidence at the trial incorporated in the record, this court has nothing before it upon which to base an opinion with respect to the ruling of the court in the particular complained of. *Fitzhugh v. Fitzhugh*, 11 Grat. 300; *Washington & New Orleans Tel. Co. v. Hobson*, 15 Grat. 122; *Powell v. Tarry*, 77 Va. 250; *Fry v. Leslie*, 87 Va. 269, 274, 276, 12 S. E. 671; *Ferguson v. Willis*, 88 Va. 136, 140, 13 S. E. 392; *Trumbo's Adm'r v. Street Car Co.*, 89 Va. 780, 17 S. E. 124; *Holleran v. Miesel*, 91 Va. 143, 21 S. E. 658; *Ampey's Case*, 93 Va. 108, 25 S. E. 226; *Longley v. Commonwealth*, 99 Va. 807, 813, 37 S. E. 339.

¶ 1. See *Appeal and Error*, vol. 3, Cent. Dig. § 2367.

With respect to the suggested hardship of disposing of the case in the absence of the evidence, it may be remarked that the court is not responsible for the omission and is powerless to supply the deficiency. In the practical administration of justice, courts must be satisfied to enforce the law as they find it. They cannot undertake to prevent hardship in particular cases by a departure from established principles.

It follows from what has been said that the judgment of the circuit court must be affirmed.

CARDWELL, J., absent.

(102 Va. 343)

RHULE v. SEABOARD AIR LINE RY. CO.

(Supreme Court of Appeals of Virginia. Jan. 21, 1904.)

EJECTMENT—TITLE OF PLAINTIFF—INTRUDER—DESCRIPTION OF PREMISES—DEMURRER TO EVIDENCE—APPEAL.

1. The general rule is that the right of a plaintiff to recover in ejectment rests on the strength of his own title. However, as against an intrusion by a stranger without title on a peaceable possession, such possession alone is sufficient to maintain the action.

2. Under section 2729 of the Code of 1887, the description of the premises in a declaration in ejectment is sufficient if the premises are described with such convenient certainty as that, from such description, possession thereof may be delivered.

3. All objections to the verdict on demurrer to the evidence upon the ground of excessive damages must be presented to the trial court by a motion for a new trial, or to require the party in whose favor the verdict was rendered to remit part of the damages awarded by the jury. The objection cannot be made for the first time in the appellate court.

Error to Circuit Court, Henrico County.

Action by Mrs. Rhule against the Seaboard Air Line Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Saml. A. Anderson and P. A. L. Smith, for plaintiff in error. Munford, Hunton, Williams & Anderson, for defendant in error.

KEITH, P. This is an action of ejectment, brought in the circuit court of Henrico county by Mrs. Rhule against the Seaboard Air Line Railway, to recover a piece of land. There was a demurrer to the declaration upon the grounds: First, that it fails to show the legal title to the property to be in the plaintiff; and, secondly, that it does not sufficiently describe the property in question.

The plaintiff introduced her evidence, and, the defendant having demurred, the jury found a verdict in favor of the plaintiff, subject to the demurrer to the evidence, for the premises demanded, and assessed the damages at \$900. Upon this verdict the circuit

court entered the judgment which is now before us for review.

We deem it unnecessary to discuss the plaintiff's title. The general rule is that the right of a plaintiff to recover in ejectment rests on the strength of his own title, and is not established by the exhibition of defects in that of the defendant, who may maintain his defense by simply showing that the title is not in the plaintiff, but in some one else. "The rule is thus broadly stated by the authorities without qualification, but there are exceptions to the rule thus announced as well established as the rule itself. Whether the case of an intrusion by a stranger without title, on a peaceable possession, is not one to meet the exigencies of which the courts will recognize a still further qualification or explanation of the rule allowing the plaintiff to recover only on the strength of his own title is a question which, I believe, has not as yet been decided by this court." This statement of the law with reference to the rule and its exceptions is taken from the opinion of Judge Daniel in *Tapscott v. Cobbs*, 11 Grat. 172—a case which was decided in 1854, has been frequently relied upon since that time, and the correctness of which, so far as we have been able to discover, has never been called in question. *Olinger v. Shepherd*, 12 Grat. 462; *Atkins v. Lewis*, 14 Grat. 30; *Miller v. Williams*, 15 Grat. 213.

The Supreme Court of the United States enunciates the same doctrine in *Christy v. Scott*, 14 How. 282, 14 L. Ed. 422, where it is said that "a mere intruder cannot enter on a person actually seized and eject him, and then question his title. The maxim that the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's, is applicable to all actions for the recovery of property. But if the plaintiff had actual possession of the land, this is strong enough to enable him to recover it from a mere trespasser who entered without any title."

These authorities seem quite sufficient to maintain a doctrine so consonant to reason and so necessary to the peace and order of society.

It appears from the evidence that the plaintiff in error was at the time of the institution of this suit, and for a number of years prior thereto had been, in the peaceful and undisturbed possession of the premises in question. The record fails to show a shadow of right in the defendant in error to disturb that possession. The jury, upon a demurrer to the evidence, had a right to deem the defendant in error not only a naked trespasser, but one who had acted in a harsh and arbitrary manner. This being so, the case of the plaintiff in error is plainly within the influence of the exception, which the authorities above quoted show is as well established as the rule, and that, as against an intrusion by a stranger without title on a peaceable

possession, such possession alone is sufficient to maintain the action of ejectment.

Coming now to the description of the property, it must be conceded that in this respect the declaration is not all that could be desired; but we do not feel warranted in holding that the premises claimed are not described with such convenient certainty as that, from such description, possession thereof may not be delivered. Code 1887, § 2729. The statute obviously does not mean to require any great nicety or exactness, and the authorities are to the same effect. To discuss in detail the cases which illustrate the degree of certainty required in describing the premises demanded in ejectment would be profitless, as they leave each case to be adjudicated upon its individual merits.

It is earnestly insisted by counsel for defendant in error that the damages are excessive, and that, although the court may be of opinion that the plaintiff in error was entitled to a judgment for the premises in controversy, it ought not to enter a final judgment in favor of the plaintiff in error, but should remand the case for a new trial.

There was no motion made in the circuit court for a new trial. There was no objection in that court to the damages awarded, and it cannot be made for the first time in this court.

In *Humphrey's Adm'r's v. West's Adm'r's*, 3 Rand., at page 518, this court said that "the only question for the consideration of the court on a demurrer to evidence is whether the evidence supports the issue, or not, and the judgment is that it does or does not support it. After the demurrer is joined, the jury may either be discharged, and, if the judgment be that the evidence does support the issue, a writ of inquiry of damages is awarded, or the jury then impaneled may go on to assess conditional damages.

"But in either case the question is with the jury, not with the court, as to the question of damages, subject, as in all other cases, to the superintending control of the court to grant a new trial in case the damages are excessive. That, however, rests with the court before whom the trial was had, and that, too, upon a motion to that court for a new trial; there being no case in which that court is bound, ex mero motu, and without motion, to grant a new trial, and subject the defendant, without his consent, to greater damages. The appellate court cannot grant such new trial, for that would be to reverse the judgment of an inferior court on a motion for a new trial here, which was not made to that court, and of course on a matter in which that court committed no error." See, also, *Newberry v. Williams*, 89 Va. 298, 15 S. E. 865, and *N. & W. R. R. v. Dunaway*, 93 Va., at page 33, 24 S. E. 698.

In the last case cited many authorities were reviewed, and the conclusion was reached that it is not necessary for a motion for a new trial to be made in the trial court

in order to have the judgment on demurrer to the evidence reviewed in the appellate court, but that it would not be proper to consider the quantum of damages as being too great or too small, unless objection to the verdict upon that ground was presented in the trial court. Had that question been presented, the circuit court might have required the plaintiff to remit a part of the damages, or if, in a proper case, the defendant had asked the court to require the plaintiff to remit a part of the damages awarded by the jury, and the court had declined to do so, the question would then have been properly before this court for consideration; but, as presented to us, it is controlled by *Humphrey's Adm'r's v. West's Adm'r's*, supra, which has long been the unquestioned law of this forum.

The judgment of the circuit court must be reversed, and this court will enter a judgment in accordance with the verdict of the jury.

CARDWELL, J., absent.

(67 S. C. 491)

SMITH v. LAFAR, Chief Constable.

(Supreme Court of South Carolina. Nov. 27, 1903.)

DISPENSARY CONSTABLE—ILLEGAL SEIZURE OF WHISKY—ACTION FOR DAMAGES—EVIDENCE.

1. In a suit against a dispensary constable for the malicious and unlawful seizure from an express company of whisky in transit to plaintiff, where defendant pleads a general denial he may prove that plaintiff was engaged in the illegal sale of whisky, and had such a reputation in the community in which he lived, and allegation of such facts in the answer will not be stricken out.

2. Where a dispensary constable seizes liquors shipped from one state to another by express while in the possession of the express company, an action lies against him if the liquor was shipped for personal use; and Cr. Code 1902, § 600, providing that chapter 1, tit. 7, Code Civ. Proc., relating to provisional remedies, shall not apply to an officer having duties to perform, and that in no case shall an action lie against such an officer for damage to person or property, does not prohibit such action, chapter 1, tit. 7, of such Code, relating to arrest and bail.

Appeal from Common Pleas Circuit Court of Greenville County; Watts, Judge.

Action by Calvin Smith against S. G. Lafar, chief state constable. From order dismissing the complaint, the plaintiff appeals. Reversed.

Oscar K. Mauldin and Oscar Hodges, for appellant. Heyward, Deane & Earle, for respondent.

WOODS, J. The plaintiff in his complaint alleges the shipment by express to him from Statesville, N. C., to Greenville, S. C., of one gallon of corn whisky, purchased in Statesville exclusively for his own personal use, and the malicious, willful, and unlawful seizure from the express company of the

whisky by the defendant, a dispensary constable; that he gave the defendant full notice before the seizure that the whisky had been purchased in Statesville, N. C., and was intended for his own personal use; that he was damaged by said seizure to the amount of \$500. The answer denies the whisky was purchased in Statesville, or shipped therefrom, or that it was intended for personal use, or that plaintiff notified him that it was so intended, and that it had been purchased in Statesville or shipped therefrom, or that the plaintiff had been damaged. The denial of the eighth paragraph of the complaint, alleging the notice above referred to, is somewhat irregular in form, but its sufficiency is not now before the court. No direct reference is made in the answer to the seventh paragraph of the complaint, in which defendant is charged with willful, malicious, and unlawful seizure; but the third paragraph of the answer contains the following: "Further answering, defendant alleges that, if liquor was seized in transit to plaintiff, such seizure was legal and proper, the said plaintiff having the reputation of a liquor dealer, and having been convicted of selling liquor in violation of law, and at the times alleged in his complaint herein, as defendant is informed and believes, the said plaintiff was maintaining in the city of Greenville a place where persons were allowed to resort for the purpose of drinking liquor, and where it was bargained or sold or given away in violation of law." The plaintiff moved to strike out this second defense on the ground that it is irrelevant, immaterial, redundant, argumentative, and does not state facts sufficient to constitute a defense. The motion was denied, and the first exception draws in question the correctness of the decision.

It is the duty of dispensary constables to seize contraband liquor as directed by the statute law of the state. If, however, they seize liquor not contraband, they go beyond the law, and violate individual right. If this is done willfully and maliciously, they are liable for punitive damages. Liquor purchased in another state and shipped to the purchaser in this state is not contraband, being protected as an article of interstate commerce until it is delivered to the purchaser. *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088; *State v. Holleman*, 55 S. C. 244, 31 S. E. 622, 33 S. E. 366, 45 L. R. A. 567. The fact that the purchaser to whom it is consigned is engaged in the illicit sale of liquor, and purchases it for the purpose of resale, can make no difference. The liquor is none the less an article of interstate commerce, and cannot be legally seized until it is delivered to the consignee. For these reasons, taking this language of the answer alone without connecting it with what had been already said in the answer, it would not be a defense, for it would amount to nothing more than say-

ing, although the liquor might have been in transit from the seller in North Carolina to the purchaser in South Carolina, and therefore exempt from seizure, yet, as it was in transit to one who had the reputation of dealing in contraband liquor, and who was actually engaged in that unlawful pursuit, its seizure was lawful. Under the authorities above cited it is manifest this would be no defense, if the defendant seized the liquor knowing it was exempt by reason of being in transit from the seller in North Carolina. We find, however, the defendant had before in the answer denied the liquor was in transit, or that he had received any notice from the plaintiff to that effect. This is not an action to recover the value of the whisky, but for punitive damages for seizing liquor not contraband, willfully and maliciously. The issue therefore is whether there was a willful and malicious violation of the plaintiff's rights—an intentional abuse of official power, and malicious purpose to oppress.

Even if the liquor was exempt, the material inquiry in a case of this kind is whether the constable knew, or ought to have known, it was exempt, or was he endeavoring with due caution to honestly exercise the duties of his office in making the seizure? In meeting this issue the fact that the plaintiff had the reputation of being a liquor dealer, and had been convicted of selling liquor contrary to law, and that he habitually kept liquor for sale in violation of the law the constable was required to enforce, would be a very cogent defense. Those who habitually engage in the illicit sale of liquor are professional criminals, and it would be, indeed, singular that a constable charged with unlawfully, willfully, and maliciously seizing the kind of property with which they ply their trade should not be allowed, after denying the notice of the exemption imputed to him by the plaintiff, to allege and prove the reputation of the defendant as an illicit liquor dealer, and the fact that he was actually engaged in selling contraband liquor, in rebuttal of the charge of willful and malicious seizure of exempt liquor. It is possible for a burglar to have shipped to him a kit of tools, intending to use them for the exclusive purpose of opening his own safe, but it would be a very effective defense for a police officer, charged with willful and malicious tort in seizing the tools, to allege and prove their owner was known as a professional cracksmen, and was actually engaged in plying his trade with other tools when the tools intended for a lawful purpose were seized. It is true, as a general rule, reputation, good or bad, may not be pleaded or proved as a defense in a civil action. Exceptions to this rule embrace actions for breach of promise, seduction, malicious prosecution, libel and slander, assault and battery. As another exception, "in actions of tort, wherever the defendant is charged with

fraud from mere circumstances, evidence of his general good character is admissible to repel it." Greenleaf on Evidence, 54; Dawkins v. Gault, 5 Rich. Law, 153; Werts v. Spearman, 22 S. C. 219. We have no hesitation in making a case of this kind an exception. The dispensary law requires of dispensary constables delicate and responsible duties, the vigilant discharge of which is of great importance to the public. When a person whose liquor is seized seeks to punish such an officer by recovering from him damages for intentional violation of his duty, it would be beyond all reason to deny to the officer the right to plead and prove on the issue of willfulness and malice that such person was known as a professional dealer in illicit liquors. For these reasons it seems clear the allegations are not immaterial nor irrelevant. An allegation is irrelevant when the issue framed by its denial can have no connection with nor effect upon the cause of action. Pomeroy on Remedies, § 551; Smith v. Smith, 50 S. C. 54, 27 S. E. 545.

Proof of the facts alleged here might be made under the general denial of willfulness and malice, and a general denial would have been more in accordance with the best rules of pleading. But it does not follow the allegation should be stricken out as redundant and argumentative. "If a complaint or petition should, in violation of the principles established by the reformed procedure, allege the evidence of some issuable or material fact instead of the fact itself, or should state a conclusion of law in place of the proper fact or facts which support it, these averments would be irregular, imperfect, insufficient, and liable to correction by a motion; but they might not be necessarily redundant. If the pleading was not reformed, and if the defect was not so serious as to render it demurrable, it would be treated on the trial as sufficient; and the statement of probative matter or of legal conclusions would take the place of the issuable or material facts which ought to have been averred, and would thus become material." Pomeroy on Remedies, § 551. The first exception is overruled.

The circuit judge sustained the demurrer interposed by defendant to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, in that suit could not be brought against the defendant individually, but must be brought upon his official bond. Since the decision of Scott v. Donald, 165 U. S. 59, 17 Sup. Ct. 265, 41 L. Ed. 632, it is not to be doubted that individuals have the right under the Constitution of the United States to import liquor into this state for their own personal use. It is equally well settled by the cases of Rhodes v. Iowa and State v. Holleyman, supra, that liquor purchased out of this state and shipped into the state does not become subject to the dispensary law until delivered to the consignee. Scott v. Donald was an action for

\$6,000 damages for the willful and malicious seizure of liquor from the railroad company by a state constable. It was therefore precisely like the case now under consideration. At the time that case arose the dispensary law provided: "No suit shall lie for damages alleged to arise by seizure and detention of liquors under this act." Act 1895, § 22 (21 St. at Large, p. 737). The constitutional right to import implies that the appropriate remedy for the violation of the right cannot be denied by the state. Upon this principle the Supreme Court of the United States disregarded the statutory prohibition above quoted. The same prohibition is to be found in the present dispensary law (Cr. Code, § 578). Under the authority of Scott v. Donald we are obliged to hold it is without effect in cases of this kind, and that a suit for damages may be maintained against a dispensary constable for illegal seizure of liquor imported for personal use or in transit from another state, unless the General Assembly has provided another remedy, which was intended to be exclusive, and which substantially supplies its place.

In 1900 the General Assembly passed an act amending the dispensary law, and the portion of the amendment which is now under consideration appears in the Civil Code, in section 661: "Such constables shall, before entering upon the duties of their office, each give bond to the state in the sum of five hundred dollars, with surety or sureties to be approved by the attorney general, conditioned for the faithful performance of the duties of his office; and in case of the breach of said bond, suit may be brought thereon by any person aggrieved thereby, either in the county where any of the obligors reside or in any county where said breach may have occurred." The question is whether suit on the bond of the constable was intended to be the exclusive remedy of the owner where liquors in transit from another state or imported for personal use are willfully, maliciously, and unlawfully seized. In considering whether the remedy was intended to be exclusive, it must be remembered the General Assembly had before it the principles laid down by the cases above referred to. There are no words in the statute indicating the exclusion of other remedies; but, as was held in Moore v. Ewbanks, 66 S. C. 376, 44 S. E. 971: "Where a statute authorizes the taking or damaging of property for public purposes, and provides a remedy by which compensation may be obtained, such remedy is not cumulative, but conclusive." If, however, the statute, as in this instance, merely gives permission to use the new remedy, and the new remedy is inadequate to take the place of the old, it will not be regarded as exclusive, because the courts will not, in the absence of express words in the enactment to that effect, impute to the Legislature an intention to destroy an old remedy without supplying a new one sufficient to protect and

enforce the right. The bond is limited to \$500. It is manifest this would be quite inadequate where the damages sought are over \$500 in one suit, or an aggregate of more than \$500 in several suits. Suits are allowed at the instance of private persons on all official bonds, but the bond required by the state of an officer to secure the faithful discharge of his duty is not the measure of his liability. If the sheriff should, while acting officially, do willful and malicious injury to the amount of \$20,000, it cannot be doubted the party injured could maintain a suit against him for the entire amount, although his bond might be for only \$10,000. We think it clear the remedy of suit on the bond was not intended to be exclusive.

Section 600, Cr. Code, provides: "Chapter I, title VII, of the Code of Civil Procedure of this state, entitled 'Of Provisional Remedies in Civil Actions,' shall not apply to any officer or person having duties to perform under this chapter, and in no case shall an action lie against any such officer or person for damages to person or property, as provided in said chapter." Title 7 of chapter 1 of the Code of Civil Procedure relates to arrest and bail, and hence the position of defendant that it prohibits an action of this kind cannot be sustained.

For the reasons above stated, the second exception is sustained.

The judgment of this court is that the judgment of the circuit court dismissing the complaint be reversed.

(67 S. C. 499)

MATTHEWS v. SEABOARD AIR LINE RY. et al.

(Supreme Court of South Carolina. Nov. 27, 1903.)

RAILROADS—INJURY TO LICENSEE—USE OF RIGHT OF WAY—EVIDENCE.

1. Where a railroad company has acquiesced for a long time in the use of a path by pedestrians over a right of way, one using it becomes a licensee, and, if he knows the dangers of the path, he uses it at his own risk; but the company is liable to one injured thereon in ignorance of the dangers, where there are no guards and no notice thereof.

2. Defendant railroad company dug an excavation under the tracks of two parallel roads between which was a path customarily used by pedestrians. A bridge had been built over such excavation, but it had become decayed, and the public were accustomed at such place to cross a bridge used on one of the parallel roads. *Held*, that all the railroad companies were liable as joint tortfeasors where a person was injured by falling into the excavation at night, he being ignorant of the fact that the bridge had been taken away, and that pedestrians were accustomed to cross over one of the railroad bridges.

Appeal from Common Pleas Circuit Court of Greenwood County; McCullough, Special Judge.

Action by O. P. Matthews, administrator of John E. Partlow, against the Seaboard & Roanoke Railroad Company and the Rail-

road & Gaston Railroad Company, operating the system known as the Seaboard Air Line Railroad, as lessees of the Georgia, Carolina & Northern Railway, the Southern Railway, the Charleston & Western Carolina Railway Company, and town of Greenwood. All defendants appeal except the latter. Affirmed.

S. J. Simpson and F. Barron Grier, for appellant Charleston & W. C. Ry. Co. T. P. Cothran, for appellant Southern Railroad, J. L. Glenn, for appellant Seaboard & R. R. Co. Graydon & Giles and Wm. N. Graydon, for respondent.

WOODS, J. The plaintiff, as administrator of John E. Partlow, instituted this suit for damages, alleging his intestate was killed by falling into a railroad cut in the town of Greenwood, and that the accident was due to the joint negligence of the defendants. The defendants demurred on the ground that the complaint fails to state facts sufficient to constitute a cause of action. The demurrer of the town of Greenwood was sustained, and the plaintiff did not appeal. The separate demurrers of the three railroad companies were overruled, and they have all appealed.

The appeal involves no question concerning the incorporation, sales, and leases of the several railroads, which are set out in the complaint, and no reference need be made to them. The following statement contains all the allegations of the complaint necessary to the discussion of the questions involved:

The Columbia & Greenville Railroad was built in 1852 from Columbia to Greenville, and is owned and operated by defendant Southern Railway Company. The Charleston & Western Carolina Railroad was built in 1882 from Augusta, Ga., to Spartanburg. The Georgia, Carolina & Northern Railroad, known as part of the Seaboard system, was built in 1890, and at Greenwood passes under the Southern Railway and the Charleston & Western Carolina, at right angles, through a cut about 30 feet deep and 18 feet wide. The Southern Railway and the Charleston & Western Carolina Railway, for about 200 yards above the crossing toward Greenville and about 500 yards below the crossing toward Columbia, run parallel to each other and about 10 or 12 feet apart. The sides of the cut for a distance of about 60 feet are held secure by granite walls, and the crossing is made by iron girders resting on the sides of these walls. The walls are entirely within the limits of the rights of way of the two roads by which they are crossed. The Southern Railway has a side track running across the cut parallel with its main line, on the side opposite to the track of the Charleston & Western Carolina Railway, and has always maintained a bridge across the cut between its main line and

side track. Negligence is charged against all the defendants in that they allowed the cut to remain open and unprotected, and failed to keep a light burning at the cut, or to give any notice or warning of its danger, although it was in the corporate limits of the town, within 200 yards of the public square, and crossed one of the main thoroughfares; the defendants, well knowing the danger of leaving it thus unprotected, their attention having been called to it, several persons having fallen into it, and at least one having been killed by the fall.

It is further alleged "that at least twenty years before the building of the said Georgia, Carolina & Northern Railroad there was a well-beaten path—a regular traveled place—over which the public had acquired a prescriptive right to travel, and used by the public at their will and pleasure, along the space now between the track of the said Columbia & Greenville Railroad and the Charleston & Western Carolina Railroad, both above and below the said cut, which path or traveled way the public have continued to use up to the present time." Negligence is charged against the Georgia, Carolina & Northern Railway Company in not building a bridge across the cut it had made, thus leaving it open and exposed, and in a dangerous condition. After the cut was made, the path was deflected from its original course, about six feet from the cut, across the main track of the Southern Railway, and then led over the cut on the bridge built by the Southern Railway between its side track and main line. It is alleged the defendants all well knew the public were using the path as a passageway or sidewalk for pedestrians, with a right to do so; but none of them gave any notice or warning to the public not to so use it, but, on the contrary, such use was "with the knowledge, acquiescence, and consent of them all." The complaint then gives the following account of the accident: "That on the night of March 13, 1899, John E. Partlow, who was a citizen of Greenwood county, but not a resident of the town of Greenwood, and not acquainted with the cut and its surroundings, left the home of his daughter, Mrs. Bessie P. Andrews, in said town, to go down to the public square of said town on some matter of business or pleasure, walked along the said path, and on account of said cut being open and unprotected, his ignorance of its presence, and his being unable to see it in the darkness of the night, fell into the same, without fault or negligence on his part, and was so bruised and hurt by the said fall that he died from his injuries on the 2d day of April, A. D. 1899."

Responsibility is thus charged on the defendants, as a conclusion from the allegation above set forth: "That the direct and proximate cause of the death of the said John E. Partlow was the gross and concurring negligence of the said defendants in constructing

said cut, and in allowing it to remain open and unprotected in the manner aforesaid, although they each and all well knew the danger of allowing it so to remain, and although it was the duty of each and all of them to cover or guard the same."

Since the accident, the town of Greenwood has bridged over the cut with strong and heavy timbers, and erected a fence at each end of the bridge; and the Southern Railway Company has erected a fence as a guard on the outside of the upper or northern granite wall, between its main track and the track of the Charleston & Western Carolina Railway Company, where the town had previously had a fence, which had fallen into decay.

In the foregoing synopsis of the complaint no reference is made to allegations concerning the duty and neglect of the town of Greenwood, for when its demurrer was sustained without appeal its alleged liability was eliminated from consideration.

The first question made by the demurrers is whether the plaintiff's intestate was using a way over which the public had by prescription a right to travel. There are some authorities which hold a railroad company may release or convey a portion of its right of way, and hence that individuals may acquire a private right of way, or the public a highway, over the company's right of way by continuous, open, and adverse use for 20 years. *Gay v. R. R. Co. (Mass.)* 6 N. E. 236; *Turner v. Ry. Co. (Mass.)* 14 N. E. 627; *Blumenthal v. State (Ind. App.)* 51 N. E. 496; *Ry. Co. v. Crownpoint (Ind. Sup.)* 50 N. E. 741; *People v. Ry. Co. (Cal.)* 33 Pac. 728; 22 Am. & Eng. Ency. Law, 1220; *Elliott on Railroads*, § 425. The subject is referred to in *Boggero v. Ry. Co.*, 64 S. C. 104, 41 S. E. 819; *Jones v. Ry. Co.*, 61 S. C. 560, 39 S. E. 758; *Haltwanger v. R. R. Co.*, 64 S. C. 7, 41 S. E. 810; *Hankinson v. R. R. Co.*, 41 S. C. 1, 19 S. E. 206; and *Ringstaff v. Ry. Co.*, 64 S. C. 546, 43 S. E. 22; but the question here made was not decided or involved in any of these cases. The doctrine above stated, under our statutes and the general principles of law, should be received, we think, with an important limitation. Railroad companies are allowed to acquire rights of way by condemnation because of the interest the public has in the construction and operation of their roads as highways, and hence a right of way so acquired is burdened with duties to the public. Therefore it may be stated as a general proposition, while the railroad company may deal with the right of way so acquired as its own in the conduct of its business as a carrier, it cannot dispose of it or use it so as to destroy or impair its ability to serve the public. 5 *Thompson on Corporations*, §§ 5878, 6137; *Thomas v. R. R. Co.*, 101 U. S. 87, 25 L. Ed. 950; *Ry. Co. v. Hyatt (Cal.)* 64 Pac. 272, 54 L. R. A. 522; *Collett v. Com'rs (Ind. Sup.)* 21 N. E. 329, 4 L. R. A. 321; *R. R. Co. v. Spokane*, 64 Fed. 506, 12 C. C. A. 248. Our statute under which

the right of way is acquired provides that nothing therein contained "shall be construed to confer upon such person or corporation any right in or power over the lands so condemned, other than such as may be within the particular purpose for which such lands were condemned." Civ. Code 1902, § 2194. Nevertheless, it is absolutely necessary that there should be many crossings for the use of those passing from one side of railroads to the other for business and social purposes, and it is sometimes essential that a public road or another railroad should run parallel with a railroad already constructed within the limits of its right of way. In recognition of this public necessity the law allows condemnation of a way for such purpose over lands already acquired for a railroad right of way, "provided, that in the construction of such other highway there be no hindrance to the use and enjoyment of the highway for which such lands or right of way were previously procured." Civ. Code 1902, § 2195.

When conditions arise that would justify the condemnation of a way over a railroad right of way, the railroad company no doubt could, without violating its duty to the public, waive condemnation, and allow the easement over its own right of way, subject to the condition indicated by the statute that the new highway should be so constructed as not to interfere with its own use to such an extent as to impair its ability to perform its public duties. Prescription can only arise from presumption of a grant or dedication. Under our own statute the railroad company has no power over a right of way acquired by condemnation except to use it for railroad purposes, and it therefore cannot grant it to another for other uses. The statute further forbids any portion of the right of way being taken under the state's right of eminent domain for another public highway, except with the provision that such other highway shall be so constructed as not to interfere with the first public purpose for which the land was set apart. The public may no doubt acquire a right to use a particular way over lands set apart for a railroad right of way by use clearly shown to be adverse for 20 years, in the sense that after that lapse of time the railroad authorities cannot arbitrarily forbid the use of such way for any reason not connected with the operation of the railroad; but, since the company cannot grant its right of way so as to defeat the purpose for which it was acquired, and it cannot be condemned for another highway so as to hinder these uses, it cannot be presumed that there ever was any grant or dedication to a public use inconsistent with the purpose for which the property was acquired by state authority. The use made of the right of way by others, with or without the consent or acquiescence of the company, must be regarded subject to the right to use the property for the conduct of the railroad's business as a carrier for the public.

Besides, the width of the strip of land necessary for railroad purposes is fixed under the authority of the state, and this fact creates a strong presumption that the whole of it should be preserved as necessary for the purpose for which it is set apart, except when burdened with condemnation for another highway; and the mere use for purposes of travel of a portion of the right of way, however long and notorious, should be regarded not adverse, but subject to yield to the end the state has in view in exercising its power of eminent domain in setting it apart and fixing its limits. The case under consideration affords a striking example not only of the reasonableness, but of the necessity, of this rule. Two of the great railroad systems have acquired rights of way and are running their main lines through the town of Greenwood 10 or 12 feet apart. If the people of that vicinity are held by the use here alleged to have acquired a right, not subject to railroad purposes, to the space not actually occupied by the railroad tracks, it would inevitably interfere with the construction of side tracks or double tracks, which the development of the country may render essential to the public convenience and welfare, but also with the present operation of trains. The rule founded on legal principles and demanded by public necessity is thus stated in *Jones on Easements*, § 281: "A prescriptive right to a passageway along the track or right of way of a railroad cannot be acquired by the public or by individuals while the railroad company has constantly used a single track over such right of way. The construction and operation of one track upon its location is an assertion of right to the entire width of its right of way. The presence of a track constantly in use is a defiant badge of ownership, and the only practical assertion of title that can be made. If the public has used paths by the side of the railroad track for any length of time, the use must be considered as permissive, and not adverse. An injunction will be issued in behalf of the railroad company to restrain any interference with the laying of a second track over such part of its way as has been used by the public as a footway for more than twenty-one years." *R. R. Co. v. Freeport (Pa.)* 20 Atl. 940.

The complaint alleges this narrow strip had been used by the public for more than 20 years before the accident occurred, but it does not allege it was not used by the railroads for the purposes for which a right of way is acquired, or that it was not necessary for those purposes, or that the foot travel over it was inconsistent with railroad uses, or in any way hostile or adverse. The bald statement that "the public had acquired a prescriptive right to travel" on this strip is a mere legal conclusion, which, so far from being supported by the allegation of fact, is negatived by the statement that the public use was "with the knowledge, ac-

quiescence, and consent" of the defendants. *Bailey v. Gray*, 53 S. C. 514, 81 S. E. 354. Under the allegations of the complaint, we conclude there was no public right of passage acquired by prescription between the tracks of the Southern Railway and the Charleston & Western Carolina Railway.

It should be observed, the conclusion that the public cannot acquire a way on a railroad right of way by prescription which is founded on the presumption of a deed does not imply that title to portions of the right of way may not be acquired by adverse possession which is founded on possession hostile to the true owner. Neither adverse possession nor the doctrine of equitable estoppel, referred to in *Crocker v. Collins*, 37 S. C. 333, 15 S. E. 951, 84 Am. St. Rep. 752, is involved in this case. While a railroad company cannot lose its right of way by alienation or prescription, because of the public's interest in its holding it for public purposes, it may impose upon itself as a private corporation duties and obligations to the public or to individuals by inviting the use of the right of way, or indicating its willingness that it should be used by the public or particular individuals. In such circumstances the duty devolves on the railroad company to exercise ordinary care to avoid injury to those so using the right of way. This rule is not peculiar to railroads, but is of general application. The invitation need not be expressed in words, but may be implied in a number of ways; such, for instance, as the actual construction or repairing by the railroad company of a road or a bridge along the right of way, which would not be suggestive of any other use except travel on foot or in the ordinary vehicles of the country. The allegation here is that the defendants acquiesced and consented for many years to the use by the public of a "well-beaten path, a regular traveled place," along the right of way of the Southern and the Charleston & Western Carolina Railroads, and at right angles to the track of the Georgia, Carolina & Northern Railroad. "Acquiescence and consent" convey the meaning, not only of knowledge and recognition on the part of the defendants of the alleged use of the right of way, but actual concurrence in such use. The complaint does not allege that the acquiescence and consent on which plaintiff's intestate would have been authorized by law to rely in undertaking to travel the path was evidenced only by the fact that there was "a well-beaten path, a regular traveled place," but, assuming this to be plaintiff's position, the complaint still states a cause of action. It is true that a railroad track is itself a danger signal to pedestrians. All persons in possession of reason must be held to know that, so far from a railroad company being able to construct its road with regard to the safety of those who walk on it, it must have numerous dangerous cattle guards, cuts, and trestles, and that no ade-

quate speed of trains could be maintained if those in charge of them had to have concern for persons who take the risk, unbidden, of walking on the track or right of way. Hence, ordinarily, those who walk along or across railroads, however general the practice may be, are trespassers, taking upon themselves all the risks; and the railroad company owes them no duty except not to harm them willfully or wantonly. *Jones v. Ry. Co.*, 61 S. C. 560, 39 S. E. 758; *Smalley v. Ry. Co.*, 57 S. C. 243, 35 S. E. 489. But where a railroad company allows the public to use its right of way for a long time at a particular place in a large town so continuously and frequently that it becomes a well-beaten or clearly defined path, plain and open, a reasonable man may well infer that he will not encounter unguarded cuts and the other dangers of the ordinary path along the track. In such a case the owner of the property knows and acquiesces in the use, and by his acquiescence those wishing to go in that direction are lured into a sense of safety in following the course obviously taken by those who have preceded them. If the owners, or those in control of the property, fail to observe ordinary care in avoiding injury to persons who travel the path, relying on the safety suggested by the implied invitation, they must be held responsible.

A contrary view is taken in some cases of very high authority. *Redigan v. R. R. Co.*, 155 Mass. 44, 28 N. E. 1133, 14 L. R. A. 276, 31 Am. St. Rep. 520; *R. R. Co. v. Arnola* (Miss.) 29 South. 768, 84 Am. St. Rep. 645; *Devoe v. R. R. Co.* (N. J. Err. & App.) 43 Atl. 899; *Griswold v. R. R. Co.* (Mass.) 67 N. E. 354; *Ry. Co. v. Martin*, 14 Neb. 295, 15 N. W. 696; *Ry. Co. v. Griffin* (Ind. Sup.) 50 Am. Rep. 783; *Lingenfelter v. R. Co.* (Ind. Sup.) 55 N. E. 1021; 3 Elliott on Railroads, § 1154. The general rule, in which all the courts agree, however, is that the owner of property is held to ordinary care to avoid injury to one who enters his premises by invitation, express or implied; but the variance is as to what facts imply an invitation. In the cases above mentioned it is held that acquiescence in the use of the right of way for a long time, indicated by a plain, well-defined road or path at a particular point, manifestly differing from the ordinary path along the track, does not imply invitation or suggestion to the public to use the path, except where the path is used as an approach to the company's place of business by those having occasion to transact business with the company.

The rule as we have stated it, which is contrary to the doctrine laid down in the above cases, seems to require nothing more than ordinary good conduct on the part of the owner in the use of his property, to the end that injury to his neighbor may be avoided; and we think it is supported by the current of judicial opinion. *Jones v. Ry. Co.*, 61 S. C. 560, 39 S. E. 758; *Hansen v. So.*

Pac. Co. (Cal.) 38 Pac. 957; Taylor v. Canal Co. (Pa.) 57 Am. Rep. 446; Burton v. R. R. Co. (Ga.) 25 S. E. 736; Ry. Co. v. Potter (Kan.) 67 Pac. 534, 56 L. R. A. 575; Davis v. Ry. Co. (Wis.) 17 N. W. 406, 46 Am. Rep. 667; Barry v. R. R. Co. (N. Y.) 44 Am. Rep. 377; Swift v. Ry. Co., 123 N. Y. 645, 25 N. E. 378; Felton v. Aubrey, 74 Fed. 350, 20 C. C. A. 436; Harriman v. Ry. Co. (Ohio) 12 N. E. 451, 4 Am. St. Rep. 507; Ry. Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434; Bennett v. R. R. Co., 102 U. S. 577, 26 L. Ed. 235; Lepnick v. Gaddis (Miss.) 16 South. 213, 26 L. R. A. 686, 48 Am. St. Rep. 547; note, 26 L. R. A. 688; 23 A. & E. Ency. Law, 732. The English cases are to the same effect. It is, of course, always a question for the jury to determine whether the way was so plain and so constantly used, with the acquiescence and consent of the owner, as to imply an invitation to the public to enter.

It is noteworthy that while in the case of Redigan v. R. R. Co., supra, the Supreme Judicial Court of Massachusetts seemed to take very advanced ground against the doctrine that invitation may be implied from such conditions as are above stated, yet in the case of Chenery v. R. R. Co., 35 N. E. 554, 22 L. R. A. 575, it holds, while long use by the public of a well-defined path across a railroad track does not, as a matter of law, import a license, still it presents a question of fact for the jury as to whether a license is to be implied, which would subject the railroad to liability for negligence.

The New York Court of Appeals and the courts of some other states hold that, where injury results from mere passive omission of the railroad company to guard or give notice of a dangerous place on its right of way, where the public has been accustomed to use it in the manner indicated above, no liability will be incurred for resulting accident, but that the company will be liable for injury resulting from its active negligence at such place; as, for instance, in running its trains without looking out for the safety of travelers, or digging a pit, or placing explosives, without adequate notice, at a place where it has acquiesced in the general and frequent use by the public of its railroad track. Barry v. R. R. Co. (N. Y.) 44 Am. Rep. 377; Byrne v. R. R. Co. (N. Y.) 10 N. E. 539, 58 Am. Rep. 512; Felton v. Aubrey, 74 Fed. 350, 20 C. C. A. 436. This distinction may fairly be supported on the ground that the people at large may well be held to have notice of the dangers already existing along the path they are accustomed to travel, and the owner may properly assume that they enter the premises in full contemplation of the danger, and of their own volition assume the risk; but they do not assume the risk of dangers brought upon them unexpectedly by the owner of the property. The distinction should not apply to that portion of the public who are not familiar with the dangers of

the way, but enter it with sufficient reason to infer it has been used by the public with safety. Applying this view to the allegations of the complaint in this case will, we think, make its reasonableness obvious. Those who walked in the path here described entered not a public highway, but the property of the railroad companies as licensees; and, even if they did so in pursuance of an invitation, express or implied, but knew of the existence of the cut and its dangerous condition, they accepted the invitation in full view of the danger, and for their own convenience voluntarily assumed it. In such case, it seems clear the railroad companies would not be responsible for resulting injuries. But, if the jury should find the path is of the kind to invite entrance and suggest safety, one who enters, relying upon this invitation, in ignorance of danger, and falls into a deep, unguarded cut, at right angles to the path, may hold the railroad companies responsible, in the absence of contributory negligence, if they had reason to expect such persons to enter. The allegation here is that the plaintiff's intestate did not know of the cut or surroundings, and could not see it on account of darkness. We venture to suggest that if this distinction between those who know the danger and those who do not is borne in mind it will reconcile in some measure the apparent conflict of authority on this subject.

Before leaving this branch of the case, it may be well to observe there is an obvious difference between a case like this, where there are allegations of such apparent use by the public as to suggest safety and invite entrance, and the turn-table and other cases of that nature, such as Bridger v. R. R. Co., 25 S. C. 24; Ry. Co. v. Beavers (Ga.) 39 S. E. 82, 54 L. R. A. 314, and Ryan v. Towar (Mich.) 87 N. W. 644, 55 L. R. A. 310, 92 Am. St. Rep. 481, where there is no indication of invitation, or even willingness, that the person injured should enter, the entry being merely a trespass to gratify curiosity, or to attain some other end peculiar to the particular individual.

The appellants insist, however, that the attempt of plaintiff's intestate to use a path between two railroad tracks, with which he was unacquainted, in the darkness of night, was itself such carelessness on his part as to warrant the court in dismissing the complaint on the ground of contributory negligence. Whether there was contributory negligence by Partlow in this respect, which was the proximate cause of his death, depends on the character of the path, and possibly on many other circumstances, which are for the consideration of the jury. The case of Jarrell v. R. R. Co., 58 S. C. 491, 36 S. E. 910, therefore does not apply, for the reason that we cannot say, as a matter of law, that no other conclusion could be drawn than that plaintiff's intestate was guilty of contributory negligence, which was the proximate

cause of his death. No detailed discussion of this point is attempted, because the case is to be heard by a jury.

Having reached the conclusion that the complaint states a cause of action, the remaining question is whether the defendants can be held jointly liable. It will be observed there is no allegation that any one of the three companies had improperly constructed its road. The charge is not that the cut which made the danger and into which Partlow fell was improperly constructed and located, but that, owing to the kind of path that led to it over the right of way of the Southern Railway and the Charleston & Western Carolina Railway, these defendants, after the cut was made, owed the duty to Partlow, entering it as one of the public, either to properly notify the public not to use the path, or to guard or warn by obstructions or lights. The wrong, if any, was in inviting Partlow into a place of danger, known to them, but not to him, without warning or safeguard; and it was of no consequence that the danger was not created by these companies, but by the rightful action of another railroad in making the cut. If, under such circumstances, he was injured without fault on his part, they should be held liable. On the other hand, the lessees of the Georgia, Carolina & Northern Railway cannot avoid liability on the ground that it had no part in allowing the use of the path, and had never in any way consented to such an approach to its cut. It is alleged the Georgia, Carolina & Northern Railway Company knew of the existence and nature of the path when it made the cut, which was dangerous to pedestrians because of its being across the path at right angles. It will hardly be disputed that one who rightfully makes a ditch or cut, dangerous to travelers, across a well-defined way, with knowledge that it has for a long time been used as a public way, and gives no warning and places no safeguard, will be liable to those who, without fault of their own, are injured thereby. If there was any duty to safeguard the cut, it seems clear that it was a duty which devolved upon each of the defendants. From this conclusion it results that the defendants were properly sued jointly. "If two or more persons owe to another the same duty, and by their common neglect of that duty he is injured, doubtless the tort is joint, and upon well-settled principles each, any, or all of the tortfeasors may be held. But when each of two or more persons owe to another a separate duty, which each wrongfully neglects to perform, then, although the duties were diverse and disconnected, and the neglect of each was without concert, if such several neglects concurred and united together in causing injury, the tort is equally joint, and the tortfeasors are subject to a like liability." *Matthews v. R. R. Co.* (N. J. Sup.) 27 Atl. 919, 22 L. R. A. 262. See, also, *Peoria v. Simpson*

(Ill.) 51 Am. Rep. 683. The allegations of this complaint would bring the case even within the Pennsylvania rule, which is much stricter as to joint liability than that above stated. *Klauder v. McGrath* (Pa.) 78 Am. Dec. 329. The cases of *Langhorne v. Ry. Co.* (Va.) 22 S. E. 159, and *Howard v. Union Traction Co.*, 195 Pa. 391, 45 Atl. 1076, on which appellants rely, may be readily distinguished from this case.

It is quite obvious the allegations of this complaint are very different from those which were held insufficient in *Dorn v. Ry. Co.*, 58 S. C. 364, 38 S. E. 654.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

GARY, A. J., concurs in the result.

(67 S. C. 515)

SOUTH BOUND R. R. v. BURTON. SAME v. TAYLOR. SAME v. HIGBEE. SAME v. DAY. SAME v. PIERCE. SAME v. FINLEY. SAME v. GREER. SAME v. HOLMES.

(Supreme Court of South Carolina. Nov. 28, 1903.)

RAILROADS—USE OF CITY STREET—RIGHT OF ABUTTING OWNERS—ELEMENTS OF DAMAGE—ESTOPPEL.

1. Under the act of 1786 (4 St. at Large, p. 751) under which the city of Columbia was founded, the state owns the fee of the streets. In 1871 the Legislature empowered the council to lay out new streets and to widen or otherwise alter those then in use, subject to the constitutional provision against taking private property without compensation, and the statutory provision as to the method of acquiring property for street purposes. Held that, if the city council authorized the operation of a railroad in a street, an abutting owner was entitled to damages for the substantial depreciation of the value of his lot.

2. The measure of damages for the use of a street by a railroad company is the decline in the value of the property because of the noise, smoke, loss of light and air, increased risk of fire, and material interference with ingress and egress, so far as they depreciated the value of the lots.

3. Possession by a railway company of a portion of a street, without interference on the part of the public, may afford ground to estop the public from questioning the title of such company.

Appeal from Common Pleas Circuit Court of Richland County; Dantzler, Judge.

Eight actions by the South Bound Railroad Company against Eliza Burton, against Maria L. Taylor, against Mary E. Higbee, against Margaret Day, against Emma L. Pierce, against John N. Finley, against Aaron Greer, and against Martha Holmes. From decrees for defendants, plaintiff appeals. Modified.

Wm. H. Lyles and D. W. Robinson, for appellant. Melton & Belser and P. H. Nelson, for respondents Taylor, Higbee, Day, Pierce, Finley, and Greer. R. W. Shand, for respondent.

§ 2. See *Eminent Domain*, vol. 12, Cent. Dig. § 235, 278, 279, 286, 272.

ent Burton. J. T. Seibels, for respondent Holmes.

WOODS, J. The South Bound Railway Company brought these separate actions against the several defendants to enjoin them from prosecuting statutory proceedings instituted to obtain compensation for depreciation of their property in the city of Columbia, resulting from the construction and operation of the plaintiff's railroad through Lincoln street. All of the lots abut on Lincoln street, except lot No. 2 of the defendants, Eliza Burton and her co-tenants, which is contiguous to their lot No. 1 on that street. The circuit judge, upon trial of the case, dissolved the temporary injunctions, holding that all the defendants were entitled to have their damages assessed under the condemnation statute. The act of 1786 (4 St. at Large, p. 751), under which the city of Columbia was founded, provided that the land acquired by the commissioners for that purpose should be held by them "for the use of this state," but it directs them to lay off lots and streets of prescribed dimensions. In 1871 the Legislature empowered the city council to "lay out new streets, close up, widen or otherwise alter those now in use," subject to the constitutional prohibition against taking private property without compensation, and the statutory provisions as to the method of acquiring property for street purposes and assessing damages. Under this authority the city council, on September 28, 1899, authorized the South Bound Railroad Company to build its road through Lincoln street.

The appellant takes the position that the state, under the act of 1786, remains the absolute owner of all streets of the city, that abutting owners can acquire no rights therein against it, and, since it enjoins the city council to close up or alter the streets, the authorization by the council to use Lincoln street was equivalent to direct authority to the railroad from the state. We incline to think the appellant's view is correct, that the rights acquired by the state in the lands upon which the city of Columbia was laid off are similar to those of the United States in the lands upon which the national capital is built. In both instances the streets were laid off under public authority, and commissioners directed to sell lots with reference to those streets; and under such circumstances the public faith is pledged not to destroy or materially interfere with the street privilege, which it created as an inducement to purchasers. This principle was not involved in *Van Ness v. Mayor*, 4 Pet. 232, 7 L. Ed. 842, or *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 3 Sup. Ct. 445, 27 L. Ed. 1070, relied on by appellant. Conveyance to the purchaser of lots abutting on a street carries with it the property rights to the reasonable use of the street, of which he cannot be deprived for even a public purpose without compensation. *Hot Springs R.*

R. Co. v. Williamson, 34 L. Ed. 355, note; *Railroad Co. v. Applegate* (Ky.) 83 Am. Dec. 497; *Haynes v. Thomas*, 7 Ind. 48; *Lewis on Eminent Domain*, § 114. But whatever may be the rights of the state in this regard, it is clear that the Legislature did not by the act of 1871 intend to confer on the city council the absolute power over the streets which appellant attributes to the state. Fair interpretation of the act leads to the conclusion that it only gives such control of streets as is usually exercised by such officers, which is subject to the constitutional burden of making compensation for the taking of private property. It may be true that, where the state by charter authorizes the construction of a railroad on a definite line, the right is implied to enter and cross the land of the state on that line; but this implication does not extend to the destruction or impairment of private property rights which others have acquired with respect to such land in consequence of an antecedent contract with the state. It is manifest, therefore, the respondents having acquired property rights in Lincoln street by reason of the state's sale of the abutting lots to their grantors, with an implied contract that the purchasers should have the usual benefits and privileges of abutting owners, the state could not, though the owner of the street, authorize the taking away of such benefits and privileges without compensation.

The vital question, therefore, is whether the construction of a railroad through Lincoln street is such curtailment of the usual street privileges as entitles an owner of abutting lots to compensation for the depreciation in value of his property arising from the railroad use. It is insisted such depreciation does not amount to taking property, but only damaging it, and hence cannot form the basis of a proceeding under our Constitution and statute, which only provide compensation for "taking." It is not to be doubted, as said in *Transportation Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336, "The state, and the city council as its agents, had full power over the highways of the city to improve them for the uses for which they were made highways." Those who purchase city lots, in the absence of statutory protection, take them subject to the exercise of the discretion of the city authorities to improve the streets for the uses for which they were made highways. It is true, in *Garraux v. Greenville*, 53 S. C. 577, 31 S. E. 597, the court said: "The great weight of authority is to the effect that a change in the grade of a street which diminishes the value of the adjacent property is not a taking of property, within the constitutional provision above quoted." Similar expressions are used in *Water Co. v. Greenville*, 53 S. C. 89, 30 S. E. 699. These are correct statements of the law applicable to those cases, both of which involved claims for damages arising from a change of grade made in improving a street; for the claimants there

held their property subject to the right of the city council to improve the street by changing the grade, and hence such alteration could not involve the taking of a property right, for none existed as against the discretion of the council to change and improve the street. 2 Dillon on Municipal Corporations, § 990. The depreciation of value produced by building an ordinary railroad through a street presents a very different question. The operation of a railroad running to distant points is not a street purpose. It is not ordinarily used to transport either freight or passengers from one part of a city to another, and has no direct connection with a city's internal traffic or travel, which are the distinctive uses of its streets. Hence the building and operation of a railroad through a street cannot be regarded such a street use as to require the abutting landowner to submit to the total or partial obstruction of the value of his property without compensation. Causing such depreciation is clearly destroying or taking property. Property is not only ownership of particular lands or chattels, but it embraces the value they have by reason of their legal relations to all other things. All rights in a street which the residents of a city have in common are administered, under legislative authority, by the city council as trustees for all its citizens, and hence the council's consent to the use of the street by the railroad company is binding on the city at large (*Cherry v. Rock Hill*, 48 S. C. 560, 26 S. E. 798); but an abutting landowner has a special property in the benefits derived from the street on which his land is situated, by reason of its relation to the street, which differs in kind and degree from the interest of the municipal public, and the destruction or any impairment of these benefits for other than street purposes, which materially lessen its value, is taking private property. This view seems clearly correct in principle, and we think it is supported by the great weight of authority even in those states where, as in this state, the constitutional and statute law do not provide for compensation for damage to property when taken for a public purpose. *Wilkins v. Gaffney*, 54 S. C. 199, 32 S. E. 299; *Abendroth v. Railroad Co.* (N. Y.) 25 N. E. 496, 11 L. R. A. 634, 19 Am. St. Rep. 461; *Story v. Railroad Co.*, 90 N. Y. 122, 43 Am. Rep. 146; *White v. Railroad* (N. C.) 18 S. E. 330, 22 L. R. A. 627, 37 Am. St. Rep. 639; *Railroad Co. v. Steiner*, 44 Ga. 546; *Elliott on Roads & Streets*, 528; 1 *Lewis on Eminent Domain*, 240. As was intimated in *Ross v. Ry. Co.*, 83 S. C. 483, 12 S. E. 101, and *Leitzey v. Water Power Co.*, 47 S. C. 464, 25 S. E. 744, 34 L. R. A. 215, it would be a very narrow and technical construction not to hold that the term "lands," used in the condemnation statute, embraces "all rights and easements growing thereout." The case of *McLauchlin v. Ry. Co.*, 5 Rich. Law, 596, was decided under constitutional and statute law essentially different from those now in

force; but even if this was not the case, we should be forced to overrule it on this point on principle as well as under the authorities above cited.

The great majority of the older authorities sustain appellant's view that the doctrine above stated applies only where the owner of the abutting property also owns the fee in the street, but not where he has only an easement, the fee being in the state or the city. A careful collation of the cases supporting this position is found in 2 Dillon on Mun. Corp. § 702, note. But this doctrine is now completely overturned. 2 Dillon on Mun. Corp. §§ 704, 723c; *Story v. Railroad Co.*, supra; *Lahr v. Railroad Co.*, 104 N. Y. 268, 10 N. E. 528; *White v. Railroad*, supra; *Theobald v. Railway Co.* (Miss.) 6 South. 230, 4 L. R. A. 735, 14 Am. St. Rep. 504; *McQuaid v. Railway Co.* (Or.) 22 Pac. 899; *Kaufman v. Railroad Co.* (Wash.) 40 Pac. 137; *Adams v. Railroad Co.* (Minn.) 39 N. W. 629, 1 L. R. A. 493, 12 Am. St. Rep. 644. It is difficult to imagine a right more empty and theoretical than private ownership of the fee in the street of an established city. The possibility of regaining possession of the property by abandonment of the street is so remote that it may ordinarily be regarded a negligible factor. The adjacent owner has no present beneficial use differing in the slightest degree from that which is acquired by a purchaser, for himself and his assigns, who buys a lot abutting on a street laid out by the state or the city on its own land. In the one case in his dedication he retains, and in the other, by the state's or the city's dedication, he acquires, certain street privileges which constitute property.

But it is not the mere laying of a railroad track and the operation of a railroad in a street that would entitle abutting landowners to compensation, when, as in these cases, they have not the fee in the street, and have, therefore, not even a technical interest in it beyond the right to use it for street purposes. Hence it is only the substantial depreciation of the value of the abutting lots that can be assessed in their favor, and the measure of the assessment is the decline in the value of the property consequent upon the use of the street by the railroad. The difference in value should be substantial, and not fanciful or conjectural, for the advance of society imports increased friction among its members; and, if the law sanctioned the holding up for compensation of public and private enterprises on account of mere inconvenience or annoyance, it would impede rather than promote the public welfare. We shall not attempt to add anything to the very clear statement of the law on this subject made by Mr. Justice Jones in *Allen v. Union Oil Co.*, 59 S. C. 578, 38 S. E. 274. It is there held that there must be some substantial physical injury to the real estate, not merely discomfort, inconvenience, or bodily injury to the person of the owner. The jarring of the building,

noise, smoke, vapors, loss of light and air, increased risk of fire from sparks, material interference with ingress and egress, set forth in each of the answers, are all items which may enter into the estimate, but only so far as they depreciate the value of the lots. *Bowen v. Railroad Co.*, 17 S. C. 579; *Board of Trade v. Darst*, 85 Am. St. Rep. 306, note; *Egerer v. Railroad Co. (N. Y.)* 14 L. R. A. 381, note; *Case v. Minot (Mass.)* 22 L. R. A. 543, note. The loss of light and air cannot be excluded from consideration, as appellant contends, under the authority of *Bailey v. Grey*, 53 S. C. 515, 31 S. E. 354, and *Napier v. Bullwinkle*, 5 Rich. 301, for these cases only hold that the right to light and air cannot be acquired by prescription, and do not touch this question. The case of *Manson v. Railroad Co.*, 64 S. C. 121, 41 S. E. 832, does not apply, because in that case the court held those claiming damages had no legal interest in Sydney Park, near which their lands were situated, differing in kind from that of other residents of the city of Columbia.

We proceed to the consideration of the several cases, in view of the legal conclusion above stated. The jury determines the amount of the assessment; the court can only fix the principles on which it should be made. If the foregoing statement of the law is correct, it will not be denied that the injunction in the case of *Martha Holmes* must be dissolved. *Maria L. Taylor, Eliza Burton* and her co-tenants, *Mary E. Higbee, John N. Finley*, and *Aaron Greer* have corner lots, and hence have access from another street. This fact may lessen the depreciation, but it does not destroy their right to have the loss of value assessed.

It is alleged that *Emma L. Pierce, Margaret Day, John N. Finley, Mary E. Higbee*, and *Eliza Burton* and her co-tenants have encroached on Lincoln street, and it is contended that, in so far as the injury to the lots of these parties arises from, or is increased by, such encroachment, they can make no claim against the railroad company. The appellant has attacked with great force the conclusion reached by the court in *Crocker v. Collins*, 37 S. C. 334, 15 S. E. 953, 34 Am. Rep. 752: "We think, therefore, that mere adverse possession, for the statutory period, of a street or alley in a town, which is a public highway, cannot confer a title. But where such possession is accompanied with other circumstances which would render it inequitable that the public should assert its rights to regain possession, then, upon the principle of estoppel, a party may be protected against the assertion of right by the public, in order to prevent manifest wrong and injustice. For example, when a party, under an honest conviction of right, has taken possession of a portion of one of the streets or alleys of a town, and expended his money in erecting buildings thereon, without interference on the part of the public, these, or perhaps other circumstances connected with adverse posses-

sion for the statutory period, may afford good ground for estoppel." This doctrine has been repudiated by courts of high authority, but it has much to commend it. Certainly the argument against it is not sufficiently strong to warrant the court in overruling the case. We think there is sufficient evidence to sustain the conclusion of the circuit judge that these cases fell within the rule stated in that case. Lot No. 2, of *Eliza Burton* and her co-tenants, does not abut on Lincoln street, and they have not, by virtue of such ownership, any property rights in its street privileges differing from those of the general public. For this reason, the injunction in their case must be made permanent as to this lot. *Cherry v. Rock Hill*, supra; *Manson v. Railroad Co.*, supra; *Aldrich v. Railroad Co. (Ill.)* 63 N. E. 155, 57 L. R. A. 237.

With the modification indicated above, the judgment of the circuit court is affirmed.

(57 S. C. 526)

DICKSON v. BURCKMYER et al. (two cases).

(Supreme Court of South Carolina. Nov. 28, 1903.)

COUNTY TAXES—LEVY—SCHOOL TAX—POWER OF COUNTY BOARD—COMPUTATION—HARMLESS ERROR—SALE—TITLE DEED—SEIZURE BY SHERIFF—EXCESSIVE LEVY—ASSIGNMENT OF BID—RIGHTS OF LANDOWNER.

1. A levy of county tax by the Legislature without levy by county authorities is valid.

2. Under 23 St. at Large, p. 157, § 18, providing that county commissioners shall levy a tax in their respective counties for the support of public schools, the county board has no power to do anything other than see that the school tax is entered for collection, and entry of the tax without action by the county commissioners does not affect its validity.

3. Const. art. 11, § 6, providing that county boards shall levy an annual tax on all the property in their respective counties, to be collected at the same time and by the same officers as other taxes, confers only administrative power on the board of county commissioners as to the school tax.

4. Under Code 1902, § 355, where the sum resulting from the computation of the tax on any particular parcel of property requires for its exact expression any fraction less than a half mill, such fraction should be dropped.

5. An error in taxes collected by execution of \$1 is too small to render the sale invalid where it is not shown to have interfered with payment by the owner, or causes a sale of a larger piece of property than otherwise would have been sold.

6. Code 1902, § 421, requires the auditor to issue tax executions to the sheriff in duplicate, and prescribes the form in which the execution shall run; and the sheriff is directed, on sale, to attach the duplicate to the title deed. *Held*, that the fact that the sheriff attached the original, instead of the duplicate, to the deed, is immaterial.

7. Under Code 1902, § 423, a sheriff, under a tax execution, must "seize and take exclusive possession of so much of the defaulting taxpayer's estate" as is necessary to raise the amount of the tax.

8. Whether a sheriff made an excessive levy of tax is an issue for the jury, and the fact that the land sold for 10 times as much as the amount of the taxes is not conclusive.

9. A bid at tax sale may be assigned by the purchaser.

10. An objection that the tax execution did not specify the amount of taxes to each fund is not well founded.

11. A sale of real estate for taxes not made for cash is invalid.

12. Failure of owner of land to have the tax sale thereof suspended, under 20 St. at Large, p. 52, § 3, is not a bar to an action against the purchaser at tax sale for possession of the land within two years.

Appeal from Common Pleas Circuit Court of Beaufort County; Klugh, Judge.

Actions by Eliza O. Dickson, by J. M. Dickson, guardian ad litem, against Cornelius Burckmyer and others, and by Marion Rush Dickson, by J. M. Dickson, guardian ad litem, against same defendants. From an order overruling demurrer, both parties appeal. Affirmed.

The plaintiffs allege that the tax deed in question was invalid for the following reasons:

"(1) The fiscal authorities of the county of Beaufort failed and neglected to levy a tax for county purposes for the county of Beaufort for the fiscal year beginning January 1, 1899, upon all the taxable property in said county, or upon any part thereof, as required by article 10, § 13, of the Constitution.

"(2) The county board of commissioners of the county of Beaufort failed and neglected to levy a tax of three mills on the dollar upon all the taxable property in said county, or upon any part of it, for the public schools for the county of Beaufort for the fiscal year beginning January 1, 1899, as required by article 11, § 6, of the Constitution.

"(3) There has been no valid levy for county or school taxes for the county of Beaufort for the fiscal year beginning January 1, 1899, as required by law, and the execution issued to enforce the payment of such taxes is void.

"(4) The auditor of the county of Beaufort entered upon the tax duplicate for the fiscal year beginning January 1, 1899, the sum to be levied upon the real estate of W. F. Proctor for county and school purposes, without having received from the officers or authorities legally empowered to determine the rate or amount of taxes to be levied for school and county purposes statements of the rates and sums to be levied for the current year, as required by section 287, Rev. St. S. C. 1893.

"(5) The real estate listed in the name of William F. Proctor (975 acres) consisted of two separate tracts, to wit, the Cotton Hall Farm, containing 600 acres, and the Winterdale Place, containing 875 acres; and the said auditor failed and neglected to enter either upon his own duplicate, or upon the duplicate for the county treasurer, for said fiscal year, the taxes upon each of said parcels of land, as required by sections 287 and 289, Rev. St. 1893.

"(6) The said county auditor for said fiscal year assessed against the said property, list-

ed in the name of W. F. Proctor, for all purposes added together, a rate of taxation (14¼ mills) resulting in a fraction less than one-half mill, and failed to drop said fraction of one-fourth of one mill, as required by section 288, Rev. St. 1893.

"(7) The said county auditor for said fiscal year entered upon his own duplicate, and upon the duplicate for the county treasurer, against the said property listed in the name of W. F. Proctor, taxes for all purposes amounting to \$34.49. Said property assessed at \$2,350 would have been chargeable at the rate of 14¼ mills for all purposes, with taxes (if otherwise legal) to the amount of \$33.4875. Said auditor has therefore overtaxed said property to the amount of one dollar and one-fourth of one cent, for which excessive and illegal amount the tax execution also called.

"(8) That the county auditor of Beaufort county, upon the expiration of the time allowed by law for the payment of the taxes for said fiscal year, failed, as required by section 347, Rev. St. 1893, to issue a warrant or execution in duplicate against William F. Proctor, the alleged defaulting taxpayer, but, on the contrary, partially filled out an original and duplicate tax execution, and delivered the original to the said sheriff, retaining the duplicate in his office, attached to the stub of his tax execution book. That the duplicate so retained as aforesaid by the treasurer is illegal and fatally defective, in that the portion of the same beginning with the words, 'These are, therefore' (as shown in the form set out in the above section of the Revised Statutes), is blank, with nothing thereafter except the signature of the treasurer and the name of the county; and the original, wrongfully attached to the deed delivered to defendants by the said sheriff, is similarly and in other respects defective and illegal.

"(9) That the said sheriff annexed to the deed executed by him to the defendants as aforesaid the original tax execution, and not the duplicate, as required by section 349, Rev. St. 1893.

"(10) That the said sheriff has not levied, seized, or taken exclusive possession of the whole or of any part of the real estate hereinbefore referred to. That upon receipt of the tax execution hereinbefore referred to from the county treasurer, the said sheriff sent the same, with a large batch of other executions, to Roger Pinckney, a magistrate of Beaufort county, for collection. That said Roger Pinckney intrusted the same to his constable for collection, who reported to him that he could not collect it. That said Roger Pinckney so reported to the sheriff, and returned the execution. That the said sheriff took no further legal steps in the matter, except to advertise and sell the land. That he never went upon the premises either in person or by deputy.

"(11) That the taxes claimed to be due upon the entire 975 acres above described were

only \$34.49; the penalty of 15 per cent. amounted to \$5.17; making a total of \$39.66. On March 15, 1900, James M. Dickson, father of this plaintiff, sent, for the purpose of paying the taxes upon the said 975 acres, to the county treasurer, a check for \$34.49, which the treasurer had in his hands at the time the said execution was issued, leaving a balance of the penalty only \$5.17. That said sheriff was informed of said payment, but, notwithstanding, attempted to levy and sell the entire real estate of 975 acres for the payment of the amount alleged to be due, \$39.66, and costs of levy, advertisement, and sale. That said attempted levy and sale were in direct violation of section 349, Rev. St. 1893, which directs the sheriff to seize and take exclusive possession of only 'so much of the defaulting taxpayer's estate, real or personal, as may be necessary to raise the sum of money named therein.' That the said check was not returned by the treasurer to said J. M. Dickson until June 18, 1900, after the alleged sale on June 5, 1900.

"(12) That on June 7, 1900, the said sheriff notified the said J. M. Dickson that upon payment by him of \$13.45, the balance claimed to be due, he (the sheriff) would withdraw the sale, and forward receipt. That thereupon the said J. M. Dickson forwarded to the sheriff the said amount, which, however, was returned by the sheriff, with the statement that the land had been sold, and that the purchasers demanded a deed for the same.

"(13) That said attempted levy and sale were excessive, contrary to the spirit and letter of the law, and null and void.

"(14) That at said alleged sale the said real estate was bid off by one C. L. Paul, Jr., at the price of \$435. That he did not comply with the terms of sale.

"(15) That the deed from the sheriff to the defendants Cornelius Burckmyer and H. G. Burckmyer is witnessed by C. L. Paul, Jr., who has an interest in said real estate. Said deed is therefore void.

"(16) That the alleged execution fails to state the amount of taxes to each fund, as required by section 347, Rev. St. 1893, and directs the sheriff to collect more, by \$1.0025, than the entire property was liable for, as shown in 7, supra.

"(17) That the sale of said real estate was not advertised according to law, and was not made for cash.

"(18) That the title to said real estate was in the plaintiff at the time the taxes were or ought to have been levied, and at the time the alleged execution was issued."

T. P. Cothran, for plaintiffs. Wm. Elliott, Jr., for defendants.

WOODS, J. The plaintiffs in these two cases sue separately to recover different parcels of land, but the actions, in other respects being based on the same allegations of fact,

and involving the same legal questions, were heard together by consent in the circuit court and in this court. The defendants demurred to each of the complaints on the ground that it did not state facts sufficient to constitute a cause of action. In overruling the demurrers, the circuit judge decided a number of interesting questions, and both sides have appealed.

It appears from the complaints that one Wm. F. Proctor was the owner of two tracts of land in Beaufort county, known as "Cotton Hall Farm" and "Winterdale Place," containing, respectively, 600 acres and 375 acres, and that on November 15, 1898, he conveyed Cotton Hall Farm to the plaintiff Marlon Rush Dickson, and Winterdale Place to the plaintiff Eliza De C. Dickson. Under his conveyances they seek to recover in these actions the lands from the defendants, Cornelius Burckmyer and H. G. Burckmyer, who, as the complaints allege, claim title by virtue of a purchase of both tracts together as one tract at a sale made by the sheriff of Beaufort county under a tax execution against W. F. Proctor, issued for taxes claimed to be due for the fiscal year beginning January 1, 1899; the sheriff's deed therefor having been executed on or about June 18, 1900.

The plaintiffs, under 18 different heads, allege facts concerning the levy and assessment of the taxes and the sale by the sheriff which they insist make the sale illegal and void. The demurrers raise the question whether, assuming these allegations to be true, the defendants' title would be defeated by any or all of them. The grounds upon which the tax title is assailed, as stated by the plaintiffs, will be printed in the report of the cases, and we proceed to their consideration without quoting the complaint or the exceptions. In considering these grounds, it should be borne in mind that the right to tax property, so essential to the very existence of government, under the laws of this state, can be enforced only by subjecting property to sale for nonpayment of taxes assessed against it. To hold tax sales invalid for slight and technical irregularities would therefore be to unreasonably embarrass the state in the collection of its revenue. The sound view is that all requirements of the law leading up to tax sales which are intended for the protection of the taxpayer against surprise or the sacrifice of his property are to be regarded mandatory, and are to be strictly enforced. On the other hand, those provisions of the statute designed merely for the guidance of the officer, in order to secure the due and orderly conduct of the public business, concern the state only, and, as to the individual taxpayer, are to be regarded directory; and the courts will not, in his behalf, declare a tax sale void for failure by the officer to follow the strict letter of such provisions of law. Cooley on Taxation, 471; French v. Edwards,

80 U. S. 510, 20 L. Ed. 702. The questions here involved should be considered in view of this general principle.

The plaintiffs' first position is that, although the tax levy for county purposes for the year 1899 was fixed by the General Assembly, the tax sale was of no effect, because the fiscal authorities of Beaufort county failed to levy this tax, as provided by article 10, § 13, of the Constitution of the state. We agree with the circuit judge, that the case of *Railway Co. v. Kay*, 62 S. C. 28, 39 S. E. 785, is directly opposed to the plaintiffs' view.

The next question is whether there was a valid levy of the three-mills school tax provided by article 11, § 6, of the Constitution, in these words: "The existing county boards of commissioners of the several counties, or such officer or officers as may hereafter be vested with the same or similar powers and duties, shall levy an annual tax of three mills on the dollar upon all taxable property in their respective counties, which tax shall be collected at the same time and by the same officers as the other taxes for the same year."

* * * Section 13 of "An act to raise supplies," etc., for the fiscal year commencing January 1, 1899 (23 St. at Large, p. 157), is as follows: "That the county board of commissioners in each of the several counties of this state shall levy a tax of three (3) mills on the dollar upon all taxable property of their respective counties, for the support of public schools in their respective counties, which shall be collected at the same time and by the same officer as the other taxes for this year, and shall be held in the county treasuries of the respective counties and paid out exclusively for the support of public schools, as provided by law." This school tax was charged against the land in dispute by the county auditor, but the complaint alleges no levy was made by the county board of commissioners.

Whether this was a legal tax, depends upon the meaning to be given to the word "levy," as used in the sections of the Constitution and of the statute above quoted. Does it import that some distinct official action by the county board of commissioners was necessary before the tax could be entered for collection? It will be observed that the Constitution is mandatory in requiring the levy to be made by the county board of commissioners, and leaves no discretion of any kind to that board. After much consideration, the constitutional convention of 1895 rejected a proposition to require the General Assembly at each regular session "to empower and authorize" the county board of commissioners to levy an annual tax "not exceeding three mills." In the most explicit language, the Constitution has thus made the three-mill school tax a permanent charge on all property, not to be lessened by any official action short of constitutional amendment. Fixing the rate of

taxation, and ordering that it shall be levied, is the creation of the tax. This excludes from the act of levying, which is required of the county board of commissioners, any signification of creation. The duty to levy imposed on the board is therefore purely ministerial, and only imports that it should take such action as would result in the tax being placed on the auditor's books. This could be done by serving on the auditor a resolution directing him to enter the tax, or in any other appropriate method. In other words, the ministerial action required of the board is to aid in the collection of the tax by taking steps to have the tax entered on the books containing the tax levy. The county boards of commissioners have no power to do anything more or less than require that the tax be entered, and, if it is entered without the formality of the requirement, it seems quite manifest that their formal mandate becomes unnecessary, and its absence does not affect the legality of the entry.

This conception of the meaning of the word "levy," as here used, is supported by the following very clear statement of the distinction by Associate Justice Gary in the case of *Railway Co. v. Kay*, supra: "The word 'levy,' as hereinbefore shown, is frequently used in more than one sense, and its meaning in a particular instance is to be determined by resort to the context. It is sometimes used for the purpose of conferring all the powers incident to the creation and collection of a tax, as when 'corporate authorities are vested with power to assess and collect taxes for corporate purposes,' while again it is only intended to confer administrative powers in the collection of the tax, without reference to its creation, and this is the sense in which it is used in the thirteenth section. By this construction alone can force and effect be given to all the foregoing provisions of the Constitution. It will be observed that the thirteenth section makes no reference to the creation of the tax, which only could be done by the General Assembly, or by the county after the General Assembly had 'vested it with power to assess and collect taxes for corporate purposes.' The intention was that the taxes for the subdivisions of the state should be collected by the respective fiscal authorities thereof, whether imposed by the General Assembly or the corporate authorities of counties, etc., when vested by the General Assembly with power to assess and collect taxes for corporate purposes." See, also, *Coolley on Taxation*, 325, note.

For these reasons, we think the first, second, third, and fourth grounds assigned by the plaintiffs for alleging the tax title invalid are unsound.

The plaintiffs' fifth position is that the land which was sold as the property of Wm. F. Proctor consisted of two tracts, and the county auditor entered them for taxation as one tract, and not separately. The com-

plaint fails to allege that they were returned for taxation as separate tracts, or that they were not contiguous, or that they were separate from each other in any respect except in the names by which they were called. There is no sufficient allegation that the auditor entered two distinct parcels of real property as one, in violation of section 289 of the Revised Statutes of 1893 (Code 1902, § 356).

The sixth allegation against the tax title is that the aggregate per cent. of taxation was $14\frac{1}{4}$ mills, and the auditor, under section 288 (Code 1902, § 355) of the Revised Statutes of 1893, should have disregarded the fraction of one-fourth of a mill in his computation. This construction of the statute is obviously erroneous. The meaning of the law is that, where the sum resulting from the computation of the tax on any particular parcel of property requires for its exact expression any fraction less than a half mill, such fraction shall be dropped.

The plaintiffs, in their seventh objection, allege the assessment of the property to have been \$2,350, upon which the tax should have been computed at $14\frac{1}{4}$ mills, making \$33.4875, whereas the sum of \$34.49 was charged, and execution issued therefor. There is no allegation that Proctor, the owner, was exempt from poll tax, and the \$1 excess may be referred to this liability. Cooley on Taxation, 498, note. The case of *Wilson v. Cantrell*, 40 S. C. 181, 18 S. E. 517, holds the poll tax is properly included in the execution against property. Taxes cannot, however, be held to constitute a lien on property without statutory authority. *Barker v. Smith*, 10 S. C. 228. The statute does not expressly or by implication make the poll tax a lien on the property of the taxpayer. The land in this case had been conveyed away before any attempt to levy under the execution was made, and it would have been illegal to levy on and sell the land to enforce the collection of the execution if it had been based on the grantor's poll tax alone. If, on the other hand, the alleged excess arose from an error in calculation, we are not prepared to say an excess of \$1 in an aggregate tax of \$33.49 is sufficient to invalidate the sale. It is true, the sheriff is required to levy on as much property as may be sufficient to satisfy the taxes, and, if the taxes are increased by illegal additions, the taxpayer suffers injury by reason of the greater quantity of property it becomes necessary to seize and sell in order to satisfy the execution. *State v. Hodges*, 14 Rich. Law, 256; *Cooley on Taxation*, 429; 25 Am. & Eng. Ency. Law (1st Ed.) 387. But the error here was too small for the court to suppose it would have interfered with payment by the owner and recovery of the excess, under section 349 of Revised Statutes of 1893, or that it led to the sale of any more property than would have been sold if the execution had been issued for the true amount.

The allegations of the plaintiffs in the seventh ground of their attack, if established, would not defeat the tax title.

Section 347, Rev. St. 1893 (Code 1902, § 421), requires the auditor to issue tax executions to the sheriff in duplicate, and provides that the executions shall "run substantially" in the form therein prescribed. In case of sale, the sheriff is directed to attach the duplicate to the title. It is alleged here that only the original was given to the sheriff, and he attached this, instead of the duplicate to the deed. This was a mere irregularity, which could not possibly be prejudicial to the taxpayer. The law in this regard was intended to provide proper evidence of the sale, in the interest of the state and of the purchaser. In no case could it be of consequence to the taxpayer whether the original or the duplicate was attached to the deed.

It is also alleged the original and duplicate forms of execution were only partially filled out, the name of the defaulting taxpayer and the amount of the tax not being inserted in the printed form of the mandate. It is true that an execution without a mandate is usually regarded void. *Freeman on Executions*, 38. In this case the execution stated the tax, and the name of the person who had made default. We do not think the mere omission to repeat the amount and the name, in commanding the sheriff to levy, would invalidate the execution. In *Kingman v. Glover*, 3 Rich. Law, 27, 45 Am. Dec. 756, the court says: "If the process which the tax collectors are authorized to issue does, in substance and effect, comply with the provisions of law, and afford to the owner of property the notice which may be necessary for its protection, formal and technical exceptions may, without inconvenience or danger, be disregarded."

We think, therefore, the execution was valid, notwithstanding these alleged irregularities, and the eighth and ninth objections to the tax title are not well founded.

The next allegation is that the sheriff failed to "seize and take exclusive possession" of the land. The general rule is that actual seizure of possession by the officer is not necessary to a levy where the debt which is the basis of the execution is a lien on the property. *Freeman on Executions*, § 280. In this state the entry of the levy on an execution issued on a judgment has been held sufficient on the ground that no statute requires actual entry and possession of the land. *Martin v. Bowie*, 37 S. C. 115, 15 S. E. 736. A tax execution stands upon an entirely different footing, because the statute explicitly requires the sheriff to "seize and take exclusive possession" under such an execution. "Under and by virtue of said warrant or execution, the sheriff shall seize and take exclusive possession of so much of the defaulting taxpayer's estate, real or personal, or both, as may be necessary to raise

the sum of money named therein and said charges thereon, and, after due advertisement, sell the same," etc. Rev. St. 1893, § 349 (Code 1902, § 423). The requirement is one which greatly concerns the defaulting owner of the land, for the seizure and taking possession by the sheriff is a notorious act, which tends to give the defaulter and the community notice of the intended sale, and thus prevent a sacrifice of the property. We think the tenth objection to the title is well founded.

The eleventh, twelfth, fifteenth, and eighteenth objections were not sustained by the circuit judge, and the plaintiffs very properly acquiesced in his conclusion as to them.

The thirteenth position taken is that the levy for a tax of \$33.4875 on 975 acres of land, which sold for \$435, was an excessive levy. The sheriff cannot be expected to know in advance exactly how much land it will be necessary to sell to collect the amount due on process in his hands. It does not follow, as a matter of law, that the levy was excessive because the land sold for even 10 times the amount of the debt, for land sometimes sells for much more than even the best judges expect. The sheriff is required to seize sufficient property, and it is a question of fact whether he has exercised a reasonable discretion. The title of a purchaser who has bought in good faith at a tax sale should not be disturbed because the sheriff levied on more property than was necessary, unless the levy was so excessive as to indicate oppression, arising from design or inexcusable ignorance. Freeman on Executions, 253. The plaintiffs are entitled to have this issue submitted to the jury.

As we understand, the plaintiffs take the position in their fourteenth objection to the tax title, that C. L. Paul, Jr., who bid off the land, could not make a legal assignment of his bid to the defendants to whom the sheriff made title. There are authorities sustaining this position, where the assignment of the bid was made before the time for redemption by the owner had elapsed, on the ground that, until the owner had lost his right of redemption, the purchaser had only a contingent right to the title, which in law is not assignable. In this state there is no right of redemption after sale, and the purchaser has a right to demand the title as soon as his bid is entered and complied with. There is therefore no reason why he may not assign his bid as in other sales. Blackwell on Tax Titles, 374.

The sixteenth ground of attack, that the tax execution did not specify the "amount of taxes to each fund," as required by the statute, must be held not well founded, on the authority of *Association v. Waters*, 50 S. C. 466, 27 S. E. 948.

The plaintiffs' seventeenth objection is thus stated: "That the sale of said real estate was not advertised according to law, and was not made for cash." The allega-

tion as to the advertisement is a mere conclusion of law, without a statement of the facts upon which it is founded; but the direct allegation that the sale was not made for cash, if established, would be fatal to the validity of the sale, and is not demurrable.

The position taken by the defendants, that the failure of the plaintiffs to have the sale suspended under section 3 of the act of 1889 (20 St. at Large, p. 52) is a bar to these actions to recover possession of the lands, is disposed of by the case of *Bull v. Kirk*, 37 S. C. 400, 16 S. E. 151.

For the reasons above stated, all the plaintiffs' exceptions, and the defendants' 8th, 12th, and 15th exceptions, are overruled; and the defendants' 1st, 2d, 3d, 4th, 5th, 6th, and 7th exceptions are sustained. The defendants' 9th and 10th exceptions are disposed of in the discussion of the plaintiffs' 5th and 13th objections to the tax title. As to the 13th exception of the defendants, it is sufficient to say that the presiding judge did not hold that the sheriff's deed was not prima facie evidence of good title in the holder; but, inasmuch as specific irregularities were pointed out in the complaint, it became necessary for him to consider their effect on the title. Defendants' 14th exception and the several subdivisions of their 11th exception are substantially covered by their other exceptions, and are embraced in the foregoing discussion and adjudication. The result is that the judgment of the circuit court overruling the demurrers is affirmed, and the cause remanded to the circuit court for trial.

(54 W. Va. 493)

RULEY v. FOLEY et al.

(Supreme Court of Appeals of West Virginia.
Dec. 16, 1903.)

BILL OF REVIEW—LIMITATIONS—COMPUTATION OF TIME—APPEAL.

1. The time of the pendency of an appeal from a decree is not to be excluded in computing the period of limitation to a bill of review based on newly discovered evidence.

2. In excluding the time of the pendency of an appeal in computing time limiting a bill of review for error of law, does the exclusion begin at the allowance of the appeal, or the date of the bond required to perfect it?

(Syllabus by the Court.)

Appeal from Circuit Court, Doddridge County; Warren Miller, Judge.

Suit by B. J. Ruley, surviving partner, etc., against B. W. Foley and others. Decree for defendants, and plaintiff appeals. Affirmed.

J. W. Vandervort, Caldwell & Watson, V. B. Archer, and Wm. Beard, for appellant. M. F. Snider, R. F. Fleming, W. S. Stewart, and J. V. Bair, for appellees.

BRANNON, J. Foley brought a suit in equity in the circuit court of Doddridge coun-

¶ 1. See *Equity*, vol. 19, Cent. Dig. §§ 1103, 1106.

ty, for himself and other lien creditors, against F. J. Ruley & Bro., to enforce his own and other liens against lands of Ruley & Bro.; and on 6th September, 1894, a decree was made fixing liens on the lands, and directing a sale for their payment. An appeal to this court was allowed 25th October, 1894, and the decree was by this court affirmed 28th April, 1897, as appears in 43 W. Va. 513, 27 S. E. 268. On 26th April, 1900, the circuit court allowed a bill of review to be filed, seeking to reverse said decree on newly discovered evidence. Later the court allowed an amended bill of review to be filed. On 17th July, 1902, Ruley & Bro. asked leave to file an amended and supplemental bill of review, making a new party, but upon objection the court refused to allow it to be filed; and, from the decree rejecting it, Ruley & Bro. appeal.

The decree of the circuit court was an appealable final decree, from which a bill of review for either error of law or new evidence would lie. *Lehman v. Hinton*, 44 W. Va. 1, 29 S. E. 984; *Core v. Strickler*, 24 W. Va. 689; *Hogg's Eq. Procedure*, § 568a. The limitation for a bill of review is three years from the decree. *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102. The appellants seek to save their bill of review by excluding the time, not merely from the allowance of the appeal, but from the decree to the decision by the Supreme Court. Plainly, the way was open for a bill of review at once upon the decree, and the limitation started at its date. Even if we exclude time from the allowance to the decision of the appeal, the right to file a bill of review was barred when the original bill of review was filed. But can we exclude any time? If there be an appeal, and it ends without decision, and then a bill of review is filed for error of law, the time of the pendency of the appeal is excluded, because there can be no bill of review for error of law pending an appeal, since the appeal carries the case to the higher court, and while there the lower court can make no change in it for any matter of law involved in the record. *Ensminger v. Powers*, 108 U. S. 292, 2 Sup. Ct. 643, 27 L. Ed. 732; *Beach, Mod. Eq. Prac.* § 863; *Dunbar v. Dunbar*, 5 W. Va. 567; 2 *Ency. Pl. & Pr.* 327; 2 *Cyc.* 967. But though an appeal is pending, it does not prevent a bill of review in the lower court on new evidence, because it rests on matter not in the record hitherto, and thus does not involve the same matter involved in the appeal. On this principle, we hold that an appeal may go on in the Supreme Court, and a bill of review on new evidence in the circuit court, at the same time. *Gillespie v. Allen*, 37 W. Va. 675, 17 S. E. 184. Otherwise if the bill of review is for error of law. *Maxwell v. Martin*, 35 W. Va. 384, 14 S. E. 7. In *Wethered v. Elliott*, 45 W. Va. 437, 32 S. E. 209, it was held that when a bill of review is predicated on new evidence, and during its pendency more than two years elapse, its pendency does not save an appeal from being barred. They involve different

things. These cases show that there is no reason why time during an appeal should be excluded in computing time against a bill of review on new evidence, for, if there can be an appeal pending bill of review on new evidence, so there can be a bill of review on new evidence pending an appeal. Counsel cites *Ensminger v. Powers*, 108 U. S. 292, 2 Sup. Ct. 643, 27 L. Ed. 732, and *Beach, Mod. Eq. Prac.* § 865, to sustain his point that the time while the appeal pended must be counted out; but these authorities apply only where the bill of review is for error of law. As the bill of review was barred, we see no error in refusing to allow the amended bill of review. Whether, when time is to be excluded during the pendency of appeal, we begin at the allowance of the appeal, or from the bond which consummates it, under section 14, c. 135, Code 1899, it is not necessary to say. In *Ensminger v. Powers*, 108 U. S. 302, 2 Sup. Ct. 643, 27 L. Ed. 732, it is said to begin with the bond. *Dunbar v. Dunbar*, supra; 2 *Cyc.* 965. *Aspen Co. v. Billings*, 150 U. S. 31, 14 Sup. Ct. 4, 37 L. Ed. 986, leads to this conclusion.

Decree affirmed.

(54 W. Va. 495)

MAXWELL v. WILSON et al.

(Supreme Court of Appeals of West Virginia.
Dec. 16, 1903.)

DEEDS—COVENANTS—GENERAL WARRANTY—
DEFICIENCY IN QUANTITY—REMEDY AT LAW
—LIMITATIONS—EQUITY.

1. A covenant of general warranty in a deed for land relates to title, not quantity, and does not warrant quantity. *Burbridge v. Sadler*, 32 S. E. 1028, 46 W. Va. 39 (Syl., point 6).

2. A claim for compensation for deficiency in quantity of land conveyed by deed, where the purchase money has been paid, is a mere personal demand, not cognizable only in equity, but in law, and is subject to the statute of limitations. *Burbridge v. Sadler*, 32 S. E. 1028, 46 W. Va. 39 (Syl., point 4).

3. In a chancery cause for the enforcement of a legal claim, where a court of law and a court of equity have concurrent jurisdiction, the statute of limitations will be given effect upon demurrer when it plainly appears on the face of the bill that the statute applies in the case.

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County; John Homer Holt, Judge.

Bill by W. B. Maxwell against Allen L. Wilson and others. Decree for plaintiff, and defendant Allen L. Wilson appeals. Reversed.

Harding & Harding, for appellant. Strader & Strader and E. D. Talbott, for appellee.

McWHORTER, P. By deed dated the 22d day of May, 1889, Allen L. Wilson and Emma J., his wife, "in consideration of eight dollars per acre for the land hereinafter described amounting to the sum of \$1,952, paid and to be paid as follows:" One-third cash, and the residue in two equal payments at

¶ 3. See *Limitation of Actions*, vol. 23, Cent. Dig. §§ 170, 671, 672.

one and two years, with interest from date, secured by vendor's lien—conveyed to W. B. Maxwell a tract of land lying in Randolph county, described by metes and bounds, and as containing 244 acres, with covenants of general warranty. The deferred payments of purchase money were paid by the vendee as they fell due; the last payment being made about the 22d of May, 1891. On the 13th day of October, 1898, W. B. Maxwell sued out of the clerk's office of the circuit court of Randolph county his subpoena in chancery, and at the November rules, 1898, filed his bill in equity against Allen L. Wilson, W. A. Wilson, and the United States Coal, Iron & Manufacturing Company, alleging the purchase by plaintiff from the defendant Allen L. Wilson of the said tract of 244 acres of land at the price of \$8 per acre, exhibiting a copy of the deed with his bill; that after the purchase plaintiff took possession of the land, and had had possession of it ever since; that plaintiff relied with absolute confidence upon the representations of Wilson as to the quantity of land in said tract, and did not incur the expense of having the same surveyed; that, at the time of purchasing, the land had a large prospective value on account of the coal, building stone, ballast stone, and timber thereon, if a railroad should be built upon or near the same, and plaintiff had confidence that such road would be built soon thereafter, and that such had been built through the land, realizing what the plaintiff believed was its prospective value, and it had become fairly of the value of \$30 per acre; that about the 22d of January, 1898, plaintiff sold the timber on said land at the price of \$1,000, but the purchaser of the timber discovered a large deficiency in the acreage of said tract, and refused to pay the whole of the purchase money for the timber, and plaintiff, by the advice of counsel, gave to the purchaser a large abatement upon the price of the contract to be paid, and incurred a large amount of costs and expenses in vindicating his title, in which ways he suffered in the aggregate a loss of about \$200, all of which was incurred by reason of the false and fraudulent misrepresentations of said Wilson as to the quantity of said land; that afterward, at a large expense, plaintiff caused Charles M. Marsteller, the surveyor of Randolph county, to go upon the land and make an accurate survey thereof, when it was found to contain but 177½ acres, being a shortage of 66½ acres, making an aggregate of \$532, exclusive of interest, overpaid for the land by plaintiff; that, before plaintiff knew there was a shortage in the land, he had sold a large amount of building rock therefrom, and all the timber and a right of way for a railroad through the land, so that he was in no position to insist upon or consent to a rescission of his contract; that he had discovered some time about the — day of —, 1897, that there was probably a shortage in the acreage of said land, and

did not even have an intimation before that time that there was a shortage; that, as soon as he ascertained it, he called the attention of Wilson to the fact, but he failed and refused to reimburse him for his loss; that Wilson was the owner of another tract of 185 acres, in the same district in Randolph county, and on the 9th of February, 1898, said Wilson, for the purpose of hindering, delaying, and defrauding his creditors, and especially the plaintiff, pretended to sell and convey the 185 acres to the defendant W. A. Wilson, for the purpose of pretended consideration of \$6,500 in cash; that W. A. Wilson was a very young man, and never had any such amount of money, or means of any considerable amount; that he was the nephew of said Allen L. Wilson, and had full notice and knowledge of the fraudulent intent and purpose of said Allen L. Wilson when he accepted such deed, and did not pay any fair consideration for said land, and participated with his grantor in his fraudulent design and purpose; that Allen L. Wilson was not the owner of any other real estate, and had practically no personal property, so that plaintiff was remediless to recover the amount justly due him upon the breach of warranty of said Allen L. Wilson, except out of the proceeds of the sale of the said 185-acre tract; that while Archibald Wilson was the owner of said 185 acres, on or about the 19th of November, 1872, he leased and sold the coal thereon, and the right to remove it, at a royalty of 10 cents per ton, to one Isaac Carpenter; that by successive alienations thereof the said lease passed into the hands of the defendant United States Coal, Iron & Manufacturing Company, which was the owner of the same, but had not mined and removed any of the coal, and was entitled to do so; that the said 185 acres would not rent for enough in five years to satisfy plaintiff's claim, and that no part of the claim had ever been paid; and prayed that the amount legally and justly due him from said Allen L. Wilson be ascertained, and that the said deed to W. A. Wilson be set aside and canceled as having been executed for the purpose of delaying, hindering, and defrauding plaintiff, and the 185 acres be sold, and the proceeds applied to the payment and satisfaction of the amount due plaintiff, and for general and special relief. The bill also exhibits, as a part thereof, the deed for the 185 acres to W. A. Wilson, and the contract of lease or sale of the coal therein. The defendant Allen L. Wilson filed his demurrer to plaintiff's bill, and says that the bill shows upon its face no grounds for equitable relief; that the bill is multifarious; that the bill and exhibits filed therewith show that the plaintiff has been guilty of such laches as will defeat his claims of relief; and, "because the plaintiff's demand is purely legal, and was barred by the statute of limitations at the time of the bringing of this suit; and said defendant now here gives the plaintiff

notice that he will rely on said statute to defeat his demand as fully as though he had especially pleaded it in this cause." The said Allen L. Wilson and W. A. Wilson filed their several and separate answers to the bill, to which plaintiff replied generally. The answers denied all fraud or intention to defraud. Allen L. Wilson also denied all material allegations of the bill. Depositions were taken and filed by both plaintiff and defendants. The cause came on to be heard on the 17th of October, 1902, and the court held that the deed of conveyance made the 9th of February, 1898, from Allen L. Wilson to defendant W. A. Wilson for the 185 acres was made for the purpose of hindering, delaying, and defrauding the plaintiff in the enforcement of his claim, and set aside, annulled, and canceled said deed, and held that the plaintiff was entitled to recover from the defendant Allen L. Wilson the value of the deficiency, 65 $\frac{1}{4}$ acres, at \$8 per acre, or such deficiency with interest thereon from the time it was paid for, and the costs and expenses plaintiff was compelled to pay in vindicating his title to the land, if he paid such costs or incurred any such expenses, and referred the cause to one of the commissioners of the court to ascertain and report the amount plaintiff was entitled to recover, and also to ascertain and report the liens upon the 185 acres of land, and amounts and priorities thereof, and the state and condition of the title to said 185 acres. On the 20th of October the court made an order setting forth that on a former day of the same term the court had entered the demurrer of Allen L. Wilson to plaintiff's bill, and had overruled the same. The commissioner filed his report, ascertaining the amount to be due from defendant Allen L. Wilson to the plaintiff, \$1,064.96, and that the same was a lien upon the 185 acres of land, and reported that no other liens had been presented to him. The defendant Allen L. Wilson excepted to the report because "it reports that there is due from him to the plaintiff on account of a deficiency in the acreage of the land, and proceedings thereabout, the sum of \$1,064.96, or any part thereof, or any other sum, because he owes said plaintiff nothing by reason of the premises." And defendant W. A. Wilson excepted because it reported said sum as a lien upon his land. The cause was finally heard on the 6th day of May, 1903, when the court overruled the exceptions to the commissioner's report, and confirmed the report, and decreed the sale by commissioners of said 185 acres of land to pay said claim. Defendant Allen L. Wilson appealed from said decrees of October 17, 1902, and May 6, 1903.

The first and second assignments of error are that the court erred in not sustaining defendants' demurrer to plaintiff's bill, and also in not dismissing said bill upon the pleadings, proofs, and the hearing thereof. I deem it unnecessary to take any account of the re-

maining assignments of error that the court erred in decreeing to plaintiff the sum decreed on account of the supposed deficiency in the said land, and in not sustaining defendants' exceptions to the commissioner's report—as, in my view of the case, the cause is disposed of upon the demurrer. It is well settled that the statute of limitations will be given effect upon demurrer when it plainly appears upon the face of the bill that the statute may be applied in the case. The deed from Wilson to plaintiff dates May 22, 1889. The last payment of purchase money was made two years thereafter, May, 1891. This suit was brought to recover for the alleged deficiency October 13, 1898, more than seven years after the date of the deed. In *Burbridge v. Sadler*, 46 W. Va. 39, 32 S. E. 1028 (Syl. point 6), it is held: "A covenant of general warranty in a deed for land relates to title, not quantity, and does not warrant quantity." "It has been conclusively settled that covenants for title do not extend to the quantity of land conveyed unless such clearly appears to be the intention." *Rawle on Cov.* 289. And in section 297: "And where land is conveyed by a particular description, and with an enumeration of the quantity of acres, the latter is held to be matter of description, merely, and cannot be deemed an implied covenant for quantity. As, therefore, the descriptive boundaries curtail the quantity, it has been repeatedly held that the covenants for title apply to the premises contained within those boundaries, and not to any enumeration of acres. *Perkins v. Webster*, 2 N. H. 287; *Large v. Penn*, 6 Serg. & R. 488; *Snow v. Chapman*, 1 Root, 528, and many other cases there cited. It is further said in the same last-mentioned section: "Of course, however, this rule will not apply where on the face of the instrument it appears that the covenants were directly intended to assure a particular quantity to the purchaser." As in a late case decided by this court (*Sibley v. Stacey*, 44 S. E. 420), where the deed conveyed certain trees, describing them as to kind, number, size, etc., "marked thus, 'K,' now sound and growing upon the lands of the grantor," etc., it was held to import a covenant or warranty that such trees existed, of the kind and character named, as the language used was not a mere descriptive recital, but was the essence of the conveyance, and that on such covenant or warranty a suit might be maintained for a deficiency in the number of trees conveyed within ten years from the date of the conveyance. Here the definite number of each and every kind of tree, by actual count, was given—nothing contingent on calculation, but the trees counted and designated by a peculiar mark for identification; and the deed contained a further covenant that the vendor would "protect and take care of said timber as long as it may remain upon said premises," and, as stated in the opinion, "thus virtually retaining dominion over the property until possession thereof is taken by the grantee." This

was properly held to be a warranty, by implication, of the number of trees, as well as the title thereto. In *Rickets v. Diakens* (N. C.) 4 Am. Dec. 555, it is held that "the words of a deed describing the length of lines and boundaries, etc., and concluding with the words 'containing so many acres,' do not import a warranty of quantity." In section 1044, 2 Dev. on Deeds, it is said: "In the description of land it is usual, after the description by metes and bounds or subdivisions, to add a clause stating that the land described contains so many acres. But unless there is an express covenant that there is the quantity of land mentioned, the clause as to quantity is considered simply as a part of the description, and will be rejected if it is inconsistent with the actual area, when the same is capable of being ascertained by monuments and boundaries. The mention of the quantity of land conveyed may aid in defining the premises, but it cannot control the rest of the description." In *Pecare v. Chouteau's Adm'r*, 13 Mo. 528, it is said in the opinion: "The cases in which quantity has been held were matter of description are cases where the specific tract conveyed was fixed by metes and bounds or by numbers, or in some other way so determined as to place beyond doubt what tract was conveyed." In *Crislip v. Cain*, 19 W. Va. 438 (Syl., point 18), it is held: "The specification [in a written contract to convey or in a deed conveying] of the quantity exactly, without the addition of the words 'more or less,' or any other qualifying words, renders the deed or contract ambiguous as to whether the parties did or did not intend that the vendor, by such positive affirmation of quantity, should be regarded as making a warranty that there was this quantity." In *Burbridge v. Sadler*, 46 W. Va. 39, 32 S. E. 1029 (Syl., point 4), it is held: "A claim for compensation for deficiency in quantity of land conveyed by deed, where the purchase money has been paid, is a mere personal demand, not cognizable only in equity, but at law, and is subject to the statute of limitations." And in *Sibley v. Stacey* (W. Va.) 44 S. E. 420 (Syl., point 1), it is held: "A legal demand sued on in equity is subject to the statute of limitations, and not laches." The demurrer to the bill should have been sustained.

The decree is reversed, the demurrer to the bill sustained, and the bill dismissed.

(64 W. Va. 89)

LEE v. SMITH.

(Supreme Court of Appeals of West Virginia.
Nov. 14, 1908.)

RES JUDICATA—OBJECTION TO JURISDICTION—
—APPEARANCE—ANSWER.

1. L. instituted his chancery suit in the circuit court of Harrison county (the county in which the alleged cause of action arose) against S.; but the writ commencing the same was directed to the sheriff of, and served on S. in, the county of Jefferson, where he then resided. L. filed his bill, and took depositions. S. appeared and

objected to the taking thereof because no issue had been made on the bill by plea or answer thereto by defendant; but S. cross-examined plaintiff's witnesses, reserving his right to object to the jurisdiction of the court in said suit because the writ was directed and served as aforesaid. The court afterwards refused the motion of S. to quash said writ and dismiss the bill. S. afterwards took and filed depositions, and also filed his answer to the bill, whereupon the court heard the cause upon the bill and exhibits, answer of defendant, and replication thereto, and depositions, and by its decree dismissed said bill at the costs of plaintiff, which decree has not been appealed from, but is in full force and effect. *Held*, that said decree is not void, but may be relied upon by S. as a bar to a subsequent suit brought by L. against him upon the same cause of action.

2. Point 1 of syllabus in *Matheney v. Sandford*, 26 W. Va. 386, approved and applied.

(Syllabus by the Court.)

Appeal from Circuit Court, Jefferson County; E. Boyd Faulkner, Judge.

Suit by Dabney C. Lee against Cruger W. Smith. Decree for defendant, and plaintiff appeals. Affirmed.

D. B. Lucas and D. C. Lee, for appellant.
John Bassel, for appellee.

MILLER, J. On the 9th day of February, 1886, appellant borrowed from appellee \$2,200, for which he executed to appellee his obligation under seal, bearing the date aforesaid, payable three years after its date, with interest from the 20th day of August, 1887; interest having been paid thereon to that date. To secure the payment of this debt, with its interest, as aforesaid, Lee, on the day first named, executed and delivered to Smith a deed of trust, whereby he conveyed to Thomas W. Harrison, trustee, certain property situate in Harrison county, described as a certain lot of ground, and the buildings and appurtenances thereto belonging, in the town of Clarksburg, and the interest of said Lee in a tract of 400 acres of land lying on New creek, of which George H. Lee, his father, had died seised, and which had not then been partitioned among the heirs and others entitled thereto; appellant being one of the heirs. It was and is provided in the deed of trust that, if the party of the first part should desire to dispose of his interest in said New Creek lands before said single bill should fall due, then, upon his payment of \$300 as a credit on the said single bill, the trust deed should be released by said Smith as to the New Creek lands. The trust further provides for a sale by the trustee of the property therein conveyed upon default of payment of the single bill. The debt not being paid at maturity, Lee, by his deed bearing date on the 11th day of March, 1899, but acknowledged and delivered by him on the 30th day of March, 1899, in consideration of the sum of \$2,404.96, granted unto appellee, Smith, in fee simple, without reservation of any kind, and with covenant of general warranty, the said property theretofore conveyed by him to said trustee as aforesaid. The

said consideration, \$2,404.96, was and is the amount of money then due on said trust debt. On the day last named, Smith gave to Lee an option, in writing, authorizing him to sell the property at any time prior to January 1, 1890, for any amount not less than the \$2,404.96, with interest from the 11th day of March, 1889, and also agreed therein to sell the property to said Lee on the same terms, and further agreed to make a proper deed or deeds of conveyance for said property, if sold or purchased by Lee according to the terms of the option, the time of which was afterwards extended by Smith until July 1, 1890. No part of the property was either sold or purchased by appellant under the option. A chancery suit was afterwards instituted in the circuit court of Harrison county by some of the heirs of said George H. Lee, or their assigns, for partition of the said New Creek lands. Appellee was a defendant therein. Partition was made, and 71½ acres of the lands, by metes and bounds, were allotted to appellee in fee and in severalty. On the 18th day of December, 1891, appellee and wife, by their deed, conveyed the said house and lot in Clarksburg to Grace D. Lee, a sister of appellant, for the consideration of \$2,000, and on the 2d day of September, 1891, by their deed, conveyed all the coal underlying the said 71½ acres (described in their deed as 76 acres) to Benjamin Wilson for \$760. On the 8th day of February, 1892, appellee and wife, by their deed, conveyed the surface of their said parcel of land to Mary A. Smith for the consideration of \$760; but in the last-mentioned deed the coal, oil, and other minerals under said land were expressly reserved by the grantors. By their agreement in writing, bearing date on the 10th day of June, 1899, appellee and wife leased said land to the South Penn Oil Company for oil and gas purposes.

Appellant afterwards commenced his suit in chancery in the said circuit court of Harrison county, and at the January rules, 1895, filed his bill against appellee; but the summons to the defendant was directed to the sheriff of Jefferson county, where the defendant then resided, and was there served upon him. In his bill appellant alleges, in substance, that he obtained the loan from appellee as above stated; that he made his single bill for the same, and executed the said deed of trust, conveying the property hereinbefore described, to secure the payment of the debt at maturity; that, when the debt became due, wishing to avoid a public sale under the deed of trust, he, by his deed of March 11, 1889, granted to said Cruger W. Smith, in fee simple, for the consideration of the amount of the debt due, the property conveyed in trust to secure said debt; that said Smith delivered to him an option authorizing him to sell the property; and that the time of the option was extended by Smith at appellant's request. Appellant sets out in his bill the sales by appellee to

Grace D. Lee, Benjamin Wilson, and Mary A. Smith, and charges that those transactions were fraudulent on the part of appellee. Appellant further charges that appellee had committed a fraud upon him in the purchase of the New Creek property, by representing to appellant that said property was of small value and not easily marketable; that said Smith had peculiar technical knowledge to know, and did know, that said land was especially valuable, and underlain with rich veins of coal; and that appellee, by reason of his superior knowledge, obtained an unconscionable bargain from appellant, and, by said deed and transaction, acquired from appellant valuable property for a grossly inadequate consideration. The bill further alleges that said three purchasers, Lee, Wilson, and Smith, were and are innocent purchasers for value, without notice of any fraud on the part of appellee. The bill then prays that said Cruger W. Smith be adjudged and required to pay appellant the sum of \$2,000, with interest thereon from April 1, 1889, or \$2,700 as of the date of the institution of the suit, being the excess of the value of the property at time of its conveyance to Smith as aforesaid over the amount due him from appellant on the debt. The bill is verified by the affidavit of the plaintiff.

Appellee filed his answer, denying therein all the material allegations of the bill. Depositions were taken and filed by both appellant and appellee. At the September term, 1896, the cause was heard by the circuit court of Harrison county upon the bill, answer, general replication thereto, exhibits, and depositions; and thereupon the bill was dismissed, and the costs were decreed against the appellant. From this decree no appeal was ever allowed. It stands unreversed, and in full force and effect. More than two years having elapsed since its rendition, it is now final and conclusive.

At the March rules, 1900, appellant filed another bill in the circuit court of Jefferson county against appellee, in which he sets out substantially as he did in his first bill the said loan to him by Smith; the making of said single bill; the execution of the deed of trust; the making and delivery of said deed conveying to said Smith the said property in fee simple; the execution by Smith of said option to him, and the extension of the time thereof; the partition of the New Creek lands, and the allotment to Smith of the portion conveyed to him by appellant as aforesaid; the sales to Grace D. Lee, Wilson and Mary A. Smith, and the lease to the South Penn Oil Company; that the oil company has extracted large quantities of oil from the New Creek lands, and that said Smith has been offered a large sum for his royalty reserved in the lease. The charges against Smith of fraud and unfair dealing are substantially reiterated. Appellant further alleges "that the understanding between himself and the said Smith at the time of the

said transaction was that the said conveyance to said Smith was to be regarded by them, and was in fact, an equitable mortgage to more fully secure the payment of the debt, with its accrued interest, at a later period." The bill prays that the said Cruger W. Smith be required to transfer and convey to appellant the oil or petroleum, gas, and other valuable minerals under the New Creek lands reserved by appellee, or pay to appellant the value of the same. To this bill appellee tendered and filed his plea of former adjudication, verified by his affidavit, accompanied by a certified transcript of the record of the first-mentioned chancery cause.

Appellant then presented in court, and asked leave to file, an amended and supplemental bill in the cause, alleging, among other things, that said Smith, instead of having the trustee to execute said trust, undertook its execution himself, by taking said deed to himself, thus leaving the legal title to said property outstanding in the trustee, where it still is; that, at the date of the deed to Smith, plaintiff had nothing but the equity of redemption, and could convey no more than he had, and that said Smith, having himself undertaken to execute the trust, should have sold only so much of said property as was sufficient to pay the debt, which Smith at once proceeded to do, and did do, to the amount of \$3,520, leaving outstanding in the hands of the trustee a valuable deposit of oil, the existence of which was not known to plaintiff, but known and relied upon by Smith, though not disclosed by him to the plaintiff; and that the sale of said oil and gas was never intended or contemplated by any of the parties. This amended bill then prayed that said Cruger W. Smith and Flora McD. Smith, his wife, the South Penn Oil Company, the Eureka Pipe Line Company, and Thomas W. Harrison, trustee, be made parties defendant thereto, and be required to answer the same; that the whole transaction be considered as a mortgage; that an account be taken, and a receiver appointed; and that Smith and wife be compelled to convey to plaintiff the gas and oil underlying said 71½ acres of land.

To the filing of said amended bill, the defendant objected, and moved the court to reject the same, which was done. Appellant then replied to the said plea nul tiel record, and the cause came on to be heard upon the bill, exhibits therewith, said plea, the transcript of the record, and upon the general replication to said plea, as well as the replication of nul tiel record; and the court being of opinion that the matters averred in said plea were true, and constituted a defense to the matters alleged in plaintiff's bill, it was decreed that the said bill be dismissed, and that plaintiff should pay to the defendant his costs in said suit by him expended. From this decree the appellant obtained an appeal, and complains that the circuit court erred in rejecting his said amended

bill, and in sustaining said plea of former adjudication. He contends that the circuit court of Harrison county had no jurisdiction to make its decree dismissing his first bill; that said decree was and is therefore a nullity; that the said deed of March 11, 1899, was and is a mortgage, and should be so treated; and that the court erred in rejecting said amended and supplemental bill.

The process commencing the first suit was issued from the office of the clerk of the circuit court of Harrison county, the county wherein the cause of action, if any, arose; but it was directed to the sheriff of, and served on Smith, the defendant, in Jefferson county, where he then resided. Section 2 of chapter 124 of the Code of 1899 provides: "Process from any court, whether original, mesne or final, may be directed to the sheriff of any county, except that process against a defendant (unless a railroad, canal, turnpike, telegraph, or insurance company be defendant) to answer in any action brought under the second section of chapter one hundred and twenty-three of this Code, shall not be directed to any officer of any other county than that wherein the action is brought." The process under consideration does not come within any of the exceptions contained in the section cited. The statute is mandatory where applicable. In *Warren v. Saunders*, 27 Grat. 259 (an action of assumpsit), it was held that process issued in a county where the cause of action arose, but directed to another, was void. And in *Coda v. Thompson*, 39 W. Va. 69, 19 S. E. 548 (also an action of assumpsit), this court says that "such seems to be law as generally held." 22 Am. & Eng. Enc. Law (2d Ed.) 190. But we do not pass upon that question in the case before us.

But on the 10th day of April, 1895, at the time and place where depositions were being taken in the first-mentioned cause on behalf of the plaintiff, defendant, Smith, by his counsel, John Bassel, Esq., excepted to the taking of any depositions in the cause in advance of appearance by demurrer, plea, or answer to the bill by defendant, and also reserved the right to thereafter file a plea to the jurisdiction of the court in said cause. Appellee, by counsel, on that and subsequent days, attended the taking of plaintiff's depositions, and cross-examined the witnesses. He afterwards filed exceptions to the depositions taken by plaintiff, because, as he alleged, the court had no jurisdiction of the suit, and because no answer had been filed, and no issue had been in any way made between plaintiff and defendant in the cause. Appellee also filed his affidavit showing that the writ commencing said suit against him was issued from the office of the clerk of the circuit court of Harrison county, but directed to the sheriff of Jefferson, in which county the defendant then resided, and there served upon him. On the 30th day of May, 1895, the court made the following order: "This day

came the defendant, Cruger W. Smith, and moved the court to quash the writ of summons herein, and abate or dismiss this cause, upon the ground that at the time of the institution of this suit he was a resident of the county of Jefferson, in this state, and still is a resident of that county, and that the writ of summons in this cause was directed to the sheriff of said county, and was served upon the defendant in said county, and in support of said motion filed his affidavit herein, and thereupon the plaintiff, in opposition to said motion, together with the notice to take the same, and return therein the caption and certificate thereto attached, offered to read the depositions taken by him in this cause, to the reading of which defendant objected, but the court permitted said depositions, notice, return, caption, and certificate to be read as affidavits, merely; and thereupon the defendant excepted to said depositions, and moved to suppress the same, upon the grounds, first, because the court has no jurisdiction in this cause; and, second, because the depositions were improperly taken, no answer having been filed by the defendants herein, and no issue having in any way been made up herein—which exceptions to said depositions, and motion to suppress the same, were denied, and the court overruled defendant's motion to quash the writ of summons in this cause and dismiss the suit, upon the ground that said defendant had personally appeared in pursuance of said notice, and had cross-examined divers witnesses adduced by the plaintiff." Afterwards, on the 14th day of September, 1895, the defendant, Smith, filed his answer to the plaintiff's bill, to which the plaintiff replied generally, whereupon the final decree was made as aforesaid.

Whether the court erred to the prejudice of appellee in refusing to quash the writ and abate said cause is not now a question before us. Appellee does not complain of that or any other decree or order of the court. Certainly appellant cannot be heard to complain for him. In *Brightwell v. Bare et al.*, 52 W. Va. 380, 44 S. E. 162, the court says: "At all events, it is a well-established principle that an appellant must show by the record not only that there is error in the judgment of the circuit court, but that he himself has been thereby injured." Appellant had invoked the jurisdiction of the court. He had caused the writ to be issued, directed to the sheriff of Jefferson county, where the defendant then resided, and served upon him. He is a lawyer of ability, learning, and research, as is shown by his preparation of his case. He should not now be heard to complain because the court took and retained jurisdiction of his suit. Whenever a party seeks the aid of a court of justice to enforce his rights, and submits his case to the decision of the court, and invites it to decide upon them, and makes no objection to the jurisdiction until after the court has heard and adjudicated, he is estopped

from subsequently objecting to its decision, and the proceedings taken thereon. *Herman on Est. & Res. Ad.* § 389; 15 L. R. A. 273, note.

We must determine from the record whether or not the decree of September 18, 1896, is void. Works on Courts & Their Jurisdiction, pp. 103, 104, says: "As a rule, the failure to object to the jurisdiction of the person at the proper time, where the party appears, is a submission to the jurisdiction of the court, and waives the right to contest such jurisdiction at any subsequent time. Therefore, if a defendant believes that the court has not, for any reason, obtained jurisdiction of his person, he should, if he appears at all, enter his appearance for the special purpose of objecting to the jurisdiction, and at once enter such objection. But if he is satisfied that the court has not jurisdiction of his person, and that jurisdiction will not be presumed, he need not appear at all; and any judgment rendered against him without jurisdiction is void, the same as if the court were without jurisdiction of the subject-matter. The effect of a general appearance, after having appeared specially and made objection, which has been overruled, is the same as if no objection had been made. By appearing afterward and contesting the case on the merits, a defendant loses his right to contest the ruling of the court below on his objection to the jurisdiction on appeal. If a party wishes to insist upon the objection that he is not in court, he must keep out for all purposes except to make that objection." In this case the court had jurisdiction of the subject-matter. Works, on page 36, further says: "As has been shown, jurisdiction of the subject-matter cannot be conferred upon a court by the consent of the parties. It is otherwise as to the jurisdiction of the person. If a court has jurisdiction of the subject-matter, a party may voluntarily submit himself to such jurisdiction, or may, by failure to object thereto at the proper time, waive his right to contest such jurisdiction." The defendant did object to the jurisdiction of the court over him for the reason stated in the decree hereinbefore set out, but, upon consideration of all the facts, the court declined to abate the suit. The defendant then, without further objection, filed his answer to the bill, and took and filed the depositions of himself and other witnesses in his own behalf; and upon the whole case, as made by both plaintiff and defendant, the cause was decided, and plaintiff's bill was dismissed. It was the province of the court to pass upon the question of its jurisdiction, and, having done so, the decree is not void for any error which the court may have committed. "Where the court has jurisdiction of the parties and the subject-matter in the particular case, its judgment, unless reversed or annulled in some proper proceeding, is not open to attack or impeachment by parties or privies in any collateral action or proceeding whatever." *Black on Judg.* § 245. Therefore the said decree of

the circuit court of Harrison county made and entered on the 18th day of September, 1896, is not void.

Appellant also contends that he is prejudiced by the rejection of his amended and supplemental bill. It is in irreconcilable conflict with the original bills in both causes. Plaintiff alleges in each original bill that he conveyed said property to appellee in fee simple. If he did so, the title to the oil and gas thereunder passed to appellee by the deed. In *Wilson v. Youst et al.*, 43 W. Va. 826, 28 S. E. 781, 39 L. R. A. 292, it is held that "petroleum oil, as it is found in the cavities of the rock, is part of the realty, and embraced in the comprehensive idea which the law attaches to the word 'land.'" The amended and supplemental bill was properly rejected. *Hogg's Equity Procedure*, § 171, and cases there cited; also *Hanby's Adm'r v. Henritze's Adm'r*, 85 Va. 177, 7 S. E. 204.

The contention of appellant that his deed to Smith, of the 11th day of March, 1899, was and is in fact an equitable mortgage to more fully secure the payment of the said debt, with its accrued interest, at a later period, is unreasonable and untenable, and is not sustained by the record.

The appellee is also a lawyer, and is presumed to have known his rights in the premises, as well as the legal consequences of the transaction. It appears that he drafted the deeds and other papers connected with the loan. Having a valid lien on the property by reason of his deed of trust, which he could enforce at any time after the debt became due, by notice and sale, it is not probable that he took the last deed, absolute on its face, with the understanding that it should be in fact a mortgage, requiring for its enforcement a suit in equity.

The case at bar is very similar in all respects to *Matheney v. Sandford*, 26 W. Va. 386, 401. In that case the court says: "If it is claimed that a deed conveying a tract of land in consideration of a debt due from the grantor to the grantee was, though absolute in its form, a mortgage on this tract of land to secure this debt, the circumstance that this debt was already secured by a deed of trust executed by the grantor to a trustee conveying this identical tract of land to secure this debt, and nothing else, is a circumstance so strongly indicating that the transaction was what it purported to be—a sale of the land, and an absolute conveyance of it, and not a mortgage to secure this debt—that it would take very strong parol evidence and strong circumstances to justify a court in regarding it as a mortgage; and in such a case as this the circumstance that the grantor was hard pressed for money, and the grantee was a known money lender, or that this debt [the price paid for the land] was considerably less than the value of the tract of land, and that the possession of the land remained with the grantor for several months after without any rent paid therefor,

or any even professedly reserved, would be entitled to but little weight to show that this deed absolute on its face was a mortgage, as against the circumstance that the parties could not have thought of the transaction as the giving of a lien of mortgage on this tract of land for this debt, as a lien on this land to secure this debt already existed."

The disposition of this case does not necessarily require a decision upon the question last above discussed. It is, however, plain that said conveyance of March 11, 1899, is a deed absolute, and not a mortgage. There is, in substance, very little difference, if any, between the claims set up by appellant against appellee in the first and second suits. In the first bill the plaintiff prays that the defendant be decreed to pay him \$2,700, as a just restitution on a part of the value of the property inequitably obtained by Smith from him in excess of the amount due on the debt. In the second suit, plaintiff claims that there is a valuable deposit of oil and gas underlying the New Creek lands, the sale of which to the defendant was never intended or contemplated by any of the parties; and he prays in his second bill that the said Smith be required to transfer and convey to him the oil, gas, and other valuable minerals under said tract of land. In the first suit, plaintiff demands a part of the value of the property; in the second, he asks a part of the land. *Wilson v. Youst*, supra. In *Southern Pacific R. Co. v. United States*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355, Mr. Justice Harlan, speaking for the court, says: "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is, of course, the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order, for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them." In *Rogers v. Rogers*, 37 W. Va. 407, 16 S. E. 633, the court thus states the rule: "An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have liti-

gated as incident thereto, and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from being *res adjudicata*." *Corrothers v. Sargent*, 20 W. Va. 351; *Tracey v. Shumate*, 22 W. Va. 475; *Sayre's Adm'r v. Harpold*, 33 W. Va. 553, 11 S. E. 16.

Applying the law thus annunciated to the case before us, we conclude that all material matters in controversy therein were adjudicated and determined in the former suit between the same parties, and are therefore now *res judicata*.

For the foregoing reasons, there is no error in the decree complained of. It must be affirmed.

(54 W. Va. 335)

WHEELING CREEK GAS, COAL & COKE CO. v. ELDER et al.

(Supreme Court of Appeals of West Virginia. Dec. 5, 1903.)

VENDOR AND PURCHASER—CONTRACT—MUTUAL COVENANTS—WAIVER OF PERFORMANCE—SPECIFIC PERFORMANCE.

1. Though in a contract for the sale of land a provision for payment on a day be made of the essence of the contract, yet, if the vendor is not then able to pass good title, equity will relieve against a failure to pay on the day, and enforce performance at the instance of the vendee.

2. Where a contract for the sale of land makes payment on a day of the essence of the contract, but also requires the vendor to make a deed simultaneously with payment, the covenant for payment and that to make a deed are mutual and dependent; and if the vendor do not make, or offer to make, a deed on the day, equity will disregard the failure to pay on the day, and enforce the contract at the instance of the vendee.

3. Though a contract for sale of land make payment on a day of its essence, yet the vendor may waive compliance with it, or, after failure to pay on the day, continued recognition by him of the contract as still binding is a waiver of strict compliance.

(Syllabus by the Court.)

Appeal from Circuit Court, Marshall County; Thayer Melvin, Judge.

Bill by the Wheeling Creek Gas, Coal & Coke Company against Thomas B. Elder and others. Decree for defendants, and plaintiff appeals. Reversed.

Melghen & Oldham, for appellant. Riley & Ritz, for appellees.

BRANNON, J. The Wheeling Creek Gas, Coal & Coke Company brought suit in the circuit court of Marshall county against Thomas B. Elder, the bill in which states that Elder agreed with H. C. Staggars to sell to Staggars the coal in two tracts of land by two written agreements. These agreements contained this language:

"This agreement witnesseth, that T. B. Elder and Rosana, his wife, parties of the first part, hereby agree to sell and convey to H. C. Staggars, party of the second part, his heirs and assigns, all the coal of the Pittsburgh or river vein, in and under that certain tract of land, * * * for which the party of the second part, heirs or assigns, shall pay six dollars per acre, for each and every acre, as follows: One-third when deed is signed, sealed and delivered, the remainder in two equal annual installments thereafter, with interest at 5 per cent. on deferred payments. Second party reserves the right to pay the whole amount when deed is delivered.

"A general warranty deed, clear of all encumbrances, to be made to the said party of the second part, his heirs and assigns, when the first payment is made (party of the first part to furnish complete abstract of title), and others are secured by deed of trust on the said property hereby sold.

"It is expressly understood and agreed that if the first payment aforesaid is not made on the 30th day of November, A. D. 1899, or as soon thereafter as the title shall be examined and accepted by the party of the second part, or his heirs or assigns, this agreement shall be considered as rescinded, and neither party shall be bound thereby.

"Witness my hand and seal this 17th day of August, A. D. 1899. T. B. Elder. [Seal.]"

The bill states that Staggars, by writing, 24th October, 1899, assigned his right under said contract to D. H. and S. H. Pearsall. The bill states that, at the time of the assignment by Staggars to the Pearsalls of said contracts, the Pearsalls had been commissioned by certain named persons to purchase a coal field, and such assignments were taken for the benefit of themselves and associates; that said Pearsalls and those associates on 7th November met and ratified such assignments, and organized themselves into a company or association by the name of the Wheeling Creek Gas, Coal & Coke Company, agreeing to become incorporated under that name, and in the meantime to act under that name with relation to such coal purchase; that Samuel H. Pearsall was at such meeting elected president, and Daniel H. Pearsall treasurer; that said company was incorporated under the laws of West Virginia 21st December, 1900; and that on 25th April, 1901, the Pearsalls assigned to the corporation said agreements. The bill states that on 22d November, 1899, the Pearsalls signified in writing to Elder that the association, by said corporate name, had become owner of said agreement with Staggars, and agreed to perform his covenants, and take and pay for the coal according to the agreement with Staggars, and the treasurer of said association did pay Elder \$20 as part of the purchase money under the sale, and that Elder, in writing, did accept notice of the ownership of said company under said agreement, and did agree to the substitution of the asso-

clation, acting under the name of the Wheeling Creek Gas, Coal & Coke Company, in place of Stagers in said agreements, and thus Elder contracted and agreed with said company, and accepted from it \$20 under said contracts for the sale of the coal. The written notice of acceptance is signed by D. H. Pearsall as treasurer of said association, and its acceptance is made "subject to examination and approval of the titles, with complete abstracts of title." The bill further states that a number of tracts of coal land had been purchased by said association—among them, the Elder tracts—and that Elder and the association agreed that Elder would join with other parties who had sold coal lands in the block purchased for the association, and employ an attorney to make abstracts of their titles and prepare deeds, and that the certificate of such attorney would be acceptable to the association, and title would be taken upon his certificate, and would be paid for as soon as he should prepare proper papers, and that under this agreement Elder forthwith employed Meighen & Oldham as attorneys to prepare abstracts and deeds, and that it was understood and agreed between Elder and the association that no more of the purchase money should be due or payable by the terms of said contracts until such abstracts of title should be completed and the titles approved by said attorney, and that in the meantime said contract should remain in full force, and that Elder gave his title papers to said attorneys, and they undertook to make the abstracts, and were from time to time assisted therein by Elder; that the contract made with the attorneys was that they should complete abstracts for all the lands in said block, and, as soon as completed, said company was to settle for the same, paying one-third of the purchase money down, as per the contract. The bill further states that said attorneys found that the title of Elder was not good and marketable, as the title to 87 acres of it was held by a deed to Elder so defectively executed that the title was bad, and that at Elder's instance the attorneys wrote a new deed, and had it executed by the proper persons, and thus perfected Elder's title, and that said attorneys so certified to the association, and it at once undertook to pay Elder for the coal and get his deed. The bill also states that until late in the autumn of 1900 Elder made no objection to complying with his contract as soon as he could perfect his title, never denying his liability to do so, or alleging any default or cause for rescinding on the part of the association, but that late in that autumn he conceived that he could sell the coal for greater price, and fraudulently refused to meet the representatives of said association, and that the attorneys prepared a deed to be executed by Elder, dated 24th October, 1900, to the Pearsalls and other parties who were members of said association. Elder refused to execute it,

and it was returned to Pearsall with the declaration that Elder had no contract with him and his associates. The bill then says that the association at once urged Elder to make the deed and receive the purchase money, and in December, 1900, Pearsall and Patton tendered him the money and requested him to execute the deed, and, he refusing, they deposited \$700 in bank on the 7th of December, 1900, and notified Elder that he could get it by calling on B. F. Meighen for a check payable to Elder, and left in Meighen's hands, to be delivered upon delivery of the deed. The bill avers the continued readiness of the plaintiff to perform the contract, and brings said purchase money into court. Upon demurrer to the bill, the court dismissed it, and the gas company appeals.

In a brief it is claimed that, if the agreements are to be regarded as options, they are of no force, because the acceptance of them was subject to examination and approval of title, with complete abstract, whereas acceptance of an option must be unconditional. *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249. But the condition in the acceptance was nothing more than the condition contained in the option, if an option, and surely an acceptance may insert a condition consistent with the option itself. If this condition had been left out of the acceptance, the condition would have been spoken by the option. The acceptance only repeated unnecessarily what the option contained. But I regard the papers, not as options, but as actual sale; and the presence of a subsequent condition of defeasance does not make them options, or any the less contracts of sale. *Monongah v. Fleming*, 42 W. Va. 538, 26 S. E. 201. Viewed as such, no acceptance was necessary. True, as the papers say that Elder "agrees to sell" and make no binding obligations on either party till payment, we might regard them as options. But that is immaterial, for, if options, acceptance made them ordinary contracts, governed by their terms. *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249. The papers provide that deed shall be made at payment—both at same moment. So payment was not the act of acceptance.

Treating the papers as such contracts, the defense says that failure to make the first payment on the day fixed caused the contracts to end—worked their rescission—because time is made by them the essence of the contract. The general rule is that time of payment is not of the essence of the contract, as the purchase money is a simple debt, and interest is compensation for delay of payment. *Ballard v. Ballard*, 25 W. Va. 470. But the parties may lawfully make it so, and that such is the intent in this case is manifest from the papers. But the contracts demand good title, and impose upon Elder duty to exhibit abstract of good title and delivery of deed simultaneously with the first pay-

ment, and give Staggars right to examine title in the very forfeiting clause. The words requiring payment on a given day alone do make time the essence; but do the provisions that Elder is to show abstracts of title, make a deed, and allow time for examination of title, modify this? Staggars is required to pay on a day, but on that same day, at the time of payment, Elder must show abstract of title and have a deed in his hand. These are dependent covenants. Staggars was bound to offer payment, but Elder was bound to do the things required of him, and Staggars was not bound to deliver the money until Elder was ready to do those things resting on him. *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249; *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220. Which had to perform, or offer to perform, his duty first—Elder or Staggars? Must Staggars seek Elder and offer to pay, and demand title abstract and deed? Or must Elder seek Staggars, and offer abstract and deed, and ask payment? Here we cannot say that the duty is first on either. We cannot draw so nice a distinction when duty rests on both. *Waterman, Specif. Perform.* § 444. The general rule is that a vendor must have and show good title, and these contracts require Elder to show title and make a deed at the time of first payment. As the contracts required him to have in his hand these papers, we may fairly say that it was his duty to tender them. He did not do this, and we can as fairly ascribe fault in him in this, as in Staggars—perhaps more so. And by the contracts, if Staggars had offered payment, had declared readiness on the day, Staggars was to have time to examine title.

Was payment a condition precedent, so that without it no right in equity to the land vested in Staggars by the contracts, or did the contracts vest an estate subject to be defeated by noncompliance with the subsequent condition of payment? "When a contract depends on a condition precedent, or, in other words, where the intention of the parties is that no right shall vest until certain prescribed acts are done or omitted, or unless certain prescribed acts are done or omitted before a specified time, then equity will not relieve against a breach of such precedent condition, for no court has power to make a new contract for the parties which shall confer rights where no rights originally existed. But if a contract contains a condition subsequent, or, in other words, if the intention of the parties is that the rights under the agreement shall vest at once upon its conclusion, subject to be defeated or ended upon the nonperformance of the provision which constitutes the subsequent condition, or its nonperformance at or before a specified day, then equity, by virtue of its jurisdiction over penalties and forfeitures, has power to relieve the defaulting party from the loss or forfeiture caused by his breach of this subsequent condition. This power of relief

would even more certainly exist when the breach was a failure, not to do the thing at all, but merely to do it at or within a specified time. It is therefore held in a great number of cases that the forfeiture provided for by such a clause as the one described above, on failure of the party to fulfill at the proper time, unless such failure is intentional, or causes an injury to the other party which cannot be compensated, will be disregarded and set aside in equity; and the defaulting party, performing, or being ready and willing to perform, at a subsequent time, will be allowed to enforce the contract notwithstanding delay. In short, the general doctrine is applied in the face of such express provision declaring the contract ended in case of nonfulfillment of its terms at the appointed day, unless the agreement is so worded that a compliance with these terms at the prescribed time is made a condition precedent to the vesting of any rights." "Where the clause provides for a forfeiture upon the nonpayment of the purchase price at the time stipulated, and is therefore intended to secure punctuality in payment, it has been regarded as almost a matter of course for equity to disregard it and permit a subsequent payment, since interest is treated as a sufficient compensation for delay. But even here the delay must not be willful, nor the delay unreasonable." *Pomeroy, Specif. Perform.* §§ 379, 380; *Waterman, Specif. Perform.* § 437.

I hold that this provision for a payment is not a condition precedent, but subsequent, and that an estate vested subject to be defeated, under circumstances, by nonpayment. Under these principles, equity has power to disregard this forfeiture. Especially under the circumstances of this case, as stated in the bill, which circumstances are that Elder did not furnish abstract of title or a deed, or offer to do so, and his title at the date fixed for payment was bad, to a material part of the land. "If the defendant's delay or default has caused the plaintiff's failure to perform in time, he cannot object to such failure as a defense, however plain and explicit may be the provision of the contract requiring punctuality. A vendor who cannot make a clear title in time cannot set up the purchaser's default in prompt payment of price." *Pomeroy, Specif. Perform.* § 381. "But if a party who insists upon exact time has himself been the cause of delay, a court will notwithstanding decree specific performance. The vendor is not entitled to forfeit the contract, as against the vendee, when he is himself in no condition to perform, even though by the terms of a contract he has right to declare it forfeited, and retain what has been paid, if the vendee makes the default." *Waterman, Specif. Perform.* § 436. Suppose Staggars had gone with his money to pay Elder on the day; he would have found title defective, and equity will not require him to do a useless

thing, and forfeit his right. "A tender of performance need not be made when it would be wholly nugatory, as where the vendor is unable to carry out the contract by reason of *liens*." Waterman, *Specif. Perform.* § 446.

Here is another reason for equity to relieve against the letter of the contract. According to the bill, Elder, after the day for payment, joined with others who had sold coal in employing lawyers to investigate title, and dispensed with payment until abstracts should be made, and agreed that the contracts remain in force. "Though time have been expressly made of the essence of the contract, yet the benefit of such an agreement may be waived, either at law or in equity." 2 Lomax, *Dig.* 72. "Specific performance may be decreed in favor of a party who has failed to perform his part of the agreement, if he can show acquiescence in the delay by the other party, or acceptance of a substitute for literal performance." Waterman, *Specif. Perform.* § 478. "A party may waive a condition, or treat the contract after default as continuing in force, in which case he cannot insist on a forfeiture." Waterman, *Specif. Perform.* §§ 449, 480.

It is said that, waiving strict compliance, yet the 11 months between the day of payment and day of tender is too great a delay. The answer is that the chosen attorneys of Elder were in the work of examining the titles to various tracts—Elder's among them—and he agreed to await their report. It may be that it was a long time to examine title; but the bill represents that Elder aided in the work, employed the attorneys, and did not insist on haste, but consented to such delay, recognizing right to complete the sale when report on title should come.

It is objected that the gas company has no right to sue on these contracts, because there was no contract by Elder with it, and because the corporation was not in being at its date. By the contracts Staggers acquired an estate. He assigned to Pearsalls, and they purchased in trust for the contemplated corporation, or its component organizers. Pearsalls, by deed, conveyed their estate under the contracts to the corporation. Now, it does seem that the right is vested in the corporation, if these facts are true. The bill charges that Elder recognized the coming corporation as owner of the contracts. The Pearsalls held as trustees for it, and they executed the trust by their accepted deed. Whatever rights were under the contracts, they came to it. We held in *Bank v. Lumber Company*, 32 W. Va. 357, 9 S. E. 243, that a deed made and delivered in escrow for a corporation not yet incorporated, named as grantee, and delivered to it when incorporated, was valid. Here the estate was held by individuals as trustees, and passed to the corporation when it came into being. It is not necessary to say that Elder treated with the corporation, as he contracted with a natural

person an estate which finally went to the corporation, and this makes a privity between it and Elder. "As a corporation may, in most states, ratify or adopt a contract made in its behalf by promoters before incorporation, and thus become liable thereon, it may thus also acquire the right to enforce the same. By such ratification or adoption it makes such contract its own, and may sue thereon in its name. When a contract by the promoters of a corporation with the owner of land, under which the latter agrees to sell the land to the corporation when organized, is adopted by the corporation, it may sue for specific performance." 1 Cook on Corp. § 102. We are not in a court of law, but in equity, which looks at substance, and will not allow a lawful contract to be worthless on purely technical ground. The corporation accepted the deed from Pearsalls.

It seems to me that Staggers, the Pearsalls, and their associates, should be made parties. This was not assigned as ground of demurrer. It may be thought that this is ground of sustaining the decree of dismissal, but I do not think so, as the court should have required them to be made parties, under section 58, c. 125, Code 1899.

Our conclusion is to reverse the decree, overrule the demurrer to the second amended bill, direct the plaintiff to amend by making the persons indicated parties, and remand the cause, with direction that a rule be given the defendants to answer, and for further proceedings.

(54 W. Va. 250)

CLIFTON v. TOWN OF WESTON.

(Supreme Court of Appeals of West Virginia. Nov. 28, 1903.)

AFFIRMATIVE ALLEGATION—BURDEN OF PROOF—LIMITATIONS—MANDATORY INJUNCTION—OBSTRUCTION OF HIGHWAY.

1. A bill alleges that certain deeds of plaintiff cover a certain strip of ground claimed by the defendant as part of a public street, which is denied by the answer. The burden of proof is on the plaintiff to establish such allegation.

2. The bill alleges title by adverse possession, which is denied by the answer. The burden of proof is on the plaintiff to show that such possession for the period of 10 years has been continuous, actual, hostile, notorious, and exclusive.

3. The syllabus in the case of *Ralston v. Weston*, 33 S. E. 326, 46 W. Va. 554, 76 Am. St. Rep. 834, approved.

4. In a case plainly calling for it, a mandatory injunction will be awarded to compel a nuisance to remove obstructions from a public highway.

(Syllabus by the Court.)

Appeal from Circuit Court, Lewis County; C. C. Higginbotham, Special Judge.

Bill by Ella Clifton against the town of Weston. From a decree dissolving an injunction, plaintiff appeals. Affirmed.

W. W. Brannon and H. M. Russell, for appellant. Edward A. Brannon, for appellee.

DENT, J. Ella Clifton complains of a decree of the circuit court of Lewis county dissolving an injunction obtained by her against the town of Weston. Deducting from the bill and answer the numerous, cumbrous, and unnecessary allegations contained therein, this controversy narrows itself to the right of the public to an easement for public uses in a small strip of ground situated within or adjacent to Mulberry street in the town of Weston. Plaintiff claims this strip, first, by virtue of her title papers for certain lots abutting on Mulberry street; second, by virtue of long continuous adverse possession thereto under claim or color of title. The defendant positively denies both of these claims. This casts on the plaintiff the burden of making good such claims by her proof. As to the first, she introduces no evidence to establish it; hence we may justly regard it as abandoned. As to the second, plaintiff fails to show such hostile, actual, notorious, exclusive, continuous possession under claim of title as would destroy the public easement. The title to the land is not involved. Her deeds for her lots confer on plaintiff the title to the land to the middle of Mulberry street, subject only to the public easement, and she has the right to the possession and use of the same so long as she does not interfere with such public easement. *Spencer v. Point Pleasant R. R. Co.*, 23 W. Va. 406; *Ralston v. Weston*, 46 W. Va. 544, 33 S. E. 326, 76 Am. St. Rep. 834. Her possession and inclosure thereof is not hostile to the public so long as the easement is not needed for public use. It will be presumed that such possession is in subordination to the rights of the public until there is a plain and positive disclaimer of the public rights, the assertion of adverse title, and notice to the proper legal authorities. *Flynn v. Lee*, 81 W. Va. 487, 7 S. E. 430; *Hudson v. Putney*, 14 W. Va. 561; *Clarke v. McClure*, 10 Grat. 805; *Jarvis v. Grafton*, 44 W. Va. 453, 30 S. E. 178; *Taylor v. Philippi*, 35 W. Va. 554, 14 S. E. 130. Nor will her possession and obstruction thereof by fences and buildings be deemed a public nuisance, but rather a permissible use, until she has notice to remove such obstructions. So that her holding could not be deemed adverse until she refused to remove such obstructions and brought home notice to the proper authorities that she was claiming possession not in subordination to, but in opposition to, the public easement. While she holds the title to the land, the public easement therein is common property, in which she enjoys the right of user along with the public generally, and there is no good reason why she should not use the whole thereof, and the public easement remain in abeyance, until such time as the public necessities might require the same. The law never presumes that a citizen, whose duty is to preserve, is engaged in destroying, public rights, until the undutiful intent of such citizen is established by her own evidence. If it was her original purpose to defraud the pub-

lic in taking possession of the street, she should now be able to establish such intention, with notice to the proper legal authorities. Failing to do so, the presumption must be in favor of the integrity of her citizenship and the legality of her actions. *Foley v. County Court* (decided at this term) 46 S. E. 246; *Commonwealth v. Moorehead*, 118 Pa. 344, 12 Atl. 424, 4 Am. St. Rep. 599. Even allowing the statute of limitations applicable to cases of this character, under the decision of *Wheeling v. Campbell*, 12 W. Va. 36, plaintiff has failed to establish her right to the benefit thereof. This court, however, has emphatically and advisedly disapproved of the doctrine sought to be established in the case of *Wheeling v. Campbell*, and since unwittingly followed in some subsequent cases, and has finally determined that such doctrine is not now, and never was, the law of this state. *Ralston v. Weston*, 46 W. Va. 544, 33 S. E. 326, 76 Am. St. Rep. 834. The plaintiff insists that, if the law is adhered to, many persons in Weston will suffer the loss of valuable property they have acquired by fencing in the public highways of the town. If such be true, they ought to suffer. Persons who are so indifferent to the Golden Rule and their public obligations as to make the destruction of public easements the source of private gain deserve no commiseration at the hands of violated law. The more there are of such persons, the greater the need of those sovereign principles that prevent private aggression of public rights. The mistaken departure from these principles in the case of *Wheeling v. Campbell* has caused endless fictitious claims to portions of the public highways to spring up all over the state, to be bolstered up by false swearing and manufactured evidence, to the great detriment of public interests and private morality. The law as vindicated will put a stop to all such claims, restore respect for public rights, and promote the welfare and peace of all communities alike. No man can or should be permitted to acquire in any manner whatsoever the sovereign rights of the people contrary to their sovereign will. Opposition to this doctrine tends to anarchy pure and simple.

The court has already said so much on the subject of public easements heretofore that a continuance thereof has become nothing more than a vain repetition and a waste of words. *Foley v. County Court*, and *Ralston v. Weston*, cited; *McClellan v. Weston*, 49 W. Va. 669, 39 S. E. 670, 55 L. R. A. 898; *Weston v. Ralston*, 48 W. Va. 170, 36 S. E. 446. The circuit court dismissed the plaintiff's bill, and wholly ignored the defendant's prayer for affirmative relief. The dismissal of the bill thus carried the answer with it, and was equivalent to a refusal of the relief prayed. By the dismissal of the bill the matter in controversy was determined against the plaintiff, and became *res adjudicata*, and, having the parties before it, the court should have gone on, and given the defendant complete re-

hief, so as to end the litigation between the parties over the subject-matter of the suit. The dismissal of the bill carries with it the general replication, and leaves the answer, in so far as it seeks affirmative relief, without replication. Under section 35, c. 125, Code 1899, its affirmative allegation on which is founded its prayer for affirmative relief must be taken to be true. The only real question of controversy presented by both bill and answer was as to whether the survey and plat made by Peter Flesher of Mulberry street were correct. The plaintiff alleged they were not, but failed to sustain such allegation by proof, and her bill was dismissed. This was an adjudication of the issue in favor of the defendant. From the proof and the pleadings it is apparent that the plaintiff abandoned claim to the controverted strip of ground under her title papers, and relied wholly on her possession under the statute of limitations to destroy the public easement. This being determined against her, she was without a case, and presented no defense to the affirmative allegations and prayer of the answer. Such being the state of the pleadings, the court should have entered a decree forever settling the controversy between the parties in accordance with the prayer of the answer, and thus put an end to further litigation.

The decree is amended so as to award a mandatory injunction requiring the plaintiff to remove all obstructions placed by her on Mulberry street as shown by the survey and plat of Peter Flesher, and, as so amended, is affirmed, and the cause is remanded to the circuit court, with directions to enforce the performance of such mandatory injunction.

On Petition for Rehearing.

Plaintiff insists that the affirmative of the issue in this case was on the defendant. The only issue presented by the bill and answer and general replication was as to whether the plaintiff's deeds covered the strip of land in controversy. Plaintiff alleged that they did, and further alleged that the survey made by Peter Flesher was incorrect, in that it showed that plaintiff's deeds did not cover the strip of land in controversy. If plaintiff's deeds did cover the strip of land in controversy, then the Peter Flesher survey would be incorrect, but, if the plaintiff's deeds did not cover the strip of land in controversy, then the Peter Flesher survey is correct. The whole issue, therefore, depended on whether the plaintiff's deeds covered the strip of land in controversy. Plaintiff, to sustain her equity, alleged that they did. This defendant denied. Hence the issue. Without such affirmative allegation, the plaintiff's bill was without equity. When such allegation is denied, the equity is denied, unless sustained by proof. Not only had plaintiff the affirmative of the issue, but it entirely depended on plaintiff's title papers, for the defendant had none. Not only had plaintiff the affirmative of the is-

sue, but, if true, the proofs thereof were entirely in her possession and under her control. The case that plaintiff relies upon as sustaining the proposition that the burden of proof is on the defendant is the case of *Mason City S. & M. Co. v. Town of Mason*, 23 W. Va. 211. A careful comparison between the cases will show that they materially differ with each other in every respect. In the former case the dedication of the streets sought to be opened was denied, and it was admitted in the pleadings that plaintiff's title papers covered the same. On page 218, Judge Woods says: "The answer, in general terms, denies that plaintiff is seised in fee simple of the lands claimed by it, but does not deny that the plaintiff claims title through the several conveyances filed with the bill, or that they do not include the land claimed by plaintiff, or that the deeds do not pass the title to said lands, or that the several grantors did not in fact execute and deliver said conveyances to said several grantees, or pretend to show that said deeds convey or reserve to the defendant said 'Wide' alley and Alley D."

In the present case the dedication of Mulberry street is admitted by plaintiff's title papers, and it is positively denied that such title papers cover the strip of ground in controversy, but that, to the contrary, they recognize the same as a part of Mulberry street. In the former case the statute of limitations was involved, but by the settled decisions of this court that question has been entirely eliminated from this case. Hence such former case is no authority for shifting the affirmative of the issue from the plaintiff to the defendant. There is another reason which I suggest, and in which the court does not unite, that must have some force in the future determination of similar cases, as bearing on the burden of proof; and this is that, since the determination of the case before referred to, the Legislature has seen fit to recognize town councils as inferior judicial tribunals in the determination of questions involving the rights of individuals and property, and has made their decision subject to review by the higher judicial tribunals of the state. Section 2, c. 110, Code 1899. It has thereby rendered unnecessary the appeal to equity in such cases unless irreparable injury is threatened, or it is necessary to preserve the property in statu quo until the right thereto can be properly determined. In the present case the only reason for an appeal to equity is because the defendant has notified the plaintiff to move her fence back off the street. She had a perfect right without coming into equity to present her case to the town council, and, on a finding adverse to her, to have the matter reviewed by the higher judicial tribunals of the state. If the survey of Peter Flesher was incorrect, she had the right to bring the matter to the attention of the town council, and, on their failure to correct it, to have such cor-

rection made by the circuit court. Hence, so far as the case shows, she had a perfectly adequate remedy at law, as there is no proof that she had applied to the town council and they had refused her relief, or that it was in any way preventing her from obtaining a hearing of her grievances, or was going to seize her property. The town council is a local tribunal authorized to hear and determine all questions of nuisance between its citizens and the public, and its final orders and judgments are subject to control and review by the higher judicial tribunals of the state; and there is no good reason why it should not be appealed to in the first instance, unless irreparable damage is about to be done by the taking of property contrary to law, which it is powerless to or refuses to prevent, and, if the plaintiff disregards such an available remedy, he should assume the burden of proving his equity.

It is the duty of this court to give to, and insist that proper respect should be given to, the determinations of all inferior tribunals, and throw around them the presumption that they will afford all applicants speedy redress of their grievances in accordance with law, especially when the law affords a prompt and legal mode for reviewing their final decisions by higher tribunals, and in no case should a resort to equity be entertained when such mode of review exists and furnishes adequate relief. *Board of Education v. Holt*, Judge, 51 W. Va. 435, 41 S. E. 337.

The town council of Weston is authorized by law to superintend the public highways within its jurisdiction, and keep them free from nuisances. As incidental thereto, it has the right to determine when a nuisance exists, and, if it makes such determination wrongfully, its action may be reviewed and reversed by writ of certiorari. The council in the present case made a preliminary survey of its streets according to plaintiff's title papers, and found that plaintiff's fence encroached upon the street. It thereupon notified her to remove the same. She, without applying to the council for relief as to the survey, immediately obtained an injunction, claiming that her title papers covered the strip of ground claimed to be a part of Mulberry street. The council had already determined this question to the contrary—*ex parte*, it is true—but she had the right to apply to it for a review of such *ex parte* determination, and she had no right to the aid of a court of equity unless she could allege and prove that she was threatened with irreparable injury, or at least that the council was about to take her land without condemnation. In short, to sustain her injunction, she must both allege and prove that it was her land the council was about to take from her by illegal methods. The town not only denied that it was her land, but demanded that she be required to abate the nuisance maintained thereon by her. She having failed to maintain her case, the court could not do otherwise than require

her to abate the nuisance, that the litigation between the parties might be finally ended. She alleges in her bill that she will be greatly injured by the loss of this strip of ground. This is denied in the answer, and there is no proof of such injury. She still insists that she is greatly injured by the retroactive effect of the decision in the case of *Ralston v. Town of Weston*, 46 W. Va. 544, 33 S. E. 326, 76 Am. St. Rep. 834, because it takes from her a strip of ground to which she has shown no title, except that she has occupied and used it for more than 10 years. In short, because the public has magnanimously permitted her to occupy and use a portion of the public highway for more than 10 years, that the public easement therein has been thereby destroyed, and cannot be reclaimed by the public except by condemnation and payment of compensation therefor. She occupies and uses the public land without rental, and, when the public would reclaim it, she demands payment for restoring it, and claims that otherwise she will be greatly injured. She gets all. The public gets nothing, but must pay her for its own. She failed to show that her title papers covered the land in controversy; hence she has failed to show that she had a claim of title thereto, as her claim of title was asserted under such title papers, and mere occupancy without claim of title will not vest title in her. Her claim of title did not cover the land. In addition, all sovereignty resides in the people of this country, all sovereign rights belong to them, and the title to all lands are derived from them. The plaintiff holds title to her lots by authority of the people alone. She cannot acquire any rights in the public highways except by appointment or consent of the people, as the highways appertain to the people's sovereign rights; and the decision of any court, it matters not how long or how often acquiesced in, that attempts to deprive the people of their sovereign rights contrary to their will and appointment, should be regarded as a nullity, and as furnishing no rule on which to found the rights of private property, but subject to disapproval whenever properly brought in question. Such decisions are violative of the fundamental principles of popular government, and it is the duty of every participator in the people's sovereignty, who enjoys rights and protection thereunder, to repudiate the benefits of such decisions, and seek to blot them out at their earliest opportunity. As such decisions are not merely *malum prohibita*, but *malum in se*, every citizen must take notice of their vicious character; and if, moved by covetousness, any citizen attempts to take advantage thereof to his private emolument, in total disregard of his sovereign duties, he has no reason to complain when he is deprived of his unlawful gains by the restoration of the people's sovereign rights according to their will and appointment.

The high character and extensive learning of the judges who render a decision subversive

of the sovereign rights of the people add to such decision neither strength nor potency, but only tend to show the imperfection of the human intellect, and that wisdom is not confined to the sages, but that they may sometimes be led to their advantage by a "little child."

Upon Application for Rehearing.

BRANNON, J. It was claimed in oral argument that the bill states that Ella Clifton owns the disputed strip of ground, because included in her deed, and that it is not a part of Mulberry street, and that the answer does not deny this, and that the bill ought to be taken for true, and thus establish her right to the ground free of street servitude. This contention cannot be sustained by bill and answer. The bill asserts that the disputed strip is the plaintiff's, not a part of the street. The answer asserts that it is a part of the street, and not within the plaintiff's deed. The whole drift and general intent of the answer is in denial of the facts alleged for relief in the bill. It fairly denies it logically. They both cannot logically coexist in harmony. If the one is true, the other is not. An answer is sufficient if it substantially denies the bill. *Mason City Salt & Mining Co. v. Town of Mason*, 23 W. Va. 211. Such is the result upon a general construction of bill and answer. But look at the specific allegations. The bill says that plaintiff owns the ground which the town is about to take, and it is not a part of Mulberry street. The answer pointedly says that the street as laid out on the plan of Butcher's Addition was 50 feet in width in front of the Clifton property, and when dedicated and accepted had that width, but that "said street has been encroached upon by the plaintiff during the time of her ownership of the property adjoining until said street is now narrowed to the width of 39 feet at its widest point, and 37 feet at its narrowest point." It charges that the plaintiff has deliberately moved out her fencing upon said Mulberry street to the extent of 22 feet as a part of her property. Respondent charges that no part of said street was ever conveyed or ever purported to be conveyed by any deed to the plaintiff, but that she "deliberately moved out her fence and included said strip within her property." It again asserts that she claims ground beyond her deeds, and adds: "Respondent charges that the plaintiff has inclosed within her lot ground of the width of 22 feet, and that she has thus 100 feet called for in her title papers, exclusive of the strip of Mulberry street inclosed by her." How can it be said that the answer does not deny the allegation of the bill that the plaintiff's deed covers the disputed strip, and that she has not invaded the street or inclosed any of it? In other clauses the answer denies this matter of the bill.

In view of an earnest argument on a petition for rehearing as to the burden of proof,

I deem it proper to discuss that question. Upon whom rests the burden of proof in this case? As just stated, the bill avers that the plaintiff's deed includes the strip in controversy. A plaintiff in ejectment or trespass, or in chancery, suing to recover ground, or damages to it, or rights in it, must lay down his deed upon the ground, to see whether it covers it. He cannot succeed without showing it to be his ground. This is affirmative matter. He cannot call upon the defendant to prove that he is in the right, and the charge against him false. The plaintiff says her deed gives her lots 100 feet in length. She admits that where that 100 feet ends at the west end of her lots is Mulberry street. Is she not called on to prove just how far her 100 feet goes—where her deed goes? Or is she not called upon to show the line of the street—where the 50 feet goes? When she shows one or both, she shows the true location of lot and street, and shows either that she does or does not invade the street. This is affirmative, not negative, matter. It is capable of physical proof. Simply because an answer asserts affirmative facts by way of denial of affirmative facts of a bill does not put the burden on the defendant. An answer may simply deny by negative words the allegation of a bill, or it may deny the bill by asserting facts logically denying it—facts which, if true, render it false. This is not confession and avoidance. It lacks the element of confession. It is traverse. The facts deny the truth of the allegation, by making it impossible for that allegation to be true. "As a general rule, the burden of proof rests with that party who would be defeated if no evidence at all were offered." 11 Amer. & Eng. Ency. L. (2d Ed.) 335. Can it be thought that the plaintiff could succeed without proof? The plaintiff says that the strip in dispute is not a part of the street. She must prove it. It cannot be thought that because this assertion is in negative form, the plaintiff is excused from proving it, and the defendant must prove that it is a part of the street. "It is well settled that whoever asserts a claim or defense which depends upon a negative must, as in other cases, establish the truth of the allegation." 1 Jones on Ev. § 178; giving the instance where a party asserts that another did not build according to specifications, that proper care had not been used, and other instances. "The burden of proving any given claim or defense rests upon the one who asserts it. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence or nonexistence of facts which he asserts or denies to exist must prove that those facts do or do not exist." Id. "The burden is upon him who asserts the affirmative in substance, rather than in mere form." Id. We find in 5 Eng. & Amer. Ency. L. 28, this, after statement that the form of allegation, whether negative or affirmative, is of no consequence: "If, regard-

less of terms, it is borne in mind that when the issue is joined he has the burden of proof who seeks to move the court to act in his favor, the question of whether the grounds of his claim are alleged affirmatively or negatively is really of no consequence. And if the term 'affirmative' is insisted upon as being inseparable from the 'burden of proof,' it must be remembered that the affirmative of the issue does not depend upon the form of the pleading, but the rule is concerned with the substance of the issue, and that only. Therefore, where the proof of negative matters is essential to the maintenance of a cause of action, this may necessitate a negative averment, and the plaintiff has the burden of proving it, because, looking at the substance of the issue as a whole, he must be regarded as asserting the affirmative thereof." Apply this law in this case. To succeed, the plaintiff must, as she did, assert two facts: First, that her deed covered the ground in dispute; second, that the street did not. And she had to prove one or the other, and thereby prove both. She asserted a tort by the town, and she must prove the elements going to constitute the tort; otherwise she would fail. The plaintiff must prove a tort.

But it is contended that the town failed to prove that Peter Flesher's survey and plat show the true location of the street. To this there are two answers: The first is that "it is incumbent on the plaintiff to show by allegations and proof his right to a decree before he can require the defendant to sustain the affirmative allegations of his answer." *Bryant v. Groves*, 42 W. Va. 10, 24 S. E. 605. Plaintiff had to prove that her lots, and not the street, covered this ground, before demanding proof that the Flesher plat is correct. It might be incorrect, and yet the claim of the plaintiff wholly or partially incorrect. The second answer is that the plaintiff in her bill first presented Flesher's survey as the claim of the town, and affirmed that its basis was an old line, called the "Banks line," and that that line had not been properly located by Flesher, and his survey was not correct. The answer denied this by asserting that Flesher's survey was correct. The town did not, but the plaintiff did, thus assume the burden of proof as to this survey. Under law above given, she was called upon, not to prove a logical negative, but to show where the Banks line is—where the street is—and thus overthrow Flesher's plat. She must herself show the true physical location of that line, and defeat that plat, and sustain her own assertion. We must not too much rely on the rule that a negative cannot be proven, but look at the substance of the issue, not merely the form of the allegation.

The case of *Mason City Salt & Mining Co. v. Mason*, 23 W. Va. 211, is cited as pointed authority to sustain the appellant. It can-

not rule this case. There the bill asserts title in the plaintiff by deeds, and that they covered the ground which the town proposed to open as a street; also that the plaintiff had possession for a time sufficient to give title—and thus sets up two reasons showing title. The answer denied neither. The court said that the answer did not deny that the plaintiff claimed title by its deeds; did not deny that its deeds covered the disputed ground, or that they did not pass title to it; and did not deny the possession alleged by the bill as giving title. How could the plaintiff be asked to prove those matters, when they were not denied? The answer was held not good to put those matters in issue. Of course, the defendant was held to prove matter not denying the answer—affirmative matter, such as dedication. The syllabus shows, if there had been a proper answer denying that the plaintiff's deeds covered the ground in dispute, and claiming it as a street, and denying possession, it would have called upon the plaintiff to prove those matters. It sustains the position taken in this case, when properly read. *Seim v. O'Grady*, 42 W. Va. 77, 24 S. E. 994, is a case where a bill was filed to sell a curtesy for a judgment in land bought by the wife, but to whom no deed was made in her lifetime, but was made to her heirs after her death, which deed acknowledged payment of purchase money by her. Defendants set up that she only paid part of it, and they had paid the balance. This was affirmative matter, which rested on the defense to prove. The court said, as the deed acknowledged payment by her, its recital was evidence against the heirs, and made a prima facie case of payment by her, which the defendant must meet. The case is no authority in this case.

As to the contention that the decision in *Wheeling v. Campbell*, 12 W. Va. 36, that there can be adverse possession to bar the public right in a street vested property, and that the later decisions in *Ralston v. Town of Weston*, 46 W. Va. 544, 33 S. E. 326, 76 Am. St. Rep. 834, and other later cases take away vested right of property acquired by such possession without due process of law, contrary to the Constitution of the United States (amendment 14), I think the point not well taken. I will simply refer to what is contained in an opinion in *Town v. Ralston*, 48 W. Va. 170, 187, 36 S. E. 446, and add that *Central Land Co. v. Laidley*, 159 U. S. 103, 16 Sup. Ct. 80, 40 L. Ed. 91, overrules this contention in the syllabus, reading as follows: "When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the fourteenth amendment to the Constitution of the United States." *Marchant v. Pennsylvania R. Co.*, 153 U. S. 380, 14 Sup. Ct. 894, 38 L. Ed. 751, holds the same.

(54 W. Va. 149)

SNYDER v. PHILADELPHIA CO.(Supreme Court of Appeals of West Virginia.
Nov. 21, 1903.)**SUMMONS — OYER — SUFFICIENCY — ACTION
AGAINST CORPORATION — NEGLIGENCE — GAS
WELL — CONTRIBUTORY NEGLIGENCE — VENUE
— PLEA IN ABATEMENT.**

1. The summons in an action of trespass on the case is not a part of the record until made so by oyer.

2. Advantage of a variance between the writ and declaration can be taken by plea in abatement only and after oyer.

3. A summons setting forth the full corporate name of a defendant corporation, without reciting that it is a corporation, is sufficient.

4. The owner of a gas well, situated near a public highway, may lawfully open it for the purpose of allowing the gas to blow the water out of it, although the noise thereby made is clearly such as to frighten the horses of persons riding or driving along the highway; but in doing so he must exercise care not thereby to inflict injury upon such persons or their property.

5. Persons using horses on the highway in close proximity to such well, and seeing an agent of the owner at or near it, have the right to presume that he will not open it without warning, or first looking for travelers on the road, and are not guilty of contributory negligence in failing to turn and fly from it, or in failing to give warning of their presence.

6. When, by the negligent blowing off of such well, a teamster's horses become frightened, and in attempting to control them a line breaks, causing him to fall from his wagon, whereby he is injured, the proximate cause of the injury is the blowing off of the well, although the line is weak and wholly insufficient for such an emergency.

7. In such action, if the declaration shows the jurisdiction of the court, and no plea in abatement has been filed, the judgment will not be reversed for want of proof of the venue as laid. (Syllabus by the Court.)

Error to Circuit Court, Wetzel County; M. H. Willis, Judge.

Action by Robert Snyder against the Philadelphia Company. Judgment for plaintiff, and defendant brings error Affirmed.

Rucker, Anderson & Hughes, J. W. McIntire, and E. L. Robinson, for plaintiff in error. John A. Howard, for defendant in error.

POFFENBARGER, J. As the defendant in error, Robert Snyder, driving a two-horse wagon loaded with baled hay along a public road in Wetzel county approached a point in the road from which a gas well owned by the Philadelphia Company of West Virginia stood about 50 feet distant, W. W. Little, an agent and employé of said company, opened the valve or gate of the pipe in which the gas was confined under great pressure, and permitted it to escape, thereby causing a hissing and roaring noise, which frightened plaintiff's horses, and caused him to be thrown or to fall from the top of the load of hay to the ground, where the wheels of the wagon passed over his leg, badly fracturing it, and inflicting, as is claimed, permanent injury. In an action against the company he recovered a judgment for the sum of \$2,500

as damages for the injury inflicted by the alleged negligence of said company. Of this judgment said company complains.

The first assignment of error is predicated upon the action of the court in overruling the demurrer to the declaration and each count thereof. Upon the demurrer an effort is made to take advantage of the failure of the summons to say or recite that the defendant company is a corporation, it merely naming the defendant as the "Philadelphia Company of West Virginia." An objection of this kind cannot be raised by demurrer. Advantage of it can be taken only by plea in abatement on the ground of a variance of the declaration from the writ. In cases other than misnomer "the defendant on whom the process summoning him to answer appears to have been served shall not take advantage of any defect in the writ or return, or any variance in the writ from the declaration, unless the same be pleaded in abatement." Code 1890, c. 125, § 15; *Hoffman v. Bircher*, 22 W. Va. 537; *Anderson v. Doolittle*, 38 W. Va. 629, 18 S. E. 724. The omission does not make the writ void, for it is mere matter of description. The corporate name is fully set out, and the alleged defect is mere failure to describe the defendant as a corporation. This could have been cured by amendment, and said section 15 permits the amendment to be made. If the defect could be treated as a misnomer, the writ is amendable on mere motion accompanied by an affidavit of the right name, under section 14 of chapter 125. Such plea could not have been filed without having first made the writ a part of the record by demanding oyer thereof. 4 Min. Ins. 1266; 5 Rob. Pr. 98; *Hogg's Pl. & F.* 166, note 8; *Stephens v. White*, 2 Wash. 212; *Watson's Ex'r v. Lynch's Heirs*, 4 Munf. 94. To have availed itself of the plea in abatement, oyer of the writ must have been had, and the plea in abatement filed before any other plea was put in. A plea in abatement raises the question of jurisdiction, and after a general appearance the jurisdiction of the court for want of sufficient process cannot ordinarily be raised. 4 Min. Ins. 1266. Objections which do not go to the substance of an action are treated as waived if not made when the occasion of them arises. "It is a well-established rule that by appearing and pleading to the action a defendant waives all defects in the process or the service thereof. The cases go further, and imply such a waiver from the defendant's taking or consenting to a continuance as fully as they do from his pleading to the action. The object of the writ is to apprise the defendant of the nature of the proceeding against him. The fact of his taking or agreeing to a continuance is evidence of his having made himself a party to the record, and of his having recognized the case as in court. It is too late for him afterwards to say that he has not been regularly brought in to court." *Harvey v. Skipwith*, 16 Grat.

410. By appearance to the action for any other purpose than to take advantage of the defective execution or nonexecution of process, a defendant places himself expressly in the situation in which he would be if process were executed upon him. *Mahany v. Kephart*, 15 W. Va. 609; *Bank v. Bank*, 3 W. Va. 386; *Lumber Co. v. Lance & Co.*, 50 W. Va. 636, 41 S. E. 128. Had all these dilatory steps been taken by the defendant, they might have been unavailing even under adverse rulings of the courts, for many decisions hold that it is unnecessary to append the descriptive words "a corporation." See *Gillett v. Stove Co.*, 29 Grat. 565, in which both writ and declaration omitted the words, but were held good; *Woolf v. Steamboat Co.*, 62 E. C. L. 103; *Norris v. Statts*, Hob. 110; *Henriques v. West India Co.*, 2 Ld. Raym. 1534; *Rees v. Bank*, 5 Rand. 326, 16 Am. Dec. 755; *Douglass v. Railroad Co.*, 44 W. Va. 267, 28 S. E. 705; *State v. Dry Fork R. R. Co.*, 50 W. Va. 235, 40 S. E. 447; *Railroad Co. v. Sherman's Adm'r*, 30 Grat. 602. In *Woolf v. Steamboat Co.* and *Norris v. Statts* it was said that the name argues a corporation, and that setting it forth impliedly amounts to an allegation that the defendants are a corporate body. The view has been adopted and is still adhered to both in Virginia and this state. *Gillett v. Stove Co.* and *State v. Dry Fork R. R. Co.*, supra. It is inferred from the absence of anything in the brief in support of this assignment of error that it has been abandoned. At any rate, it is clear that there is nothing in it.

The criticism of the declaration is that it fails to show that the defendant violated any duty which the company owed to the plaintiff. It alleges that the defendant owned, controlled, and operated a gas well near the public highway, and that it was its duty to use due care in managing and operating said gas well, and in blowing the same off, so as not to interfere with the lawful use of said highway by persons riding and driving thereon; but that it neglected to do so. It also avers that the plaintiff, on the 28th day of April, 1897, was, as a teamster, driving his team upon and over said highway, hauling oil-well supplies, merchandise, hay, etc., in a wagon drawn by two horses driven by him, and when he, with his team, came to a point on said highway near to the said gas well said defendant, through its agents, servants, and employes then and there in charge of said gas well, not regarding its duty in the premises, carelessly and negligently managed and operated said gas well, and so carelessly and negligently caused and permitted the gas from said well to be discharged and escape with great force and in large quantities into the air, making a loud, hissing, unusual, and frightful noise, calculated to frighten horses and cause them to run away, and which did then and there frighten said horses so driven by the said plaintiff, and caused said horses to become unmanageable and run away,

whereby the said plaintiff was thrown, etc. Although the well was owned by the defendant company, and was purely private property, the use of that property by the defendant is restricted by the law so far that it cannot be, either by negligence or wantonness, so operated or handled as to inflict injury upon persons or their property. The operation of a gas well is in no sense unlawful, and as it is necessary to relieve the well of the accumulation of water by opening the gate and allowing it to blow out, this operation is also lawful, and cannot be regarded as a nuisance per se. But it is well settled that a business or transaction which is in itself lawful may be so used or so conducted as to become a nuisance and make the owner liable for injury resulting therefrom. So a man may make lawful use of his property, but if he is so negligent and careless in the use thereof as to inflict injury upon others he must answer in damages. It is a principle vital and indispensable in organized society that every one must so use his property as not to injure others. Although he has the right to the exclusive dominion and enjoyment of his own property, and may do with it as he pleases, he must respect the lives, limbs, health, and property of others to the extent of exercising at least ordinary care for their safety in the use of his property. Such right of dominion and enjoyment in him is met and limited by the same right existing in other people. He must live and let live. He owes a duty to the other, and he must so use his own property as not to injure him. At least, negligence or willful misconduct on the part of the one in the use of his own property resulting in injury to the other makes him liable. *Powell v. Furniture Co.*, 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53; *Wilson v. Powder Co.*, 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890; *McGregor v. Camden*, 47 W. Va. 193, 34 S. E. 936. The cases of *Dicken v. Salt & Coal Co.*, 41 W. Va. 511, 23 S. E. 582; *Woolwine's Adm'r v. Railway Co.*, 36 W. Va. 329, 15 S. E. 81, 16 L. R. A. 271, 32 Am. St. Rep. 859, and *Poling v. Railway Co.*, 38 W. Va. 645, 18 S. E. 782, 24 L. R. A. 215, relied upon by the plaintiff in error, do not support its contention. The language quoted from the first, "A party who is using his own property in a lawful way cannot be guilty of a breach of duty to any one," implies that he has not been guilty of negligence or willful misconduct in the use thereof; and in all those cases it was determined by the processes of the law that there had been no negligence.

This principle is very well illustrated in a line of decisions which hold that, although it is lawful for a manufacturing establishment to maintain a steam whistle, that whistle must be used with ordinary care and due regard for the rights of others, and if, by the negligent use thereof, horses are frightened and caused to run away and inflict injury, the owner of the plant is liable for the result-

ant damages. Between these cases and the one now under consideration there is a very close analogy. The principles upon which they stand are well established by courts of high standing, as well as supported by fundamental principles of law, and their application to the facts of this case as set forth in the declaration makes it clearly good. "The use of a steam whistle in a manufacturing establishment is not a nuisance per se, but it may be used so as to become such. It has been held that the sounding of the steam whistle of a factory fifteen feet from the platform on which a team is being unloaded is gross negligence which will render the factory owner liable, where the person in charge of the team is not first warned by the employes in charge of the whistle, although the whistle is in plain view from such platform, and the owner of the team, while acquainted with its operation, fails to notify his driver thereof. If a horse, frightened by such whistle, pulls at the rope by which he is hitched, and is thereby killed, the proprietor of the establishment using the whistle will not be liable to pay damages, in any event, if it appear that the accident was the combined result of the noise of the whistle and the vicious habit of the horse." 1 Thomp. Neg. § 1261. In *Knight v. Mfg. Co.*, 38 Conn. 438, 9 Am. Rep. 406, Butler, O. J., said: "Their right to use a whistle must be conceded, but like all other rights it must be so exercised as not to endanger and injure others. It is no answer to say that they did not erect or blow the whistle for any such purpose, or that they had no knowledge that it frightened horses, or that they did not suppose it was calculated to frighten them. These facts, if they existed, they were bound to know or anticipate."

The court refused to give an instruction, asked for by the defendant, telling the jury that if the plaintiff, knowing the danger of approaching the gas well, and having reason to anticipate danger, not dependent upon natural causes, but likely to happen by reason of the defendant operating its gas well, and having knowledge of the danger, approached the well, he was guilty of contributory negligence, and could not recover unless defendant's agent let off the gas with intent to frighten the horses. It is insisted that this instruction should have been given. As the plaintiff was proceeding along the public highway where he had the right to be, and the gas well had not yet been opened, he was not bound to assume that it would be opened while he was passing. He admits in his testimony that he saw Little approaching the derrick, and from this fact it might have been inferred that Little intended to open the well; but as plaintiff was already in the occupancy of the highway, the team already in close proximity to the well, where the noise, which the witnesses say was about five or six times as great as that of an ordinary locomotive whistle, was likely to fright-

en his horses, he was not bound to assume that the defendant's agent would do a negligent and reckless act. He had the right to assume that the agent would perform his duty and obey the law, by waiting until after the team had passed. All the evidence bearing on the question is to the effect that the plaintiff was so near the well when he saw Little going to it as to make his position dangerous if the well should be opened. Can it be said that because he did not turn back and fly from the mere prospect of such danger he was guilty of contributory negligence? The groundlessness of this contention is too apparent to require the citation of any authority.

On the motion to set aside the verdict, which the court overruled, it is argued that there was no proof of the ownership of the well by the defendant company. Throughout the entire trial, with the exception of a single question propounded by counsel for the defendant, the defendant company was never referred to by either counsel or witnesses by its full name. For the most part it was called the Philadelphia Company. The ownership of the well was not controverted, nor was there even a suggestion or intimation throughout the whole trial that the defendant company did not own and operate it. The plausible suggestion that the trial proceeded upon the tacit admission of the defendant's ownership of the well need not be adopted, if it could be. There seems to be enough evidence in the record to warrant the finding of the jury upon that point. In the testimony of a witness for the defendant, the following is found: "Q. Are you acquainted with the oil well on what is called the Barr farm in this county, belonging to the Philadelphia Company of West Virginia, or gas well? A. Yes, sir. Q. Do you remember the time that Robert Snyder was injured by falling off of a wagon near that well? A. I recollect of hearing of it. Q. Do you know anything about the condition of the road, as to bushes along the edge of it at that time, between the road and the well? A. Yes, sir." The witness then proceeds to describe the location. Clearly, he testified to that well as belonging to the defendant company, and identified it as the well near which the plaintiff was hurt. As there is no evidence to the contrary, this is sufficient upon which to rest the verdict as to the ownership of the well, and on that ground the verdict cannot be set aside. Had there been no admission of ownership by the defendant, or proof of it by his own witnesses, and no proof of it by the plaintiff, the verdict would have to stand upon the tacit admission of ownership, or else be set aside, but proof of it by the defendant relieves the court of the duty of saying whether it can stand upon the implied admission.

Further argument on the motion to set aside the verdict is based upon the theory of contributory negligence on the part of the

plaintiff, it being contended that, as the plaintiff knew the location of the well, and saw the defendant's agent there, and continued to advance to a point within 82 feet of the well, without warning the agent not to open it, and without doing anything else by way of precaution against danger, he took upon himself the risk and cannot be heard to complain of the result. This proposition has been sufficiently discussed in passing upon the instruction. The testimony further shows that, although the horses became frightened and ran, the wagon was not overturned, nor the load thrown off, and that shortly after it had started one of plaintiff's lines broke, and he fell from the wagon. Upon these facts it is insisted that the injury was due to the breaking of the line, and that as the plaintiff, in his business of hauling, was accustomed to driving through a community in which there were numerous gas wells, many of which were often opened and blown out, it was his duty to provide himself with safe and sufficient lines with which to control his team. This position is untenable, for the reason that the weak condition of the line cannot be regarded as having been the proximate cause of the injury. "Where the alleged intervening cause is in reality only a condition upon or through which the negligent act operated to produce the injuries complained of, the defendant will be held liable." 21 Am. & Eng. Enc. Law, 494. The excitement of the horses caused by the blowing off of the gas well must be regarded as the cause of the injury, not the weak condition of the line through which that cause operated, even if it be conceded that the fall was the result of the breaking of the line, and not of the jolting or toppling of the wagon, resulting from the running of the horses. The jury had the right to infer that, but for the negligent act of the defendant, the line, although weak, would not have broken. This principle is illustrated in 1 Thomp. Neg. § 91, as follows: "A. is passing along the street in his chaise, when the dog of B. leaps at the horse. The horse takes fright, and becomes unmanageable. In endeavoring to restrain him, a rein is broken. In consequence of this, the chaise is dashed against a post and broken. The attack of the dog, and not the breaking of the rein, is the proximate cause of the injury. * * * A street car is running at an unlawful rate of speed, in consequence of which it strikes a dray, breaks its shaft, and causes the horse to run away. The driver, while endeavoring to secure the horse, is struck by the broken shaft and hurt. The unlawful act of the street railway company is the proximate cause of his injury. A horse is allowed to run at large on a public street, in violation of a municipal ordinance. A man is driving a mare along the street, and her colt is running along by her side. The horse chases the colt. This frightens the mare so that she runs away,

and both the mare and colt are injured. The owner of the mare and colt has a right of action against the owner of the horse for the damage thus produced." The proximate cause is not always that which is nearest in time or place to the injury. The meaning of the maxim, "*Causa proxima, non remota, spectatur*," is that the true cause of an injury is that which brings it about either by direct operation or by setting in motion other causes as instruments or agents operating under its dominant influence. The proximate cause is the superior or controlling agency, as contradistinguished from those causes which are merely incidental or subsidiary to such controlling or principal cause. Phillips on Insurance, § 1093, says: "If two causes conspire, and one must be chosen, the more scientific inquiry seems to be whether one is not the efficient cause and the other merely instrumental or merely incidental, and not which is nearer in place or time to the consummation of the catastrophe." At section 1132 the same work says: "In case of the concurrence of different causes, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril, whether it is or is not in activity at the consummation of the disaster." In Brady v. Insurance Co., 11 Mich. 425, Martin, C. J., said: "That which is the actual cause of the loss, whether operating directly or by putting intervening agencies, the operation of which could not be reasonably avoided, in motion, by which the loss is produced, is the cause to which such loss should be attributed." These principles are approved in Insurance Co. v. Boon, 95 U. S. 117, 24 L. Ed. 395. In Insurance Co. v. Tweed, 7 Wall. 44, 19 L. Ed. 65, the same principle is applied in a case in which the property insured was destroyed by fire which originated from an explosion in a building other than that in which the insured property was. By the policy, loss by fire which might happen by means of an explosion was excepted, and the court held that the insurers were not liable. In the opinion Mr. Justice Miller said: "The explosion undoubtedly produced or set in operation the fire which burned the plaintiff's cotton. The fact that it was carried to the cotton by first burning another building supplies no new force or power which caused the burning." Though these principles are announced in insurance cases, it has already been shown that the courts apply them to negligence cases in seeking the cause of an injury. Whatever the form of action or relation of the parties, may be, those principles remain the same. An additional illustration is a negligence case found in Railway Co. v. Maddy, 57 Ark. 306, 21 S. W. 472, where a person almost blind, having taken a seat in a passenger car which had been put in place to receive passengers, was killed on the platform by another car approaching from the rear, in attempting to escape,

while other passengers succeeded in avoiding injury by getting off. The court held that the fact that the intestate was almost blind did not make him chargeable with contributory negligence in attempting to travel without an attendant, even if sight would have enabled him to escape injury. The reason given was that "his blindness was not the juridical cause of his injury, but only a condition that made it possible."

Under the impression that such an objection could be raised by motion to set aside the verdict or to arrest the judgment, it is insisted in the brief that there is no proof that the well is located, or that the injury occurred, in Wetzel county; and, further, that it is not shown in what district or particular locality the cause of action arose. The exact place is not material in any aspect of the case. 1 Chitty, Pl. 394. It need not be either alleged or proved. The county in which it occurred is material, and it is necessary to allege it. In other words, the venue must be laid in the declaration. But it does not follow that the judgment cannot stand because there was no proof that the cause of action arose in the county named in the declaration. In an action of this kind the county is important only as bearing upon the question of jurisdiction, and an objection to the jurisdiction, where the declaration shows jurisdiction on its face, cannot be raised by mere motion. "Where the declaration or bill shows on its face proper matter for the jurisdiction of the court, no exception for the want of such jurisdiction shall be allowed, unless it be taken by plea in abatement." Code 1899, c. 125, § 16. The defendant cannot allow the action to proceed through trial and verdict to judgment, and then complain that the cause of action did not arise in the county in which the venue is laid. If he proposes to contest the jurisdiction of the court on that ground, he must give notice of it by plea in abatement. In *Osborne v. Taylor's Adm'r*, 12 Grat. 120, the jurisdiction depended upon a question of fact to be decided by the court, namely, whether certain slaves, necessary parties to the bill, had been emancipated. No plea to the jurisdiction had been filed, and the court held that the statute applied and prevented the making of the objection to the jurisdiction for the first time in the appellate court. In *Telegraph Co. v. Hobson & Co.*, 15 Grat. 122, it appeared on the trial that some of the defendants resided out of the state, and it was held, under the statute, that, even if this were good ground for objection to the jurisdiction of the court, it was no excuse for arresting the judgment, as, to be available, it must have been set up by plea in abatement. In *Beckley v. Palmer*, 11 Grat. 625, and *Hudson v. Kline*, 9 Grat. 385, where objections to the jurisdiction in equity were sustained at the hearing, the reasoning of the court indicates that they were sustained simply because the bills on their faces showed want

of jurisdiction. Had it been otherwise, the statute would have applied. For further illustration of the application of the statute in analogous cases, see *Bank v. Gettinger*, 3 W. Va. 309; *Middleton's Ex'r v. White*, 5 W. Va. 572; *Quarrier v. Insurance Co.*, 10 W. Va. 507. But, if this were not true, there is enough evidence to warrant the finding, as will be seen by reference to the testimony quoted concerning ownership of the well.

Upon the whole case, the conclusion is that there was no error, and the judgment should be affirmed.

BRANNON, J. (dissenting). What duty to the plaintiff did defendant break? None. Therefore there can be no recovery by law. The defendant did only a lawful act in its business. The accident falls within the pale of inevitable misfortune. It is a case of *damnum absque injuria*. No negligence or wrong is shown; no violation of duty. Taking the case as shown by the plaintiff's evidence, there is no law to support the verdict. It is against law. *Veith v. Salt Co.*, 51 W. Va. 96, 41 S. E. 187, 57 L. R. A. 410.

On Rehearing.

POFFENBARGER, J. In disposing of the assignments of error it was deemed unnecessary to review the evidence, which is conflicting. In the petition for rehearing, lack of evidence of negligence is urged, great stress being laid upon the fact that Little, the agent of the company, says he looked for teams and persons passing upon the road before he opened the well, but saw none. But this testimony does not conclude the question whether there was an exercise of due care. The plaintiff testifies that he saw a man in the derrick, and that he was on high ground, and only about 100 feet distant from the well when it was opened. *W. C. Edwards*, a disinterested party, says Snyder stopped his team on top of a rise in the road a short distance from the well, and that Little could have seen him if he had looked. Being further questioned on this point, he reasserted his positive belief that a man standing in the derrick could have seen Snyder's team at the point at which the team was stopped to allow the witness (*Edwards*) to pass. *W. O. Gallaher*, who was with *Edwards*, testified as a witness for the defendant that Snyder's team stopped at a point 15 or 20 feet from the top of the rise in the road, and that a man on top of the load could see the derrick from that point, and that a man in the derrick could, in his opinion, have seen the team, if he had looked carefully. It further appears from the evidence that on the ground between the well and the point at which the team was there was some growth of weeds or brush, or of both, by reason of which the view may have been slightly obstructed. In this state of the evidence, the questions whether the agent could have seen the team, and whether

he performed the duty of looking for passing teams before opening the well, were clearly proper for the jury, and such as the court cannot pass upon without improperly interfering with the functions of the jury in the trial of the case.

(54 W. Va. 118)

BURROUGH v. ELY et al.

(Supreme Court of Appeals of West Virginia.
Nov. 14, 1903.)

LIEN—WORK AND LABOR—PERSONAL PROPERTY—ENFORCEMENT—RIGHT OF POSSESSION.

1. A common-law lien on personal property for work and labor performed is the mere right of detention of such property until satisfaction of debt, and is not the subject of equitable jurisdiction or protection, in the absence of statutory provision or other grounds of equitable interference.

2. Such lien only secures to the lienor the right of possession, and it is not otherwise enforceable. A sale made by him of the property would be wrongful.

3. For the deprivation of such possession the lienor may maintain detinue or trover, or, under execution or attachment properly obtained, he may have sale of the property.

(Syllabus by the Court.)

Appeal from Circuit Court, Lewis County; W. G. Bennett, Judge.

Bill by C. E. Burrough against Ralph H. Ely and others. Decree for defendants, and plaintiff appeals. Affirmed.

Edward A. Brannon and O. C. Higginbotham, for appellant. W. W. Brannon and W. B. McGary, for appellees.

DENT, J. C. E. Burrough appeals from the decision of the circuit court of Lewis county rendered on the 27th day of March, 1902, dismissing a bill in chancery filed by him against Ralph H. Ely and others for the purpose of enforcing a common-law lien claimed by the plaintiff on a certain lot of lumber manufactured by him for the defendant Ely.

The first question that presents itself is as to whether such bill is maintainable. If not, the plaintiff's remedies to determine and sustain his lien must be found in a court of law. The nature of the lien is only the right of possession of certain personal property on which work and labor has been performed. Hence there is no right of sale by reason thereof, either at law or in equity. The right of possession is all that such lien secures, which may be maintained by proper suit at law until the right of sale has been acquired either under execution or attachment. If the lienor is wrongfully deprived of his possession, he can maintain detinue for the goods, or trover and conversion for their value, to the amount of his claim. 2 Tucker's Com. (8d Ed.) 83; 13 Enc. Plead. & Prac. 126. In the absence of statutory provision to that effect, such lien does not au-

thorize a suit in equity to sell the property for the payment of the debt. Retention of possession is the full force of such lien, and nothing more. To this extent alone it is enforceable, and this by suit at law. 19 Amer. & Eng. Enc. Law (2d Ed.) 84; 13 Enc. Plead. & Prac. 123, 126.

The decree is affirmed.

(54 W. Va. 183)

CRAIG v. CRAIG et al.

(Supreme Court of Appeals of West Virginia.
Nov. 21, 1903.)

EQUITY—FRAUD OF PLAINTIFF—DECREE—DE-MURRER—PRESUMPTIONS.

1. If the case made by a party seeking the aid of a court of equity is tainted with fraud on his part, it will not aid him.

2. Where a decree disposing of the main issue of the cause makes no mention of the demurrer, the demurrer will be regarded as overruled.

(Syllabus by the Court.)

Appeal from Circuit Court, Preston County; John Homer Holt, Judge.

Bill by Chas. C. Craig against Elizabeth C. Craig and Charles M. Bishop. Decree for defendants, and plaintiff appeals. Affirmed.

V. B. Archer, J. A. Brown, and W. Beard, for appellant. R. W. Monroe, for appellees.

McWHORTER, P. Charles C. Craig on the first Monday in November, 1900, filed his bill in equity in the circuit court of Preston county against his wife, Elizabeth C. Craig, and Charles M. Bishop, wherein he alleged: That about 40 years before the filing of his bill he, in connection with his brother John Craig, purchased a farm from Thomas Brown. That he afterwards bought his brother's interest in said farm, and undertook to pay Brown for the farm. That he worked very hard to pay for it, but Brown finally died; plaintiff having kept the interest paid, which was about all he could do, and clear the farm as fast as he could. He then undertook to pay the children of said Brown for said farm, which he had about accomplished when he became involved in a very expensive litigation about a worthless threshing machine, which he refused to pay for, as unjust and wrong, but was defeated in the suit, and was subjected to very heavy costs, and the judgment against him was very large for a man of his means, and his family was large and expensive. The farm was sold to pay the judgment, and he bought it again, and again undertook to pay for it, and engaged in the lumber business in the hope of making the balance of the money still owing on the farm, when he was overtaken by the hard times of 1895, 1896, and 1897, and became worse embarrassed, and in an evil hour he made an assignment to Nell J. Fortney, trustee, for the benefit of his creditors; having previously given the de-

fendant Charles M. Bishop a trust deed on the farm to secure the amount he owed him. That, as the panic proceeded, things began to grow dark around him and the trustee, and they were eventually forced to surrender and sell and sacrifice plaintiff's property at nominal prices, which was almost wholly lost to plaintiff, except the farm, which, by agreement by the plaintiff and defendant Bishop, was cried off in the name of Bishop, and by agreement between the defendants, Bishop and Elizabeth C. Craig, and plaintiff, the farm was placed in the name of Elizabeth C. Craig, and the notes executed by her to Bishop with the distinct understanding between Elizabeth and the plaintiff that the notes were to be paid by plaintiff. But his wife and plaintiff's children then at home, it was expected, would work with plaintiff, and help him pay for the farm; and he again, for the fourth time in his life, undertook to pay for the farm. And alleged that defendant Elizabeth never owned a cent in the said farm; neither had she ever paid said Bishop anything on it. On the contrary, plaintiff had bought the farm more than once, and spent his life trying to pay for it. That he had always owned the farm since he purchased of his brother. And alleged that he purchased the said farm of Bishop, and had the same placed in the name of his wife by agreement that he made with her and Bishop; that his wife never owned a dollar's worth of property in her life, except in her marital rights, and a cow and a bed, up to the time plaintiff purchased the farm from Bishop, and that she had no means, or facility for acquiring any means, to pay on the farm since plaintiff purchased from Bishop, and that she had never paid anything on the notes signed by her for the purchase of the farm; that plaintiff thought when he purchased from Bishop he certainly would be able to pay for the farm, and still thought so, if his family would be loyal to him, as he expected them to be, but, to his great disappointment, they had deserted him, and were antagonizing him, in not allowing him to manage his business, and would not allow him to operate the farm and use the proceeds to pay for it, which was done by the approval and direction of his wife, the defendant, she and her eldest son having forcibly taken possession of the farm and about everything on it belonging to plaintiff, and much of the property so carried away they had destroyed, to the great prejudice and injury of plaintiff, and in violation of the agreement between Bishop and said Elizabeth C. Craig and plaintiff; that, in pursuance of his purchase for which Elizabeth C. Craig signed the notes by his direction, plaintiff began using and operating the farm, and so continued to do until the spring of 1900, during which time he faithfully applied all the proceeds thereof paying for the farm; that he paid said proceeds of the farm to Bishop on account of his purchase, and that

he paid Bishop various other amounts; that plaintiff had made valuable improvements on said farm, and that, by virtue of the positive agreement by the said Bishop and said Elizabeth C. Craig and plaintiff, the said Elizabeth had only been holding the farm in trust for plaintiff since she signed the notes. And praying that the said Elizabeth C. Craig be compelled to convey back the farm to plaintiff whenever requested thereto by plaintiff, which she refused to do, and asked that the deed made by Bishop to the defendant Elizabeth C. Craig be set aside and annulled, and, representing that Bishop had obtained a decree for part of the purchase money coming to him, which plaintiff had been unable to pay on account of his family acting as it had, prayed that the suit in favor of Bishop be heard in connection with this suit, and that, if Bishop should demand that said farm be sold before plaintiff could adjust the amount going to said Bishop, then a restraining order be entered to prevent the paying over to Elizabeth C. Craig or any one else the surplus arising from the sale of the farm after satisfying Bishop's claim, until the court should ascertain and decide to whom the surplus belongs, and that the said surplus be paid to plaintiff, and for general relief.

The defendant Elizabeth C. Craig filed her answer, admitting the general assignment made by plaintiff of all his property for the benefit of his creditors, and the deed of trust given on the farm to secure defendant Bishop, and the sale of the property under the assignment, and the sale of the farm under said deed of trust to Bishop, but denied that the farm was purchased by the plaintiff, but alleged, on the contrary, that C. M. Bishop was the purchaser, and that plaintiff had nothing whatever to do with the purchase under the trust; that, a few days after said Bishop purchased, he sold the farm to respondent, but not until after he had positively and repeatedly declined to sell it to plaintiff. Averring that the sale was made directly to respondent, without any agreement, understanding, or intention that it was ever to be turned over to or conveyed to plaintiff if she could succeed in paying for it; that it was true respondent had not the means at the time to pay for the farm, but she had the promise of her three sons and a daughter that they would assist her in paying for it, that the home might be saved to her in her old age, as well as for plaintiff, who was also expected to assist respondent, as was his duty to do in the maintenance and care of the family, but respondent and all of the family knew that it would be utter foolishness for plaintiff to pretend to buy the farm, as his creditors would have taken all his earnings and those of the children as fast as they might be applied as payments on said land under such an arrangement; that respondent was willing for plaintiff to oversee and manage the affairs about the farm, as was his duty to do when well and

able to work, and it was only when she found that he was not doing so properly that she decided to take the management out of his hands; that respondent had recently met with a fortunate sale of the coal underlying her said land, by which she had been able to discharge the entire purchase money lien resting on it, and had by said sale a fee-simple title to the surface and what was known as the three-foot vein of coal, and a surplus in money of about \$700, and was situated so as to have a comfortable home and living for herself and plaintiff and such of her children as might choose to remain with them, if plaintiff would do right, and be content to share the home with them in peace, and abandon his baseless litigation, or unnecessary and unjust annoyance to her and her children.

The defendant C. M. Bishop filed his demurrer and answer, averring that he purchased the tract of land from Neil J. Fortney, trustee, as alleged in the bill, but said that, if there was any sacrifice in the transaction, he had no part in it, as respondent was advised that plaintiff had voluntarily made an assignment to Neil J. Fortney of all his property, including this tract upon which respondent already had a deed of trust, to secure his debt, and at the sale respondent was compelled to purchase said tract of land in order to protect himself as to his lien; that he openly bid upon the said sale in competition with all other bidders, and placed the highest bid thereon, and, after it was knocked off to him at the price of \$1,545, received his deed therefor from said trustee. Respondent positively denied that he had any understanding or agreement with said C. C. Craig and Elizabeth C. Craig together, or either of them separately, at any time prior to the said purchase, at the time thereof, or at any other time, that he would or did purchase or had purchased the farm for said C. C. Craig or Elizabeth C. Craig, but that he made the purchase from said trustee in good faith for himself, and took his deed therefor, and some time afterwards sold the farm to said Elizabeth C. Craig at a price sufficient to cover his debt, interest, and cost; that he would not have sold to said C. C. Craig for the reason and on account of his failure and inability to pay off the debt existing at the time of the trustee's sale, and, as averred, that a sale to said Craig would simply put him in the position before occupied, and he would be taking the risk of a further accumulation of interest, and probably cost of a suit to enforce his vendor's lien, running the amount beyond the value of the land, but, upon representation of said C. C. Craig and Elizabeth C. Craig that he and some of his sons would assist the said Elizabeth C. Craig in making the payments, he was induced to, and did, sell it to her; but emphatically denied that there was any understanding or agreement on his part with said C. C. Craig and E. C. Craig, or anyone

else, at any time, that said sale was made or intended as a sale to said C. C. Craig, or for him, in any way.

Some 280 pages of depositions were taken and filed in the cause, including the depositions of the plaintiff himself, Elizabeth C. Craig, Neil J. Fortney, and Charles M. Bishop, and others, in which depositions there is much conflict.

The cause was heard on the 18th of December, 1901, when the following decree was entered: "This cause came on this day to be finally heard upon the process duly served on both of the defendants, bill of the plaintiff, decree nisi, bill taken for confessed, separate answers for both of the defendants, and general replications to each of said answers, depositions for plaintiff and defendant Elizabeth C. Craig taken and filed herein, cause regularly set for hearing, and was argued by counsel. On consideration whereof, the court is of the opinion that, upon the pleadings and proofs in this cause, the case is for the defendants. It is therefore adjudged, ordered, and decreed that the plaintiff's bill herein be, and the same is hereby, dismissed; and it is further adjudged, ordered, and decreed that the plaintiff pay to the defendants their costs about their defense in this behalf expended. And it being made known to the court that a certain portion of the purchase money coming from W. P. Hurst to defendant Elizabeth C. Craig on her coal sale to said Hurst, to wit, \$645.32, was put into the hands of Neil J. Fortney pending the determination of this suit, that the said Fortney is hereby directed to pay the said sum to said Elizabeth C. Craig or her attorney, whose receipt shall protect said Fortney in the payment thereof." From which decree the plaintiff appealed.

This is a suit to establish a trust upon an alleged oral agreement. At the sale by the trustee, Charles M. Bishop had purchased the farm, and had taken a deed therefor from the trustee. It is contended by appellant that it is admitted in the answer of the defendant Elizabeth C. Craig that the farm was purchased from Bishop by the plaintiff, and he quotes a part of a paragraph from the answer claiming that it contained such admission. On the contrary, the answer shows that the defendant denied emphatically that the plaintiff was the purchaser. This emphatic denial is followed by the paragraph which is only partially quoted by counsel for plaintiff in their brief, which paragraph contains facts intended to show that it was impossible for plaintiff at the time to have purchased the property with any hope or show of ever being able to pay for it or keep it. In the paragraph from the answer from which the partial quotation is made, after stating that Bishop had sold the farm to respondent, "but not until after he had positively and repeatedly declined to sell it to the plaintiff," then follows what respondent says, to show the utter futility of plain-

tiffs making said purchase from said Bishop at the time it was purchased by respondent; but plaintiff's counsel does not give the whole residue of the paragraph, which is as follows: "Respondent, not desiring to go into the long history of plaintiff's various purchases of said farm, and his failures to pay for it, as set out in his said bill, admits the truth of said statement, in the main, and says that, of all the purchases so alleged to have been made, in the case of no one of them was the plaintiff in as poor a situation, or had as poor a prospect of paying for said farm, as at the time of his last alleged purchase, when, in addition to his advanced age and greatly impaired physical condition, he was hopelessly insolvent. He had given up everything he possessed in the way of personal property, except the pittance allowed him under the exemption law, the proceeds of which paid only a trifling per cent. of his indebtedness, leaving the rest hanging over him, without any ability to pay it." It is hard to conceive, indeed, how this can be construed into an admission by the respondent of plaintiff's allegation that he made the purchase. Bishop had purchased the farm at a public sale, had the deed thereto from the trustee, and plaintiff had no interest in the farm, and no more right to purchase the same than the defendant or any other person. Bishop had very good reasons for not desiring to sell the farm to the plaintiff, who had failed for 40 years to pay for the same, and was even at that time embarrassed with indebtedness far beyond the value of the farm, as shown by the allegations of his bill, as well as by the answer of Elizabeth C. Craig. It is claimed by counsel for plaintiff that the plaintiff, Craig, paid down to Bishop at the time of purchase the sum of \$204 on said purchase, the price being \$2,050, agreed upon between them, which \$204 was paid in the following manner: Craig was indebted to Bishop in the sum of \$204, which was included in the price of the land, \$2,050, for which amount the defendant Elizabeth C. Craig gave her notes to Bishop. The said \$204 being included in the notes, and being owed to Bishop by Craig, plaintiff's counsel claims that the same was a payment of \$204 on the land. Upon this theory, if plaintiff had owed Bishop at the time an additional \$1,846, his indebtedness to Bishop would have just amounted to enough to pay for the farm, and would have entitled him to a deed from Bishop therefor. Plaintiff claims to have made some little payments to Bishop, derived from auctioneers' fees and from hauling; but no payments of any moment were made until the sale of the coal, when the whole purchase money was paid off, leaving a surplus. Counsel for plaintiff, in their brief, say, "There is practically no conflict of evidence upon the main question and claim of the plaintiff;" that the land was purchased by him, and paid for by him, as far as payments were made outside of the sale of

the coal; and that the title passed to the defendant Elizabeth C. Craig at plaintiff's request. There is as direct conflict of evidence on the main question as there could well be. The testimony of C. M. Bishop and E. C. Craig is as positive and direct that the sale was made by Bishop to the defendant Elizabeth C. Craig as it is found in their answers. Also the evidence of the trustee, Fortney. When Fortney was asked whether he recollected of anything being said, when they were preparing the papers, between Bishop and Mrs. Craig, "about preparing a contract of some kind by which the land could be sold to Charley [meaning plaintiff], or of his asking you if you could prepare such a paper," he answered: "No, sir; I have no recollection of his asking it. On the contrary, as stated, the idea of Mr. Craig's participation in the deed was tabooed at the very outset."

In *Phelps v. Seely*, 22 Grat. 573, it is held: "A resulting trust may be set up by parol testimony against the letter of a deed, and a deed absolute on its face may, by like testimony, be proved to be only a mortgage. But the testimony, to produce these results, must in each case be clear and unquestionable." And in *Troll v. Carter*, 15 W. Va. 567 (Syl., point 7): "Whenever the courts permit parol evidence to be received to establish a trust, they always require such evidence to be clear and unquestionable, to produce such results." To establish this alleged oral agreement between himself and Bishop and the defendant Elizabeth C. Craig, the laboring oar is with the plaintiff, and he must establish it by clear and unquestionable evidence. The attempt to establish it is principally by conversations had with the defendants, Elizabeth C. Craig and C. M. Bishop, and of parts of such conversations overheard. Upon the evidence submitted in the cause, the circuit court has found for the defendants, and we can by no means say that his finding is so manifestly wrong as to warrant a reversal of the decree. Indeed, a strong preponderance of the evidence submitted in the case supports the decree; and, even if it were otherwise, from the nature of the case, the appellate court would have to sustain the decree, unless the evidence was so clearly against it as to make the finding of the court manifestly wrong. Even when the evidence is conflicting, but of such a character as to make it doubtful which way it preponderated, in a cause where the mere preponderance of the weight of the evidence controlled, this court will sustain the decree. *Smith v. Yoke*, 27 W. Va. 639; *Doonan v. Glynn*, 28 W. Va. 715; *Prichard v. Evans*, 31 W. Va. 137, 5 S. E. 461; *Frederick v. Frederick*, 31 W. Va. 566, 8 S. E. 295; *Richardson v. Ralphsnyder*, 40 W. Va. 15, 20 S. E. 854.

Appellant contended that the court decided the case and dismissed plaintiff's bill on the idea that the maxim, "Where both parties are equally guilty the defendant shall

prevail," was applicable, but that it could not be so applicable, from the fact that no pleading in the case made it relevant. The allegations of the bill make it clear that, at the time of the purchase of the farm, plaintiff was deeply involved in debt; that his property had been sold and sacrificed at nominal prices, and was almost wholly lost to him. And according to the theory of his bill, he was purchasing the farm for his own use, and had the same conveyed to his wife to protect the title against his creditors. His wife, being cognizant of his insolvency and indebtedness, accepting the deed for the purpose of holding the farm in trust for the plaintiff against the rights of his creditors, and the plaintiff paying for the farm, would bring them both clearly within the maxim quoted; and the plaintiff would be guilty of a fraud in concealing his assets from his creditors, and the defendant, his wife, would be a party thereto. The court seems to have decided the cause upon its merits, and without noticing the demurrer of defendant, which is, in effect, overruled by decreeing upon the merits. *Miller v. Miller*, 92 Va. 196, 23 S. E. 232 (Syl., point 2). In *Horn v. Star Foundry*, 23 W. Va. 522, at page 543, in rendering the opinion of the court, Judge Greene says: "I need not take time to look up or cite authorities to show that this contract was fraudulent and contrary to public policy, for it seems to me to be so obviously of this character that it is only necessary for any lawyer to read the bill at once to pronounce it unquestionably of this character;" and says the circuit court ought to have sustained the general demurrer to the bill, and dismissed the same, at plaintiff's costs. This is what should have been done in the case at bar, upon the principle of the maxim, "Nemo allegans suam turpitudinem est audiendus." In *Evans v. Folsom*, 5 Minn. 422 (Gil. 342), it is held: "If the case made by a party seeking the aid of a court of equity is tainted with fraud on his part, it will not aid him." 7 *Wait's Actions & Defenses*, p. 55. It appears from exhibits filed with depositions taken in the case that plaintiff was discharged in bankruptcy from his debts, and his creditors have no interest in the issue of this case.

The said decree is right, and must be affirmed.

(54 W. Va. 82)

BROWN et al. v. NUTTER et al.

(Supreme Court of Appeals of West Virginia.
Nov. 7, 1903.)

BILL OF REVIEW—EVIDENCE TO SUSTAIN.

1. Newly discovered oral evidence, contradictory or cumulative in its nature, to be sufficient to sustain a bill of review, must, like written evidence, be so indisputable as to be decisive of the case.

2. Newly discovered evidence which is of such doubtful character as only to open up the case

for further litigation will not sustain a bill of review.

(Syllabus by the Court.)

Appeal from Circuit Court, Harrison County; John W. Mason, Judge.

Bill by Beeson H. Brown and others against Cordella Nutter and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

John Bassel, W. Scott, and Davis & Davis, for appellants. Edward G. Smith, M. F. Snider, and Edward A. Brannon, for appellees.

DENT, J. "This is an appeal by Beeson H. Brown, Henry R. Smith, Gertrude Duncan, and George L. Duncan from a decree of the circuit court of Harrison county, entered February 2, 1903, sustaining a demurrer to the bill of review filed by leave of the circuit court, to review upon the ground of newly discovered evidence the decree of the appellate court entered on March 29, 1902, revising a decree of said circuit court in the cause of Cordella Nutter against Beeson H. Brown and others, entered on June 8, 1901, by which decree of the appellate court the words 'natural gas and oil' were directed to be expunged and struck out of the deed made to said Beeson H. Brown by Cordella Nutter and her former husband, William L. Strother." *Nutter v. Brown*, 51 W. Va. 598, 42 S. E. 661. The newly discovered evidence relied on is to the effect that Matilda Flanagan and her two daughters, Sallie Johnson and Jennie Kerns, will testify that in the year 1891 Cordella Nutter stated to them, or in their presence, that she received \$1 more per acre than Matilda Flanagan and her husband received for their coal, because gas and oil was included in her conveyance. This testimony was first brought to the attention of appellants by virtue of the following note, written by one of the proposed witnesses, as she says, in the interest of justice, to wit:

"No 8 1902

"Adamston

"W. VA.

"Mr.

"B H brown Dear Sir if you want any Evidence at coart in that law Suit you are Having with G a Garritt and Dr arnett just call on me i will get you the best Evidents for you that you Ever Had yet

"truly yours

"Mrs Sallie JohnSon."

The law governing this case has been fully settled by a former decision of this court. In the case of the Davis Sewing Machine Co. v. Dunbar, 32 W. Va. 335, 9 S. E. 237, in part second of the syllabus, the rule is stated thus: "A bill of review for newly discovered evidence will not lie where the evidence is simply confirmatory or accumulative. It must be decisive in its character; such as ought, if true, upon rehearing to produce a different decree, and of which the party was ignorant at the time of the decree, and could not have learned by the exercise of reason-

able diligence." *Nichols v. Nichols' Heirs*, 8 W. Va. 174; *Wethered v. Elliott*, 45 W. Va. 436, 32 S. E. 209; *Douglass v. Stephenson's Ex'r*, 75 Va. 756. To sustain a bill of review for newly discovered evidence, the duty devolves upon the plaintiff, first, to produce evidence clearly decisive of the case; second, to show that such evidence could not have been discovered by due diligence. It matters not whether the newly discovered evidence be oral or written; if it is decisive of the case, it will be admitted for the purpose of reversing a decree; the difference between oral and written evidence being that written evidence, when the making of the writing is admitted, is indisputable. A demurrer to a bill admits the indisputable character of such evidence. On the other hand, a demurrer to a bill of review founded on oral testimony alone does not always admit that such oral testimony is true, but only that the witnesses will testify according to the allegations of the bill. Oral testimony therefore is nearly always open to dispute. To overthrow a decree of this character, the evidence must be indisputable. It must be so strong that on a review it will be decisive of the case, and not merely open it up for further litigation. If the appellants had produced a writing signed by Mrs. Nutter, wherein she admitted that she had received \$1 per acre more for her oil and gas, this would be decisive of the case, and would have justified a review thereof. The fact that Mrs. Flanagan and her daughters will testify that Mrs. Nutter admitted in their presence that she received \$1 per acre for her oil and gas is not at all decisive of the case, for the reason that their evidence is open to dispute, being a matter of memory alone; by their own cross-examination; by other facts and circumstances and by other witnesses. Hence to allow a review on their evidence is simply to throw the case wide open for further litigation, and would be nothing more than the granting of a new trial without sufficient justification thereof. To set aside the solemn decrees of this court on evidence so frail would be to throw wide open the door of equity to fraud and perjury, for defeated litigants would never allow a case to remain settled as long as witnesses could be discovered willing to testify as to admissions made by the successful party. Equity regards all such attempts with a critical and suspicious eye to preserve the fountain of justice from being too easily polluted, and rightly requires that oral evidence to overthrow a decree must be as indisputable and convincing as written evidence. The enforcement of such rule may operate harshly sometimes, but it is far better, even though it does, to uphold, rather than to destroy, such a barrier to a sea of unknown troubles and endless litigation. However desirous we may be to defend the character of litigants for whom we may have a friendly regard, yet it is the part of justice to be blind to mat-

ters extraneous to the record, and to be governed by its revealings alone. The voluntary note written by one of the proposed witnesses, as she claims in the interest of justice, is very peculiar indeed. The spelling and composition show her to be a very illiterate woman, and yet she claims the ability to get for Mr. Brown evidence, the best he ever had in his suit. Such illiteracy, knowledge of a suit, and the weight and necessity of evidence coupled with so highly a developed sense of justice at so opportune a time, is a combination seldom found in womankind, but is so rare as to excite suspicion of its sincerity. Voluntary evidence under such circumstances is always open to suspicion, and must be regarded as of little weight, instead of being decisive in its character, unless it be clearly indisputable. In the case of *Reynolds v. Reynolds' Ex'r*, 83 Va. 152, 13 S. E. 395, 598, the newly discovered evidence, though oral, was above suspicion, indisputable, and decisive of the controversy. In this case, the demurrer being regarded as an admission of what the newly discovered witnesses will testify, and not an admission of the truth of such evidence, the same must be regarded as disputable, indecisive of the controversy, and, in the light of facts, circumstances, and evidence disclosed by and contained in the old record, subject to suspicion and doubt as to the sincerity or soundness of the witnesses' memories. It is therefore wholly insufficient to justify a review of such decree.

Nor is it clear that, if the appellants had used the same diligence to discover the new evidence before the decree that they did afterwards, they would not have just as easily provided it then as now. For the first time the appellants claim, in effect, in their bill, that Beeson H. Brown paid Mrs. Nutter \$1 per acre for oil and gas. This is stated to be a fact fully known to Brown, and the bill is sworn to by him. In the former suit he filed an answer under oath, in which he made no such claim. If such were the truth, and he had set the same up as a defense, and attempted to prove it on cross-examination of his agent and Mrs. Nutter, and testified in contradiction to their testimony that such was his understanding of his purchase, the result might have been entirely different. If such had been his position, and he had made any effort to obtain the evidence to sustain it, there can be no doubt that he could have easily, by the exercise of due diligence, obtained this newly discovered evidence. He made no such defense, and therefore made no effort to obtain the evidence to sustain it.

The absence of such defense is one of the prime reasons that led the court to its former conclusions, as is plainly evident from the following three separate quotations from the former opinion, to wit: "It is not shown in evidence that the defendant purchased or paid anything for the oil and gas. He was

buying the coal, and, if he could get the oil and gas thrown in, he would take it. His sole reliance in this case is on the fact that they appear in the papers by the confessed mistakes of his agent. He does not claim that he bought and paid for them, but that because of their valueless character at that time the plaintiff was willing to let them go to secure the sale of her coal." "This undenied instruction from his principal shows that he was not bargaining for the oil and gas, but if by deceitful means or otherwise, without openly purchasing them, he could obtain them, he was willing to accept them, without regard to the means employed. He does not as a witness claim that he purchased them, or that he is out anything by reason thereof." "He gave nothing for the property, and is in statu quo without being put there." These quotations all show that the court reached its former conclusion from the fact that appellant, Brown, neither claimed nor pretended to prove that he actually purchased the oil and gas at \$1 per acre, or that he was out anything by reason thereof. If he did purchase the oil and gas and paid \$1 per acre, as he now pretends to assert, he should have set up the same in his answer, and sustained the same by his evidence. Having failed to do so when he had the opportunity, and having thereby misled the court into a wrongful decision, he is forever precluded from asserting the same, even though it were the truth. It has passed into the domain of things adjudicated, and there it must forever rest. Sayre's *Adm'r v. Harpold*, 33 W. Va. 553, 11 S. E. 16. This newly discovered evidence would have been admissible under the allegations contained in the pleadings of the former suit as tending to contradict the evidence of Mrs. Nutter and James M. Plant as to the agreement between them that the words "oil and gas" were to be stricken out of the deed, but would not have been decisive of the case, because not indisputable, as aforesaid.

A bill of review does not lie to adjudicate matters already adjudicated, except for error of law apparent on the face of the record, or for new and after-discovered evidence decisive of the case. It does not lie to let in evidence that might have had some weight, little or great, had it been introduced at the proper time, but only such as is of such force and weight as will forever end the case. Appellant Brown was negligent in not setting up and claiming that he had purchased the oil and gas at \$1 per acre, and this fact, if true, cannot be used as a ground to sustain the bill of review. Yet it is a potent fact in showing that he did not use due diligence to obtain evidence to sustain it. A litigant seldom uses reasonable diligence to obtain evidence to sustain a fact on which he does not rely.

The main question, however, for determination is as to whether the fact that Mrs. Flanagan and her two daughters will tes-

tify that Mrs. Nutter said to them, or in their presence, that she received \$1 per acre more for her coal because she included oil and gas, is decisive of the case, or, in other words, is sufficient to reverse the decree attacked. The answer to this question must be in the negative for many reasons. First, because the evidence is oral, and not indisputable, or decisive of the case; second, because the main fact which it seeks to establish was not relied on by the appellants either in their pleadings or evidence in the original litigation, but has all the marks of an afterthought that places such evidence under grave suspicion; third, because it is not of sufficient weight as contradictory evidence to overcome the positive statements of Mrs. Nutter and James M. Plant that there was an agreement between them that the oil and gas was not to be retained in the deed, but was to be stricken therefrom, sustained by the unexplained silence of the appellant Brown, for whom Plant was acting, and by other evidence and circumstances in and surrounding the case. Instead of this new evidence being decisive of the case, the suspicions against it are equally as strong as the suspicions it seeks to raise.

For these reasons we find the conclusions of the circuit court right, and affirm the decree.

BRANNON, J. (concurring). "Every distinct averment must be taken as true upon a mere application to file a bill of review." *Davis v. Morris' Ex'rs*, 76 Va. 21. In this case what do we take as true? Only the fact that the witnesses will state what the bill represents they will state, or that what they say is true? In other words, simply that they will state as the bill represents, or that their evidence is true, and proves that Cordelia Nutter made the admission specified? The case of *Sewing Machine Co. v. Dunbar*, 32 W. Va. 335, 9 S. E. 237, says that the new evidence must be such as, if true, ought to reverse the decree. If what is true? Why, the new evidence; the fact it goes to prove; that is, Cordelia Nutter's admission. The new evidence to sustain a bill of review must be "material, and such as, if unanswered, in point of fact would clearly entitle the party to a decree, or would raise a question of so much difficulty as to be the fit subject of a judgment in the cause." 2 Beach, Mod. Eq. Prac. § 860. I conclude that on the demurrer we must take it that the new evidence is true, and that Cordelia Nutter made the admissions, not simply that the witnesses will so state. Then comes the question, what is the force of that admission on this bill of review? Is it only cumulative? In *Grogan v. Railroad*, 89 W. Va. 415, 19 S. E. 563, I endeavored to define cumulative evidence. On the former hearing the question was whether Cordelia Nutter sold to Brown oil and gas as well as the coal. Brown gave evidence that she did; she gave evidence

that she did not. Is not this admission only more evidence that she did? Evidence of admissions is weak evidence, but at present we cannot consider this argument because that rule is based on the fact that evidence to prove admissions is weak, not that the admission is itself weak; that the witnesses may have misunderstood the admission. Upon the bill of review we are assuming that the admission was made. Then, treating it as made, what is its effect? If unanswered and established, does it call for reversal of the decree? I think not, because it is cumulative; more evidence to show that oil and gas were included in the sale. True, the evidence goes to prove a new independent fact not before in issue—that is, the admission; but that admission is only more evidence on the question whether oil and gas were in fact sold to Brown. I do not say that in all cases cumulative evidence is inadmissible; but I say that, if allowed, it must be so forceful as to leave no question of its effect to reverse the decree. The courts say it must be received with great slowness and caution, else there would be no end to a case, as more evidence bearing on the same issues can always be found. This admission does not, beyond question, call for a reversal of the decree. *Bloss v. Hull*, 27 W. Va. 503.

(102 Va. 306)

FUNKHOUSER v. SPAHR.

(Supreme Court of Appeals of Virginia. Jan. 14, 1904.)

APPEAL AND ERROR—DIVIDED COURT—CONSTITUTION—STATUTES—INTERPRETATION.

1. The provision of section 88 of article 6 of the Constitution that, whenever the requisite majority of the judges of the Supreme Court of Appeals sitting are unable to agree upon a decision, the case shall be reheard by a full bench, applies only to cases involving the constitutionality of laws, and does not prohibit the decision of ordinary cases by a divided court.

2. It is an established canon of construction that effect shall be given to every word in the instrument to be construed, whether it be a will, a contract, a statute, or a constitution.

3. The only proper way to construe a legislative or constitutional enactment is from the language used in the act, and upon occasion by a resort to the history of the times when it was passed. Resort cannot be had to the views or debates of the framers of the enactment.

Action between one Funkhouser and one Spahr. From the judgment Funkhouser brings error. Affirmed by divided court without opinion. Petition to rehear denied.

Elder & Elder, for petitioner.

KEITH, P. Funkhouser, who was plaintiff in error in the case of Funkhouser v. Spahr, asks a rehearing of the judgment rendered against him at the September term of this

court, in pursuance of section 3485 of the Code of 1887, which is as follows:

"The appellate court shall affirm the judgment, decree, or order, if there be no error therein, and reverse the same, in whole or in part, if erroneous, and enter such judgment, decree or order, as the court whose error is sought to be corrected ought to have entered, affirming in those cases where the voices on both sides are equal: provided however, that in order to declare, in any case, any law null and void by reason of its repugnance to the Constitution of the United States or the Constitution of this state, it shall be necessary that a majority of the judges elected to the Supreme Court of Appeals shall concur."

The contention of the petitioner is that the section above quoted is repugnant to the last sentence of section 88, art. 6, of the Constitution, which is as follows:

"Whenever the requisite majority of the judges sitting are unable to agree upon a decision, the case shall be reheard by a full bench, and any vacancy caused by any one or more of the judges being unable, unwilling, or disqualified to sit, shall be temporarily filled in a manner to be prescribed by law."

It will not do to segregate this sentence from its context. It is found in section 88 of article 6 of the Constitution, which deals with the organization and jurisdiction of this court. After stating with precision the subjects over which this jurisdiction shall extend, it proceeds to set forth the manner in which that jurisdiction shall in certain cases be exercised, and declares that: "The assent of at least three of the judges shall be required for the court to determine that any law is, or is not, repugnant to the Constitution of this state or of the United States; and if in a case involving the constitutionality of any such law, not more than two of the judges sitting agree in opinion on the constitutional question involved, and the case cannot be determined without passing on such question, no decision shall be rendered therein, but the case shall be reheard by a full court; and in no case where the jurisdiction of the court depends solely upon the fact that the constitutionality of a law is involved, shall the court decide the case upon its merits, unless the contention of the appellant upon the constitutional question be sustained. Whenever the requisite majority of the judges sitting are unable to agree upon a decision, the case shall be reheard by a full bench, and any vacancy caused by any one or more of the judges being unable, unwilling, or disqualified to sit, shall be temporarily filled in a manner to be prescribed by law."

The Constitution which preceded that now in force provided that "the assent of a majority of the judges elected to the court, shall be required in order to declare any law null and void, by reason of its repugnance to the

¶ 3. See Constitutional Law, vol. 10, Cent. Dig. §§ 11, 12.

federal Constitution, or to the Constitution of this state." The provision of the former Constitution upon this subject was deemed inadequate by the convention which framed the present Constitution, and it inserted in lieu of it the provision as it now stands, which declares that "the assent of at least three of the judges shall be required for the court to determine that any law is or is not repugnant to the Constitution of this state or of the United States." Where the constitutionality of a law is drawn in question, it is plain, therefore, that the assent of three judges is necessary to decide the case. A less number cannot hold that a law is constitutional or that it is unconstitutional. The assent of three judges is essential to the judgment, is a jurisdictional necessity, and less than that number is incapable of pronouncing any judgment in such a case. The convention was impressed with the delicacy and importance of the jurisdiction exercised by courts in passing upon the constitutionality of a law. It felt that the provision upon the subject in the former Constitution, which only went to the extent of holding that a law could not be declared null and void, as repugnant to the Constitution of the United States or of the state, unless three of the judges of the court concurred in that conclusion, did not fully meet the requirements of the situation, for under the law as it then stood an unconstitutional law might, in a particular case, be binding and operative upon the parties to the litigation because of an equal division among the judges composing the court. It considered that all cases in which the constitutionality of a law is involved are of first importance; that no statute which transcends the fundamental law should be enforced against any citizen; and therefore it required the concurrence of three judges for the disposition of the question, and prohibited any judgment for or against the validity of the law by an equally divided court. The evil which the convention sought to remedy was plain and obvious; the remedy which it applied is adequate and complete.

In the concluding sentence of the section under consideration, separated from what has been quoted, it is true, by a period, but wholly germane to and in pari materia with what has gone before, and with the manifest purpose of providing the means for carrying out the object so clearly expressed in the preceding portion of this section, the following language is used: "Whenever the requisite majority of the judges sitting are unable to agree upon a decision, the case shall be reheard by a full bench, and any vacancy caused by any one or more of the judges being unable, unwilling, or disqualified to sit, shall be temporarily filled in a manner to be prescribed by law." Now, if the purpose had been to prohibit the decision of any case by a divided court, we presume that the Constitution would have said so. The end could

have been reached by simply declaring that in every case a majority of the judges sitting must agree upon a decision. If it had been intended that this sentence should reach a class of cases not embraced in that which precedes it, the convention might, with great propriety, have made it an independent paragraph; but, if that be not so, the language employed seems to be conclusive against the construction contended for by the petitioner. "Whenever the requisite majority of the judges sitting are unable to agree upon a decision, the case shall be reheard by a full bench." "Whenever" is an adverb of time. It is not the equivalent of "in any case." Its meaning, and the only meaning given to it by lexicographers, is "at whatever time." This sentence is not to be read as though the Constitution had said, "In any case in which the requisite majority of the judges sitting are unable to agree upon a decision, the case shall be reheard by a full bench," but "At whatever time it may happen that the requisite majority of the judges sitting are unable to agree upon a decision, the case shall be reheard by a full bench"; that is to say, the "case" and the "decision" in which the constitutionality of a law shall be called in question. What is meant by "the requisite majority"? Obviously, that "the assent of at least three of the judges shall be required to determine that any law is or is not repugnant to the Constitution of this state or of the United States."

If the sentence now being considered was meant to apply to cases in which a constitutional question does not arise, and to forbid the decision of such cases when the "voices on both sides are equal," in the language of section 3485, then it would have been enough to forbid the decision of any case unless a majority of the judges sitting should concur. The use of the word "requisite" would in such case be superfluous and unnecessary. The Constitution, however, uses the expression "requisite majority," and it is our duty in expounding it to give due effect to every word. We can reject no word as superfluous, unless it may be in an extreme case, in which not to do so would lead to a conclusion absurd in itself or necessarily repugnant to the plain meaning of the Constitution. "Requisite" means "essential, indispensable," and "requisite majority" must of necessity refer to the concurrence of three judges, for that satisfies, and alone satisfies, and gives force and effect to each word employed.

It is well to observe the precise language employed from another point of view. "If in a case involving the constitutionality of any such law, not more than two of the judges sitting agree in opinion on the constitutional question involved, and the case cannot be determined without passing on such question, no decision shall be rendered therein, but the case shall be reheard by a full court;" but no provision is made for the contingency of

one of the judges being unable, unwilling, or disqualified to sit. In cases involving questions of the gravest importance it may well be that one of the judges, for some cause, cannot sit; and in that event, if the maining four are equally divided, what becomes of the case? It can only be decided by a "full court," and there is no provision for supplying the place of the absent judge, unless recourse be had to the concluding sentence of this section, or a special court of appeals be organized under the succeeding section. Here, then, is a reason—and a sufficient reason—for the addition to section 88 of the sentence under discussion. Again, if that sentence applies to all cases, then it follows either that the "requisite majority" of three judges is necessary in all cases, which would render by far the greater part of the careful provision with respect to cases involving constitutional questions meaningless and nugatory, or, if it be contended that a court of three may hear and a majority of two may decide a case not involving a constitutional question, then the adjective "requisite," which qualifies "majority," and limits its meaning, is not only superfluous, but misleading, while one of the established canons of construction, as we have seen, is that effect shall be given to every word in the instrument to be construed, whether it be a will, a contract, a statute, or a constitution.

Letters from eminent members of the constitutional convention are copied into the petition, from which it would appear that, in their opinion, the convention intended to accomplish the result contended for by the petitioner, and its purpose was to prohibit the decision of any case where the judges were equally divided.

In *United States v. Union Pac. R. R. Co.*, 91 U. S. 72, 23 L. Ed. 224, construing an act of Congress, the court said: "We are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts may with propriety, in construing a statute, recur to the history of the times when it was passed, and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it."

In *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 318, 17 Sup. Ct. 550, 41 L. Ed. 1007, Justice Peckham uses the following language: "There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual mem-

bers thereof. Those who did not speak may not have agreed with those who did, and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed"—citing a great number of authorities.

The English cases are to the same effect. In *The Queen v. Hertford College*, 3 Queen's Bench Div., at page 707, Lord Chief Justice Coleridge says: "We are not concerned with what Parliament intended, but simply with what it has said in the statute. The statute is clear, and the parliamentary history of a statute is wisely inadmissible to explain it, if it is not."

And this court, in *Sherwood v. A. & D. R. R. Co.*, 94 Va., at page 301, 26 S. E. 946, uses the following language: "It is the duty of the court to ascertain the intention of the Legislature, and, when ascertained, to give it effect; and in the search for that intent it is its duty to consider the object of the statute and the purpose to be accomplished. It must reach the intent, however, by giving to the words used their ordinary and usual signification, and to every word and every part of the statute, if possible, its due effect and meaning. * * * The intent of the Legislature, therefore, is always to be sought for by giving a fair construction to the language used, attributing to the words their ordinary and popular meaning, unless it plainly appears that they were used in some other sense."

Our consideration of the case leads us to the conclusion that the convention did not intend to forbid the decision of a case by this court where the voices on both sides are equal, unless there is drawn in question the constitutionality of a law.

The petition to rehear is refused.

BUCHANAN, J., participating.

(102 Va. 382)

STEADMAN v. HANDY.

(Supreme Court of Appeals of Virginia. Jan. 28, 1904.)

DOWER — CONTRACTS — SPECIFIC PERFORMANCE — PLEADING — ISSUE.

1. The fact that the outstanding inchoate right of dower cannot be extinguished constitutes no defense in a suit for specific performance by the vendee.

2. A court of equity can only decree on the case made by the pleadings, and a ground of complaint or defense not set up by the pleadings cannot be availed of.

3. A contract for the sale and purchase of land which is reasonable, certain, legal, mutual, based upon a valuable consideration, and entered into by competent parties, will be specifically enforced at the suit of the vendee, who has been at all times ready and desirous to perform.

¶ 2. See *Specific Performance*, vol. 44, Cent. Dig. § 196.

Appeal from Circuit Court, Patrick County. Bill by M. V. Steadman against B. A. Handy. Decree for defendant, and plaintiff appeals. Reversed.

E. J. Harvey and John W. Carter, for appellant. Hairston & Gravelly, for appellee.

HARRISON, J. The bill in this case was filed by the appellant, M. V. Steadman, seeking to enforce specific performance of the following contract, executed by the appellee, B. A. Handy:

"I have this day sold to M. V. Steadman my house and lot at Stuart, Va., for \$1,500.00, which I inherited from my son, W. E. Handy, known as the Stonewall property, payable \$500.00 cash, payable to Peoples Bank, Stuart, Va., \$450.00 in two weeks and bal. \$550.00 in thirty days; with general warranty of title. May 14, 1901."

There was a demurrer to the bill, in support of which two grounds are suggested in argument: (1) That the wife of the appellee should have been made a party defendant; that, if her husband should convey, she would be deprived of her right of dower in kind; and that her interest, though inchoate, and subject to be defeated, is vested. (2) That to grant specific performance of the contract, as prayed for, would leave the personal representative of the appellee liable to an action at law in the future should his wife survive and assert her dower rights.

The wife did not execute the contract, and was not a necessary party. The contract was executed by the appellee alone, and he had a right to sell his interest in the property without regard to whether or not his wife was willing to part with her contingent dower right. The bill expressly alleges that the appellant is willing to take such title as the appellee has bound himself to convey. The right of appellant to have specific performance of the contract is therefore not affected by an outstanding inchoate right of dower.

A sufficient answer to the second ground of demurrer is that the appellee has contracted to make a deed with general warranty of title, and the appellant only asks that the contract as written be enforced.

The answer filed by the appellee sets up the following defenses: (1) That, while appellee admits having signed a written agreement, he denies having signed the agreement exhibited with the bill. (2) That the \$500 cash payment was to be deposited to the credit of appellee in the People's Bank, instead of being applied to incumbrances upon the property held by the bank. (3) That appellee had discovered that there was a vendor's lien upon the property for more than \$300, and that he thought the property was bound for this lien, and that, if he could get appellant to pay him \$1,500, he would also have to pay the vendor's lien, thus making the property cost appellant more than \$1,800; but that, after signing the contract of sale, he

discovered that appellant was himself primarily liable for the vendor's lien, and had fraudulently concealed that fact from him. (4) That appellant had falsely represented to him that the building on the property was in an unsafe condition. (5) That the contract was executed upon condition that the wife of appellee should ratify it.

Not one of these defenses is sustained by the evidence. The learned judge of the circuit court has filed, as part of the record, an opinion in writing, from which it appears that the defenses set up by the answer were discarded as unfounded, and the conclusion that appellant was not entitled to have specific performance of the alleged contract was rested upon the sole ground that appellant "was asking a court of equity to effectuate a transaction which he was seeking to carry through, in a measure, by keeping another buyer out of the field, and lulling him to silence and inaction by representing to him that he would purchase the property for him."

We are of opinion that the evidence relied on for this conclusion does not warrant the construction placed upon it. We will not, however, enter upon a discussion of this evidence for the reason that it presents an issue not made by the pleadings. There is no hint of such a defense in the answer, and therefore it cannot be made a ground for relief. The law is well settled that a court of equity can only decree on the case made by the pleadings. *Mundy v. Vawter*, 3 Grat. 518; *Rorer Iron Co. v. Trout*, 83 Va. 415, 2 S. E. 713, 5 Am. St. Rep. 285; *Anderson v. Creston Land Co.*, 96 Va. 257, 31 S. E. 82.

The allegations of the bill are fully sustained by the evidence. The contract is distinctly proven. Its terms are clear. It is reasonable, certain, legal, mutual, based upon a valuable consideration, made and entered into by competent parties, and the party seeking its enforcement has been at all times ready and desirous to perform. Under these circumstances there should have been a decree specifically enforcing the contract in accordance with the prayer of the bill.

For these reasons the decree appealed from must be reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

OARDWELL, J., absent.

(102 Va. 368)

FISHER v. SEABOARD AIR LINE RY. CO.
(Supreme Court of Appeals of Virginia. Jan. 28, 1904.)

RAILROADS—ADJOINING PROPERTY OWNERS—
DESTRUCTION OF PROPERTY—OPERATION OF
RAILROAD—NEGLIGENCE—JOINDER OF AC-
TIONS—PLEADING.

1. A count in a complaint alleging that defendant acquired a house adjoining plaintiff's tenement, and, contriving to disturb and injure plaintiff, pulled down and carried away the

building on its lot in such a manner that the partition wall separating defendant's property from plaintiff's, with communicating doors, was left unprotected, exposed, etc., by reason of which plaintiff's tenement was greatly injured, was demurrable, since defendant, being the owner, was entitled to pull down its property, and, if its acts were negligently done, acts of negligence were not alleged.

2. Where a railroad company, under its charter, was authorized to maintain and operate a railroad adjoining plaintiff's property, plaintiff was not entitled to recover for annoyance consisting of noise, smoke, etc., caused by the operation of the railroad, unless such annoyance was the result of negligence in such operation.

3. Where plaintiff claimed damages for injuries to his tenement by reason of the negligence of a railroad company in tearing down an adjoining tenement belonging to it, to make room for its tracks, and for injuries by reason of smoke, noise, etc., resulting from the negligent operation of the railroad, such causes of action were of the same nature, and might properly be joined in the same declaration.

Error to Law and Equity Court of City of Richmond.

Action by Harris Fisher, as trustee, etc., against the Seaboard Air Line Railway Company. From a judgment sustaining demurrers to the declaration, plaintiff brings error. Reversed.

A. W. Patterson and John H. Ingram, for plaintiff in error. Munford, Hunton, Williams & Anderson, for defendant in error.

KEITH, P. This action was instituted by Harris Fisher, trustee for his wife, Ester Fisher, in the law and equity court of the city of Richmond, to recover damages against the defendant company. There were six counts in the declaration, and the defendant company having demurred to each count, and to the declaration as a whole, a judgment was entered sustaining the demurrer and dismissing the case.

It is conceded by counsel for defendant in error that the court erred in its judgment with respect to the first and second counts. We shall therefore limit our consideration to the third, fourth, fifth, and sixth counts.

The third count is as follows:

"And for this also, to wit, that the said plaintiff being the owner in fee simple of a certain other store and dwelling house (fully described in the first count, above), the said defendant afterwards, to wit, on the 10th day of July, 1899, acquired the western tenement of said mansion house, and, well knowing the premises, and contriving to disturb and injure the said plaintiff in the peaceable and lawful enjoyment of his said land with its appurtenances, did thereafter, to wit, on the 1st day of September, 1899, pull down and carry away the building upon its lot in such manner that the partition wall, with communicating doors, between said two houses, was left unprotected, exposed, and in a most unsightly condition, by means whereof the plaintiff's said tenement has been greatly injured and depreciated in value."

The act complained of in this count is one

which the defendant had a right to do. It was the owner of the building which it pulled down, and its liability, if any, results from its doing a lawful act in an unlawful or negligent manner. We are of opinion that the acts constituting negligence are not sufficiently stated in this count, and that the demurrer to it was properly sustained.

The same observations will hold good with respect to the fifth count. The defendant had the right to run its trains, but if it ran them so unskillfully, negligently, or carelessly as to injure the plaintiff, it would be responsible for such damages as might ensue. But the acts of negligence and carelessness should be stated with such reasonable certainty as to enable the defendant to make defense thereto.

The chief controversy in this case is with respect to the fourth and fifth counts, which are as follows:

"And for this also, to wit, that the said plaintiff being the owner of a certain other store and dwelling house (as described in first count, above) of great value, to wit, of the value of \$10,000, the defendant, well knowing the premises, but contriving, etc., thereafter, to wit, on the 1st day of September, 1899, erected and built upon its said lot, in immediate proximity to the aforesaid store and dwelling of said plaintiff, to wit, within 8 feet thereof, a high trestle, to wit, of the height of 25 feet, which, approaching from the rear, curves around and runs along the entire length of the plaintiff's premises; and the said plaintiff further says that afterwards, to wit, on the 27th day of May, 1900, the said defendant began running cars, trucks, trains, and locomotives over and upon the said trestle, and that the running of same has steadily increased and continued from thence to the bringing of this suit; and he avers that the movement of these trains and locomotives on said trestle is an insufferable nuisance, owing to the many horrible noises, the jarring of the ground and shaking of the buildings, and the volumes of smoke and dust so created and emitted, whereby the walls of said building have been cracked and displaced, the air in and about the said plaintiff's premises so polluted as to sensibly impair the enjoyment thereof, and the ordinary comfort of human existence therein otherwise materially interfered with; in consequence of all which the said plaintiff says that said dwelling house has been entirely vacated, and the tenant of his store has given notice of a like intention to move at the expiration of his lease; that said property has thus been greatly injured, and is now of little or no value whatever to the plaintiff.

"And for this also, to wit, that the said plaintiff being so seised and possessed of another store and dwelling house [fully described in the first count of this declaration], of great value, to wit, \$10,000, the defendant, well knowing the premises, but contriving to injure and disturb the said plaintiff in the

peaceable and lawful enjoyment of his said property, heretofore, to wit, on the 1st day of September, 1899, and on divers other days between that date and the bringing of this suit, so unskillfully, carelessly, and negligently ran its trains and locomotives along and upon the trestle of defendant adjacent to said plaintiff's premises aforesaid that the latter were and are greatly injured thereby, and in consequence thereof the said property has become and is of little or no value to said plaintiff."

It will be seen that the defendant is not charged with having taken any part of the plaintiff's property. It appears that the defendant in error, a duly chartered and incorporated railway company, built upon its own property, within 8 feet of the dwelling of the plaintiff, a trestle 25 feet in height, which, approaching from the rear, curves around and runs along the entire length of plaintiff's premises; that upon and over this trestle the cars of the defendant, drawn by locomotives, were from and after the 27th day of May, 1900, to the bringing of this suit, continuously and with increasing frequency operated; and that the movement of these trains and locomotives constituted an insufferable nuisance, owing to the noise which they occasioned, the volumes of smoke and dust created and emitted, polluting the atmosphere, and the jarring of the ground and shaking of the buildings, impairing the enjoyment thereof, and as a consequence the tenant had given notice of his intention to move at the expiration of his lease, and the property has been so injured as to be now of little or no value. The sixth count presents the same question.

Pollock on Torts, pp. 154-156, treating of this subject, says: "A man cannot be held a wrongdoer, in a court of law, for acting in conformity with direction or allowance of the supreme legal power in a state. In other words, 'no action will lie for doing that which the Legislature has authorized, if it be done without negligence, although it does occasion damage to any one.' The meaning of the qualification will appear immediately. Subject thereto, 'the remedy of the party who suffers the loss is confined to recovering such compensation (if any) as the Legislature has thought fit to give him.'"

"* * * Apart from the question of statutory compensation, it is settled that no action can be maintained for loss or inconvenience which is the necessary consequence of an authorized thing being done in an authorized manner. A person dwelling near a railway constructed, under authority of Parliament, for the purpose of being worked by locomotive engines, cannot complain of the noise and vibration caused by trains passing and repassing in the ordinary course of traffic, however unpleasant he may find it, nor of damage caused by the escape of sparks from the engines, if the company has used

due caution to prevent such escape as far as practicable."

In *Vaughan v. Taff Vale Railway Co.*, 5 H. & N. 679, the court said: "A railway company authorized by the Legislature to use locomotive engines is not responsible for damage from fire occasioned by sparks emitted from an engine traveling on their railway, provided they have taken every precaution in their power and adopted every means which science can suggest to prevent injury from fire, and are not guilty of negligence in the management of the engine."

And Chief Justice Cockburn uses the following language: "Yet, when the Legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the Legislature carried with it this consequence that if damage results from the use of such thing, independently of negligence, the party using it is not responsible."

This case was approved in *Hammersmith, etc., Ry. Co. v. Brand*, reported in 4 English & Irish App. Cases, 171, where Mr. Justice Blackburn says: "I think it is agreed on all hands that if the Legislature authorizes the doing of an act which, if unauthorized, would be wrong and a cause of action, no action can be maintained for that act, on the plain ground that no court can treat that as a wrong which the Legislature has authorized, and consequently the person who has suffered a loss by the doing of that act is without remedy, unless in so far as the Legislature has thought it proper to provide for compensation to him. He is, in fact, in the same position as the person supposed to have suffered from the noise of traffic on a new highway is at common law, and subject to the same hardship. He suffers a private loss for the public benefit."

The Supreme Court of the United States is to the same effect. In *Transportation Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336, the court said: "That cannot be a nuisance, such as to give a common-law right of action, which the law authorizes. We refer to an action at common law, such as this. A Legislature may, and often does, authorize and even direct acts to be done which are harmful to individuals, and which, without the authority, would be nuisances; but in such a case, if the statute be such as the Legislature has power to pass, the acts are lawful, and are not nuisances, unless the power has been exceeded. In such grants of power a right to compensation for consequential injuries caused by the authorized erections may be given to those who suffer, but then the right is a creature of the statute. It has no existence without it. If this were not so, the suffering party would be entitled to repeated actions, until an abatement of the erections would be enforced, or perhaps he might restrain them by injunc-

tion." See, also, *Ulline v. N. Y. Cent. R. Co.*, 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661; *Sawyer v. Davis*, 136 Mass. 229, 49 Am. Rep. 27; *Heiss v. Railroad Co. (Wis.)* 34 N. W. 916; *Randle v. Pac. R. Co.*, 65 Mo. 325.

The decisions of this court are in harmony with these cases. In *James River & Kanawha Canal Co. v. Anderson*, 12 Leigh, 278, the court held that an injunction would not lie at the instance of a property owner, whose lands did not abut upon the street at the point at which the defendant was excavating, to enjoin the prosecution of the work. Judge Allen, at page 305, after alluding to the fact that the company had encroached upon the street, said: "Was the company authorized by its charter to make this encroachment? For, if it was, then, whatever injury may ensue to the property holders on the street, an injunction cannot be awarded."

In *Richmond Traction Co. v. Murphy*, 98 Va. 104, 34 S. E. 982, the tracks of the railroad company were laid in Broad street, in the city of Richmond, in front of a portion of a lot owned by Murphy. The track, as it left Murphy's lot, came close to the sidewalk, approaching the property line of the property owners abutting on the street, and immediately adjacent to the property of E. P. Murphy. By agreement, condemnation proceedings were had; and the commissioners reported that for the taking of the property of Murphy, and for damage to the residue of his lot by reason of the construction of the railroad in the street immediately in front of his property, he was entitled to \$1,000, and further reported that, if he was entitled to damages by reason of the construction of the track immediately in front of the property adjacent to his lot, then he should be given \$1,000 additional. But the court said he was entitled to the sum of \$1,000 for the taking of his property, but that the injury done to his property by the construction of the railroad in front of the property adjacent to his lot was *damnum absque injuria*, and therefore no compensation could be allowed him.

Upon an appeal to this court, Judge Harrison delivered the opinion, saying: "To hold that each abutting lot was impaired in value by reason of the location of the road beyond its limits, and that the owner was entitled to receive compensation therefor, would so multiply the damages to be paid as to amount to a denial of the right to construct the road." See, also, *Smith v. City Council of Alexandria*, 33 Grat. 208, 36 Am. Rep. 788; *Home, etc., Co. v. City of Roanoke*, 91 Va. 52, 20 S. E. 895, 27 L. R. A. 551.

Meyer v. City of Richmond was a suit brought to recover damages against the Chesapeake & Ohio Railway Company and the city of Richmond for damages caused to the property of the plaintiff by the obstruction of the street upon which plaintiff's property abutted, caused by tracks, sheds, and fences of the railroad company built under authority of its charter, and with the assent

of the city of Richmond, by which travel along the street was arrested, and the property rights of petitioner as an abutter on said street were practically destroyed. It appears, however, that the structures complained of did not touch the property of the plaintiff. A judgment was entered in the law and equity court of the city of Richmond for the defendant, and to that judgment a writ of error was denied by this court. The case was afterwards carried to the Supreme Court of the United States upon the ground that Meyer had been deprived of his property without due process of law. The Supreme Court took jurisdiction of the case, but ultimately affirmed the decision of this court. 19 Sup. Ct. 106, 43 L. Ed. 374. In the course of the opinion the court said: "The substantial thing is not that one may be damaged by an obstruction in a street—not that one may be specially damaged beyond others—but, is such damage a deprivation of property, within the meaning of the constitutional provision? According to the Virginia cases, an additional servitude may be said to be another physical appropriation, and hence another taking, and must be compensated. But the plaintiff's case is not within this doctrine, nor is there anything in the decisions of Virginia which makes consequential damages to property a taking, within the meaning of the Constitution or that state. Decisions in other states we need not resort to or review."

After reviewing a large number of cases from this and other states, the court held that consequential damage to property by an obstruction in a street is not a deprivation of the property, within the constitutional provision against depriving a person of property without due process of law.

We do not think that the demurrer should have been sustained because of the improper joinder of various and distinct causes of action accruing at different times, and resulting in different species of alleged injuries. Indeed, this ground of demurrer was not insisted upon in the argument, and is clearly not well taken. "Wherever causes of action are of the same nature, and the same judgment is to be given in all, they may be joined in one declaration." 4 *Minor's Inst.* (3d Ed.) 1160.

We are of opinion that the third, fourth, fifth, and sixth counts were all demurrable, for the reasons assigned—with respect to the third and fifth, because the acts of negligence were not stated with reasonable certainty; and with respect to the fourth and sixth, because, as stated, the acts charged upon the defendant were authorized by its charter. But in order to secure this immunity, the power conferred by the Legislature must be exercised without negligence, with judgment and caution. For damage which could not have been avoided by any reasonable, practicable care on the part of those authorized to exercise the power, there is no

right of action; but they must not do needless harm, and, if they do, it is a wrong against which the ordinary remedies are available. "If an authorized railway comes near my house, and disturbs me by the noise and vibrations of the trains, it may be a hardship to me, but it is no wrong. For the railway was authorized and made in order that trains might be run upon it, and, without noise and vibrations, trains cannot be run at all. But if the company makes a cutting, for example, so as to put my house in danger of falling, I shall have my action, for they need not bring down my house to make their cutting. They can provide support for the house, or otherwise conduct their works more carefully. When the company can construct its works without injury to private rights, it is, in general, bound to do so." Pollock on Torts (Webb's Am. Ed.) supra; Stearns v. City of Richmond, 88 Va. 992, 14 S. E. 847, 29 Am. St. Rep. 758.

The judgment of the law and equity court is therefore reversed, and the cause remanded, with leave to amend the declaration in any manner that the plaintiff may be advised, not inconsistent with the foregoing opinion.

CARDWELL, J., absent.

(102 Va. 386)

MOSS v. HARWOOD.

(Supreme Court of Appeals of Virginia. Feb. 4, 1904.)

LIBEL—ACTIONABLE PUBLICATIONS—CHARGE OF CRIME—CHARGE PROVOCATIVE OF VIOLENCE—CHARGE INJURIOUS TO GOOD NAME—CONSTRUCTION OF LANGUAGE EMPLOYED—INUENDO—FEES.

1. A publication stating that plaintiff, a chief of police, had collected certain fines of an official, which fines did not appear by the records of the police court to have been recorded, did not charge plaintiff with the commission of the crime of embezzlement or larceny which is a statutory crime, committed, under Code 1887, § 3716, when a person wrongfully and fraudulently uses, disposes of, conceals, or embezzles any money, etc., or any other property, which he shall have received for another, or by virtue of his office, trust, or employment; or under section 3717, when an officer, agent, or employé of the state, or of any city, town, or county, having the custody of public funds, knowingly misuses or misappropriates the same, or knowingly disposes of them otherwise than in accordance with law.

2. Where the words employed in an alleged libel, interpreted in their usual and ordinary meaning, do not impute a crime, their meaning cannot be enlarged by an innuendo so as to accomplish that purpose.

3. A publication stating that plaintiff, a chief of police, had collected certain fines of a certain officer, which fines did not appear by the records of the police court to have been recorded, is not libelous under Code 1887, § 2897, which provides that all words which, in their usual construction and in common acceptance, are construed as insults, and tend to violence and breach of the peace, shall be actionable.

4. Where the words employed in a libel tend to injure the person libeled in his good name,

fame, and credit, and to bring him into public scandal, infamy, and disgrace, they are actionable, although not imputing an indictable offense.

5. As it is the duty of the chief of police to collect and report fines, to say of him that he has collected fines, but does not appear to have recorded them, while falling short of an imputation of crime, and not in express terms charging a breach of official duty, yet, when aided by a proper innuendo, does impute to him conduct tending to injure his reputation in the common estimation of good citizens, and is libelous.

Error to Circuit Court, Elizabeth City County.

Action by one Harwood against A. A. Moss. From a judgment for plaintiff, defendant brings error. Reversed.

O. C. Berkeley and J. H. Gilkerson, for plaintiff in error. R. M. Lett and O. D. Batchelor, for defendant in error.

KEITH, P. The first count of the declaration in this case charges that Harwood was chief of police of the city of Newport News, and that on the 23d of November, 1896, in the city of Newport News, A. A. Moss, the mayor of the city, published a certain false, malicious, scandalous, and defamatory libel concerning the plaintiff, as follows: "Your complainant (meaning the said defendant A. A. Moss) charges that the said chief of police (meaning the plaintiff, Harwood) has within the last past twelve months collected certain fines of Officer Padgett, which fines do not appear by the records of the police court to have been reported"—Moss meaning thereby to insinuate and charge, and have it understood, that the plaintiff, Harwood, was guilty of the crime of embezzlement and larceny.

The second count of the declaration charges that the defendant composed and published concerning the plaintiff a certain false, scandalous, malicious, and defamatory libel, setting it out in the same words employed in the first count, and charges that the defendant knew the falsity of the said charge, and that by means of the publication of the same the plaintiff has been greatly injured in his good name, fame, and credit, and brought into public scandal, infamy, and disgrace with and amongst all of his neighbors and other good and worthy citizens of the commonwealth, etc.

The defendant demurred to the declaration, and, while the demurrer does not state in terms that it is to the declaration and each count thereof, we think the language in which the demurrer is couched may be so considered. The circuit court overruled the demurrer, and its action in this respect constitutes the first assignment of error.

The language of the imputed libel is, "Your complainant charges that the chief of police has within the last past twelve months collected certain fines of Officer Padgett, which fines do not appear by the records of the police court to have been reported."

It is averred that the purpose of the de-

§ 2. See Libel and Slander, vol. 22, Cent. Dig. § 266.

fendant by this publication was to charge the plaintiff with being guilty of embezzlement.

It is well settled that: "In determining whether or not the language does impute a criminal offense the words must be construed in the plain and popular sense in which the rest of the world would naturally understand them. It is not necessary that they should make the charge in express terms. It is sufficient if they consist of a statement of matters which would naturally and presumably be understood by those who heard them as charging a crime." *Payne v. Tancil*, 98 Va. 264, 35 S. E. 725. That case, it is true, was an action for a slander, but in this respect there seems to be no difference between written and spoken words.

We are of opinion that, construing the language employed in the libel in accordance with this rule, it does not justify the interpretation placed upon it by the plaintiff.

Embezzlement is a statutory crime. "If any person wrongfully and fraudulently use, dispose of, conceal, or embezzle any money, bill, note, check, order, draft, bond, receipt, bill of lading, or any other property which he shall have received for another, or for his employer, principal, or bailor, or by virtue of his office, trust, or employment, or which shall have been entrusted or delivered to him by another, or by any court, corporation, or company, he shall be deemed guilty of larceny thereof." Code 1887, § 3716.

"If any officer, agent, or employee of the state, or of any city, town, or county, having custody of public funds, knowingly misuse or misappropriate the same, or knowingly dispose thereof otherwise than in accordance with law, he shall be confined in the penitentiary not less than one nor more than ten years; and any default of any such officer, agent, or employee, in paying over said funds to the proper authorities when required by law to do so, shall be deemed prima facie evidence of his guilt." *Id.* § 3717.

A comparison of the language employed in the libel with these quotations from the Code makes it obvious, we think, that the innuendo cannot be sustained; in other words, that the language employed, construed in its plain and popular sense, does not impute the crime of larceny or embezzlement to the plaintiff.

"The office of an innuendo is to define the defamatory meaning which the plaintiff seeks to put upon the words complained of, to show how they come to have the defamatory meaning claimed for them, and also to show how they relate to the plaintiff, whenever that is not clear upon the face of them. But an innuendo must not introduce new matter, or enlarge the natural meaning of words. It must not put upon them a construction which they will not bear. It cannot alter or extend the sense of the defamatory words, or make that certain which is in fact uncertain." *Newell on Slander & Libel* (2d Ed.) p. 619.

The same author (at page 620) says: "The

law proceeds on the hypothesis that what is the ordinary meaning and nature and intrinsic force of language is a question of law. When, therefore, words are set forth as having been spoken by the defendant of the plaintiff, the first question is whether they impute a charge of felony or any other infamous crime punishable by law. If they do, an innuendo undertaking to state the same in other words is useless and superfluous; if they do not, such an innuendo cannot aid it. It therefore often happens that where innuendoes are added which do alter and vary, and even inflame and exaggerate, the sense of the words much beyond their natural force and meaning, yet such innuendoes are held not to vitiate the declaration; the reason of which I take to be this: The words themselves imputing an infamous offense, the innuendo may be rejected as surplusage; and, as the plaintiff is not allowed to go into evidence aliunde to show that the words were in fact used in the sense imputed by the innuendo, they can have no influence whatever. But if the words do not impute such infamous crime by their natural sense and meaning, then, as a general rule, the plaintiff is not entitled to recover; and, as he cannot enlarge that meaning by an innuendo so as to let in proof of extraneous facts, his action must fail." To the same effect, see *Payne v. Tancil*, *supra*, and *Moseley v. Moss*, 6 Grat. 534.

If the words employed in the libel had imputed the crime of embezzlement or larceny, the innuendo would have been unnecessary. As the words employed, interpreted in the usual and ordinary acceptance of their meaning, do not impute a crime, their meaning cannot be enlarged by an innuendo so as to accomplish that purpose. We think the demurrer to the first count should have been sustained.

The second count is equally insufficient, if considered as charging any criminal offense upon the defendant. Nor is it good under section 2897 of the Code of 1887, which provides that all words which, from their usual construction and common acceptance, are construed as insults, and tend to violence and breach of the peace, shall be actionable.

In *Hogan v. Wilmoth*, 16 Grat. 80, it is said that, if a proceeding be under the statute, the declaration must aver that the words, from their usual construction and common acceptance, are construed as insults, and tend to violence and breach of the peace, or else employ some other equivalent averment to denote that the words are actionable under the statute. *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803; *Payne v. Tancil*, *supra*.

The count, therefore, is not good as charging an indictable offense, nor under the statute as for insulting words.

If the words employed in a libel tend to injure the defendant in his good name, fame, and credit, and to bring him into public

scandal, infamy, and disgrace, they are actionable, although not imputing an indictable offense.

In *Adams v. Lawson*, 17 Grat. 250, 94 Am. Dec. 455, it is said: "It is not necessary, to constitute a libel, that the writing should contain the imputation of an offense which may be indicted and punished. It is sufficient if the language tends to injure the reputation of the party, to throw contumely or to reflect shame and disgrace upon him, or to hold him up as an object of scorn, ridicule, or contempt."

And Judge Cooley, in his work on Torts (2d Ed.) p. 240, says: "In libel, as in slander, defamatory publications are classified as publications actionable per se, and publications actionable on averment and proof of special damage. In the first class are embraced all cases of publications which would be actionable per se if made orally. These cases, therefore, require no further attention. It also embraces all other cases where the additional gravity imparted to the charge by the publication can fairly be supposed to make it damaging. Thus, to say of a man, 'I look upon him as a rascal,' is no slander, unless shown to be damaging; but if it be published of him in one of the public journals, the presumption that injury follows is reasonable and legitimate. So to call a man in print 'an imp of the devil and cowardly snail' is libelous, though an oral imputation of the sort would be presumably harmless. So, to charge a teacher with falsehood in a report made to the official board, and with general untruthfulness, is libelous per se. The general rule is stated thus: Any false and malicious writing published of another is libelous per se when its tendency is to render him contemptible or ridiculous in public estimation, or expose him to public hatred or contempt, or to hinder virtuous men from associating with him." And again the same author says: "In other words, injury is presumed to follow the apparently deliberate act of putting the charge in writing or print, or of suggesting it by means of picture or effigy, where mere vocal utterance to the same effect might be disregarded as possibly harmless."

The law is thus stated in *Newell on Slander and Libel*, at page 37: "In conclusion it may be said that any publication, expressed either by printing or writing, or by signs, pictures, or effigies, or the like, which tends to injure one's reputation in the common estimation of mankind, to throw contumely, shame, or disgrace upon him, or which tends to hold him up to scorn, ridicule, or contempt, or which is calculated to render him infamous, odious, or ridiculous, is prima facie a libel, and implies malice in its publication."

It appears to have been the duty of the chief of police to collect and report fines. To say of such an officer that he has collected fines, but does not appear to have

reported them, while falling short of the imputation of a crime, while not in express terms charging a breach of official duty, yet, when aided by the innuendo, operating within the scope of its legitimate functions, does impute to the plaintiff conduct tending to injure his reputation in the common estimation of good citizens. We are of opinion that the demurrer to the second count was properly overruled.

For the error of the court in overruling the demurrer to the first count, the judgment must be reversed, and the case remanded for a new trial.

CARDWELL, J., absent.

(102 Va. 378)

BERKELEY & HARRISON v. GREEN.

(Supreme Court of Appeals of Virginia. Jan. 28, 1904.)

TRUSTS—ASSIGNMENT FOR BENEFIT OF CREDITORS—COUNSEL—FEES—CONTRACT.

1. A trustee in a deed of assignment for the benefit of creditors may, in good faith, employ counsel, and pay them out of the trust fund reasonable compensation for their services.

2. Evidence considered, and held that an express contract fixing the compensation of attorneys for a trustee for the benefit of creditors is established.

Appeal from Corporation Court of Danville.

Action by Berkeley & Harrison against Berryman Green, trustee. Decree for defendant, and plaintiffs appeal. Reversed.

Berkeley & Harrison, Frank W. Christian and Thos. Hamlin, for appellants. Guthrie & Guthrie, Peatross & Harris, Julian Meade, Withers & Green, E. E. Bouldin, C. U. Williams, Cabell, Cabell & Custer, and Jas. L. Tredway, for appellee.

WHITTLE, J. The controversy on this appeal is between appellants and creditors of the late John W. Holland with respect to a fee asserted by the former, as counsel for Berryman Green, trustee, against a trust fund under the control of the court.

It appears that John W. Holland, who had become liable as indorser for his brother C. G. Holland in the sum of \$156,235.10, conveyed a large amount of valuable property, real and personal, in trust to secure creditors holding indorsed notes, and other creditors of the grantor. The deed contains, among other stipulations, the following:

"It is understood and agreed that in the execution of his duties hereunder, the said Berryman Green, trustee, shall be authorized and empowered to employ counsel and compensate them for their services out of the trust funds."

By virtue of the foregoing provision, which is binding upon all creditors who have accepted the benefits of the deed, the trustee

¶ 1. See *Assignments for Benefit of Creditors*, vol. 4, Cent. Dig. § 1145.

in good faith engaged appellants as his counsel to aid him in the execution of the trust. Thereupon a suit was instituted by them, in the name of the trustee, against the beneficiaries, to construe the deed, and to obtain the guidance and assistance of the court in the administration of the trust.

At the time of their retainer the amount of appellants' compensation was not fixed, but subsequently it was agreed between them and the trustee that they should be allowed a fee of \$1,000, to be paid out of the trust fund. In pursuance of that agreement the trustee paid appellants \$500 on account of their fee, and took a receipt from them to that effect. Afterward other trustees were substituted in the place of Berryman Green, and appellants presented a petition setting forth their contract with the original trustee, the payment made in accordance therewith, and praying that the balance of their fee might be audited and approved by the court, and decreed to be paid them out of the trust fund under its control. The court directed one of its commissioners in chancery to take and report the testimony bearing upon the transaction, and, upon a return of the evidence, entered the decree appealed from, declaring that the \$500 already paid was a reasonable fee for the services rendered by appellants for the trustee, and dismissed their petition.

The trial court obviously disposed of the controversy on the theory that, upon a quantum meruit, appellants had already been adequately compensated for their services. But it must be observed that no such issue was made and submitted to the court either by the pleadings or evidence. Appellants relied in their petition upon an express contract between themselves and the trustee that they should receive \$1,000 for their services, and that allegation is fully sustained by the evidence. Indeed, there is practically no conflict between the testimony of appellants and that of the trustee with respect to the terms of the contract, and no countervailing evidence was adduced.

It is fair to presume that, if appellants had intended to rely upon an implied contract that they were to be compensated for their services upon a quantum meruit, they would have made that case in their petition, and have undertaken to prove the services rendered, and what such services were reasonably worth. Relying, however, as they had a right to rely, upon an express contract, reasonable in its terms, which the trustee was authorized by the deed to make, in the absence of any suggestion of collusion or bad faith, there was no necessity for appellants to have introduced evidence of the value of their services, other than that afforded by the agreement itself. Even where a deed does not expressly authorize it, a trustee may in good faith employ counsel to advise and assist him in the discharge of his duties, and may pay them out of the

trust fund reasonable compensation for their services. *Cochran v. Richmond, etc., R. Co.*, 91 Va. 339, 21 S. E. 664.

The administration of this trust necessitated the institution and prosecution of a litigated chancery cause, and involved debts and assets to the amount of several hundred thousand dollars. The trustee, himself a lawyer of experience and ability, was of opinion that the fee agreed upon was not unreasonable, and in that opinion this court concurs.

It follows from the foregoing views that the decree complained of is erroneous and should be reversed, and this court will enter such decree as the trial court ought to have entered, sustaining and enforcing the contract of the parties.

CARDWELL, J., absent.

(102 Va. 373)

JOHNSTON & CHEEK v. GREEN.

(Supreme Court of Appeals of Virginia. Jan. 23, 1904.)

BANKS—INSOLVENCY—PREFERRED CREDITORS—DEPOSITS—APPROPRIATION—PAYMENTS—DATE.

1. An insolvent at the time of his assignment was indebted to certain bankers, and their claim was given a preference over all others. The trustee under the assignment kept an active bank account with such bankers until the final settlement of his accounts. On June 4, 1900, during his administration, he collected and deposited to such account over \$16,000 under a decree which directed him to deduct therefrom his commissions, reasonable attorney's fees, and unpaid costs of suit, and to distribute the balance to creditors according to their priorities as ascertained by the report of a commissioner, then filed and confirmed. Checks were drawn against this deposit, and other amounts added thereto, but the larger part of the deposit remained in the bank until January 13, 1902, when the trustee gave a check to his successors for the balance standing to his credit in the bank, and on that day the substituted trustees paid such balance to the bankers on their preferred claim. Held that, though the bank had the use of the money during the time it was deposited, they had no authority to apply it to their claim, and hence it should be treated as having been paid to them on the day it was paid by the substituted trustees, and not on the day it was deposited.

Appeal from Corporation Court of Danville.

Action between Berryman Green, as trustee of the insolvent estate of John W. Holland and Johnston & Cheek. From a decree fixing the date of a payment to Johnston & Cheek as preferred creditors, they appeal. Reversed.

A. C. Edmunds, for appellants. Guthrie & Guthrie, Peatross & Harris, Julian Meade, Withers & Green, E. E. Bouldin, C. U. Williams, Cabell, Cabell & Custer, Jas. L. Tredway, and Berkeley & Harrison, for appellee.

HARRISON, J. In January, 1897, John W. Holland conveyed a large estate to Berryman Green, trustee, to secure numerous creditors. In March of the same year the trustee

filed a bill asking the direction of the court in administering his trust. In this assignment Charles L. Holland, doing a banking business under the name and style of Johnston & Cheek, was given priority over all other creditors for a debt of \$20,000, which seems not to have been questioned by any one.

It appears that the trustee kept his bank account with the banking house of Johnston & Cheek from the time the suit was instituted until the final settlement of his accounts. On June 4, 1900, the trustee collected and deposited to his credit with Johnston & Cheek \$16,393.52 under a decree which directed him to deduct therefrom his commissions, a reasonable fee to be paid his attorneys, the unpaid costs of the suit, and to distribute the balance to the creditors according to their rights and priorities as ascertained by the report of the commissioner then filed in the cause and confirmed. Checks were drawn by the trustee against this account, and other deposits added thereto, but the larger part of the deposit of June 4, 1900, remained in the bank until January 13, 1902, when Green, trustee and receiver of the court, gave to Victor & Patterson, substituted trustees, his check for \$14,193.62, the balance then standing to his credit in the bank, and on the same day the substituted trustees paid this sum to Johnston & Cheek on account of their preferred debt of \$20,000.

The contention of the general creditors is that, inasmuch as the deposit in question was made in the bank of Johnston & Cheek, and as the balance of such deposit would, after the payment of commissions, reasonable attorney's fees, and unpaid costs, have been payable to the bank as the preferred creditor, therefore such balance should be credited upon the preferred debt due to the bank as of June 4, 1900, the date of the deposit, rather than as of January 13, 1902, the date of the formal payment by the substituted trustees to Johnston & Cheek; that the trustee having failed to distribute the deposit as directed by the decree, and allowed the same, or the greater part thereof, to remain in bank until January, 1902, the bank had thereby derived all the benefit that it would have received had the balance in question been promptly and formally paid over, and should therefore be required to account for such balance as a credit upon its debt as of the date of the deposit.

We are of opinion that the lower court erred in sustaining this contention. The record shows that the account kept by Green, trustee and receiver, at the bank of Johnston & Cheek, was an active and varying one, and was subject to no special agreement, but was received and treated as the accounts of all other customers of the bank whose deposits were at all times subject to check. The decree relied on as dedicating the deposit of June 4, 1900, to the payment of the debt due to Johnston & Cheek cannot be so construed.

The decree does not direct any certain sum to be paid to the creditors. Indeed, the fund was not in the hands of the trustee. He was directed to collect certain moneys due to the fund and to deduct his commissions, pay reasonable attorney's fees, pay the unpaid costs of suit, and, lastly, to distribute the balance to the creditors according to their rights and priorities. The several payments to be made by the trustee were not ascertained by the decree, were uncertain in amount, and some of them left to the discretion of the trustee by the direction to him to pay reasonable attorney's fees. This item of attorney's fees has since been the subject of litigation, and is now undetermined, and pending on appeal in another case before this court. 46 S. E. 387. The disbursement of this fund was a duty imposed by the trust deed and the decree of the court upon the trustee, and the appellant was not only under no obligation to assume that responsibility, but its assumption would have been an unwarranted interference with a fund under the exclusive control of the court and its officer. The deposit in question did not belong to Johnston & Cheek. Under the decree no part of it was to be distributed to creditors until certain items of expense and costs had been paid by the trustee. This officer would himself doubtless have been unable to determine and settle these several items on the day the deposit was made; and yet it is insisted that the bank, ignoring the trustee and receiver, should have assumed the responsibility of determining these several matters, and should have appropriated a part of this trust fund to its own use as of the day the deposit was made. Johnston & Cheek would have had no right to apply money deposited in their bank by a bonded receiver and trustee of the court, in a pending suit, to the payment of a debt they had proved in that suit. *Railroad Co. v. Smith*, 60 Mich. 112, 15 N. W. 39; *Bank v. Evans & Dorsey*, 9 W. Va. 373; *People v. Remington*, 59 Hun, 307, 12 N. Y. Supp. 829.

The case last cited is very much in point. That was a suit to liquidate the affairs of a firm, among whose creditors was the Illion Bank. In the regular course of the liquidation, a dividend which should have been paid to the bank, amounting to nearly \$50,000, was delayed for a year or more, and during this period the receiver of the court kept on deposit at the Illion Bank a part of the trust funds largely in excess of the dividend; and it was there contended that because the bank had the use of the funds it was not entitled to interest on the dividend, but the court held that the arrangement between the bank and the receiver was one of mutual benefit and convenience, and whether one received more benefit than the other could not be inquired into; that it was in the nature of a contract between the parties with which the court had no right to interfere.

In the case at bar the report of the com-

missioner, filed September 24, 1902, properly credited the debt due appellant with the payment in question as of January 13, 1902, the day it was actually paid by the substituted trustees, and the exceptions taken to that finding should have been overruled, and the report in that respect confirmed.

For these reasons the decree appealed from must be reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

CARDWELL, J., absent.

(102 Va. 399)

CONSUMERS' BREWING CO. v. DOYLE'S ADM'X.

(Supreme Court of Appeals of Virginia. Feb. 4, 1904.)

NEGLIGENCE—CONCURRENT NEGLIGENCE—ACCIDENT—ACTION FOR INJURIES—BURDEN OF PROOF.

1. In an action for personal injuries, negligence of defendant must be established by affirmative evidence, which, while it need not be direct and positive, by some one who witnessed the occurrence and saw how it happened, yet must show more than a probability of a negligent act, and must be such as to satisfy reasonable and well-balanced minds that the injury resulted from defendant's negligence.

2. Plaintiff's intestate was employed by a painter to paint a sign over the front of defendant's building, about 15 feet from the ground. A swinging stage was erected, supported by ropes fastened to the top of the building, and which were allowed to hang from the ends of the stage to the ground below. While plaintiff's intestate was on this stage, engaged in painting the sign, defendant's wagons were constantly driving up to the front door of the building, which was under the stage, for the purpose of loading and unloading boxes. One wagon stood there about 25 minutes, and when it started away, one of the ropes became, or had already become, entangled in one of the wheels; and, as the wagon moved off, the stage received a jerk, precipitating plaintiff's intestate to the ground. Held that, if there was any negligence on the part of defendant or his servants, there was an equal degree of concurrent negligence on the part of plaintiff's intestate, in failing to guard against any danger rendered imminent by the presence of the wagon and its motions, which precluded a recovery.

3. Where one engaged in painting a sign on the side of a building about 15 feet from the ground was precipitated from the staging on which he was working, owing to the ropes suspending the staging, and which had fallen to the ground, becoming entangled with the wheels of a wagon, which had stood under the staging for some 25 minutes, there being nothing to suggest such an occurrence to either the painter or the driver of the wagon, and it being a matter of pure speculation as to how or when the rope became entangled with the wagon wheel, the consequent injury of the painter must be deemed an accident for which there could be no recovery.

Error to Law and Chancery Court of City of Norfolk.

Action by the administratrix of Charles H. Doyle against the Consumers' Brewing Company. Judgment for plaintiff, and defendant brings error. Reversed.

White, Tunstall & Thom, P. H. & H. C. Cabell, and G. M. Dillard, for plaintiff in error. Thos. H. Wilcox and Hubard & Hubard, for defendant in error.

HARRISON, J. This action was brought by the administratrix of Charles H. Doyle to recover from the Consumers' Brewing Company damages for the alleged negligent killing of the plaintiff's intestate by the servants of the defendant company.

It appears that the brewing company employed the firm of Dalby & Butler to paint its building, and to paint its name across the front of said building. This firm employed the plaintiff's intestate, Charles H. Doyle, to paint the sign, which was about 15 feet from the ground. A swinging stage was erected by these painters, from which the lettering was to be done. This stage was supported by ropes fastened to the top of the building, and during the progress of the work these ropes were allowed to hang from the ends of the stage to the ground below; the northern rope being coiled on the ground near the large front door of the building, and the southern rope fastened around a knob that came out of the building near a small south door.

While Doyle was on this stage, engaged in painting the sign, the wagons of the brewing company were constantly driving up to the large front door of the building, which was under the stage, for the purpose of loading and unloading boxes and crates of beer. In the afternoon of the day, while Doyle was upon the stage, a covered wagon of the defendant company drove up to the building to unload beer crates. This consumed about 25 minutes, when the driver came out of the building and got upon the wagon, and started immediately for the stable. In some way, not explained, the rope which lay coiled upon the ground, near the large door, became, or had already become, entangled in one of the wheels; and, as the wagon moved off, the stage received a jerk, causing Doyle to fall to the ground, producing injuries from the effects of which he died several days thereafter.

The essential grievance stated in the declaration is that the defendant company, regardless of its duty in the premises, had so negligently and carelessly governed, controlled, managed, and driven its wagon and horses that the same had become entangled with the rope attached to the staging, and had torn the same from the roof, where it was securely fastened, thereby throwing Doyle violently to the ground, and causing the injury complained of.

The jury found a verdict for the plaintiff, and assessed the damages at \$8,500, which was distributed by the verdict, in equal proportions, to the widow and children of the deceased.

A motion for a new trial was made upon the ground that the verdict was contrary to

the law and the evidence, and for other reasons; but the court overruled the motion and gave judgment for the plaintiff, to be distributed as directed by the verdict, and the defendant excepted.

We are of opinion that in no aspect of the case, under the evidence adduced, was the plaintiff entitled to recover, and in this view it is unnecessary to consider any other assignment of error than the refusal of the court to set the verdict aside as contrary to the law and the evidence.

It is an established fact that the coming and going of the wagons of the defendant up to and from the door over which the deceased was at work was well known to him, and to the firm of painters by whom he was employed. It is further established—indeed, it is not contradicted—that, when the wagon in question drove up to the door, it assumed a position of absolute safety, so far as the deceased was concerned. Doyle himself says that he looked, and the ropes were hanging $2\frac{1}{2}$ or 3 feet from the wheels of the wagon, and that he went on with his work, and paid no further attention to the wagon. It further appears that the wagon remained unmoved in this safe position for about 25 minutes, when the driver came out and started for the stable; the horse moving off as he was stepping to his seat. The last seen of the ropes by either Doyle or the driver was when the wagon was left standing with the ropes $2\frac{1}{2}$ or 3 feet from it. There is no evidence which shows how or when the rope became entangled with the wheel of the wagon, nor is there any evidence from which any satisfactory or reliable inference can be drawn to show with any certainty when, how, or by whose instrumentality the rope and the wagon, which were from 2 to 3 feet apart, became entangled with each other. The evidence leaves this important question in the region of the barest conjecture. Whether the rope became entangled with the wagon while the driver was in the building, or after he mounted the wagon and started off, or by his driving against the rope, or whether the contact was the result of the stage upon which Doyle was working shaking or moving the rope so as to bring it and the wagon together, is not revealed by the evidence. Any one of these conjectures is as consistent with the testimony as the other. Indeed, other theories might be suggested in explanation of the accident, but in such cases we are not permitted to indulge in conjecture or speculation. The burden is upon the plaintiff to make out her case, which is, in the first instance, to establish the negligence of the defendant by affirmative evidence, which must show more than a probability of a negligent act. The proof need not be direct and positive, by some one who witnessed the occurrence and saw how it happened, but it must be such as to satisfy reasonable and well-balanced minds that it

resulted from the negligence of the defendant. *Southern Ry. Co. v. Hall*, 102 Va. —, 45 S. E. 867; *N. & W. Ry. Co. v. Poole's Adm'r*, 100 Va. 148, 40 S. E. 627.

In the case last cited, Judge Buchanan says: "When damages are claimed for injuries which may have resulted from one of two causes, for one of which the defendant is responsible, and for the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause. And he must also fail if it is just as probable that the damages were caused by the one as by the other, since the plaintiff is bound to make out his case by the preponderance of evidence."

If, however, it appeared that the defendant's driver was guilty of negligence, as alleged, and, as contended, guilty of negligence in not looking, when he came out of the building, to see if the rope was in or near the wheel, the plaintiff would not be entitled to recover, because of the continuing and concurrent negligence of the deceased. Doyle was in full view of the wagon and horse from the time it stopped until the moment of the accident, and it was certainly as incumbent upon him to be on the alert to protect himself, as it was obligatory upon the driver to be on the lookout for his protection. If the driver was negligent in not seeing the danger to which Doyle was exposed before starting the wagon, it was equally negligent in Doyle not to have seen and guarded against such danger. If the driver was negligent in handling the reins and starting the horse, Doyle was equally negligent in handling the rope, which was under his control. There is no testimony suggesting negligence on the part of the driver that does not convict Doyle of an equal or greater degree of negligence. One had no better opportunity to anticipate the accident, nor any better means of preventing it, than the other. If, therefore, there was negligence, it was concurring negligence, continuous and mutual up to the instant of the accident, which disentitles the plaintiff to recover. *Richmond Traction Co. v. Martin's Adm'x*, 102 Va. —, 45 S. E. 886.

There was nothing in the situation to suggest danger to either party from the time the wagon stopped until it started away. Doyle says that he regarded the situation as a safe one, and paid no further attention to the wagon after it stopped. If the accident had been anticipated, it could have been easily avoided by either party—on Doyle's part, by drawing the rope up to a place of safety above the wagon, and on the driver's part by examining to see that the rope had not come in contact with the wagon during his absence. Neither, however, anticipated trouble, and therefore neither took precautions to avoid it. The true view of the case presented by the record is that the injury complained of was the result of an accident

which was not expected, and could not have been anticipated by a person of ordinary prudence. The fact, as shown in the outset, that it is a matter of pure speculation how or when the rope became entangled with the wagon wheel, greatly strengthens the view that the case must be referred to the region of pure accident. It would violate every principle of justice or law if the defendant were compelled to foresee and provide against that which reasonable and prudent men would not expect to happen. *Persinger's Adm'x v. Alleghany Ore & Iron Co.*, 102 Va. —, 46 S. E. 325.

For these reasons, we are of opinion that the lower court erred in overruling the motion of the defendant to set aside the verdict, and its judgment must therefore be reversed, and the case remanded for a new trial.

CARDWELL, J., absent.

(102 Va. 394)

SEABOARD & R. R. CO. v. HICKEY.

(Supreme Court of Appeals of Virginia. Feb. 4, 1904.)

RAILROADS—INJURIES TO CHILDREN—JUMPING ON CARS—NEGLIGENCE—EVIDENCE—SUFFICIENCY.

1. Plaintiff, a boy eight years old, ran out from a throng of people, and attempted to catch hold of a cuff or socket on a car of defendant's freight train, when he slipped and fell between the two rear trucks of the car, and was injured. The preponderance of evidence was that plaintiff was attempting to jump on the car. The only member of the train's crew who saw the accident was a brakeman standing on the top of one of the cars, who saw plaintiff jump, and attempt to clutch the cuff, when he lost his hold and fell, and who thereupon immediately signaled the engineer, but failed to attract his attention. *Held*, that there was no evidence of negligence on the part of defendant.

Error to Hustings Court of Portsmouth.

Action by John Hickey against the Seaboard & Roanoke Railroad Company. There was judgment for plaintiff, and defendant brings error. Reversed.

G. Hatton, for plaintiff in error. Jeffries & Lawless, for defendant in error.

WHITTLE, J. This action was brought by defendant in error to recover damages from the plaintiff in error, who was the defendant in the court below, for personal injuries alleged to have been inflicted upon him by the negligence of the defendant.

The specific allegation of the amended declaration is that during a carnival in the city of Portsmouth the defendant, while running a freight train over its tracks along one of the streets of that city, negligently permitted the plaintiff, a boy eight years and four months of age, to attempt to climb and ride upon one of its cars; that while so attempting to climb upon said car, and while riding thereon, plaintiff was by the default, carelessness, recklessness, negligence,

willfulness, and improper conduct of the defendant, violently thrown to the ground and under the cars, by means whereof his left leg was so fractured and injured that it had to be amputated.

The jury found a verdict for the plaintiff, and assessed his damages at \$6,000, whereupon the defendant submitted a motion for a new trial on the ground that the verdict was contrary to the law and evidence, and for other reasons; but the court overruled the motion, and rendered judgment for the plaintiff, and the defendant excepted.

The view taken by this court is that there was a total failure on the part of the plaintiff to trace actionable negligence to the defendant, and that in no aspect of the case was he entitled to a verdict; and that renders a detailed notice of other assignments of error unnecessary.

All the instructions given by the court were, in one form or another, predicated upon the supposed negligence of the defendant, and, as there was no evidence tending to establish that fact, upon familiar principles the instructions ought not to have been given. A brief statement of the circumstances and uncontroverted facts bearing upon the casualty will show the utter groundlessness of plaintiff's demand.

At the time of the accident a freight train of the defendant, consisting of 3 box cars, attached to the rear end of the train—13 flat cars and an engine—was being propelled along Crawford street. As the train was passing a "baby stand," around which a crowd had assembled, the plaintiff ran out from the throng, and attempted to catch hold of a cuff or socket (intended to receive a stanchion) on the hindermost flat car, when he slipped and fell between the two rear trucks, one of the wheels of which passed over his leg and inflicted the injury complained of. Fisher, the only witness for the plaintiff who saw the accident, was standing within 10 yards of him when he fell. His attention was first directed to plaintiff by observing his arm raised and seeing him fall underneath the car. Witness ran to him at once, and plaintiff drew up the injured leg, and was in the act of stretching out the other leg, when he was drawn from between the wheels. While Fisher's testimony is not very clear, and differs from that of other witnesses in that he expressed the opinion that plaintiff was not attempting to jump on the car when he fell, it involves no question of veracity between them. Considered in the light of other evidence bearing directly upon the accident, it would seem that Fisher observed the plaintiff for the first time after he had failed to grasp the cuff on the flat car, and was in the act of falling. However that may be, his statement that he did not think plaintiff was endeavoring to jump on the car, which was but the expression of an opinion, is opposed

to the allegation of the amended declaration, the oft-repeated admissions of the plaintiff, and to all the other evidence in the case upon that point. But, if his version of the occurrence were accepted, it would not affect the result, because, while it tends to exonerate the plaintiff from willful misconduct, it in no wise imputes negligence to the defendant.

The only member of the train's crew who saw the accident was a switchman and brakeman, who was standing on the top of the middle box car. He testified that a number of boys were attempting to get on the train, and that, while a policeman was trying to keep them off on one side, he was similarly engaged on the other. He saw the plaintiff jump and attempt to clutch the cuff or socket on the flat car, when he lost his hold and fell. He also saw some one seize him, and immediately signal the engineer, but failed to attract his attention. The occurrence was instantaneous, and, after plaintiff's danger became known to the brakeman, it was impossible for him to have averted the accident.

It was likewise in evidence that the plaintiff was an intelligent boy, that he lived on a street along which the railroad was located, and was accustomed to trains, and knew of the danger he incurred in attempting to ride on them. He had received repeated warnings on the subject, and been punished for disregarding them. A year or two prior to the accident one of the yard conductors, who lived next door to plaintiff, remonstrated with him about riding on these trains, and several days after the accident plaintiff remarked to the physician who attended him that he would not have been hurt if he had heeded the conductor's advice. He had been ordered off another train of the defendant by a policeman and by one of his own witnesses not more than half an hour before the accident. Notwithstanding these reiterated admonitions, while the train in question was passing, he endeavored to persuade one of his playmates to go with him and ride on the cars, and, despite the refusal and expostulation of his friend, made the attempt which terminated so disastrously.

It cannot be affirmed of the plaintiff that he did not possess sufficient knowledge and discretion to understand the nature of his act and the peril he was encountering. But the case does not depend upon the capacity or incapacity of the plaintiff to commit negligence. The primary question is, has the defendant been guilty of negligence? And that question, upon the evidence, admits of but one answer. To sustain the verdict of the jury in this case would present the anomaly of subjecting a defendant wholly free from fault to the payment of damages by way of compensation for an injury to a plaintiff which was the direct result of his own gross negligence and misconduct.

It was suggested that the defendant was negligent with respect to the length and speed of the train, and in failing to ring the bell. Of that contention, it is sufficient to observe that no such grounds of negligence are alleged in the declaration, and, if alleged and proved, there would have been no causal connection whatever between them and the accident.

For these reasons the lower court erred in overruling the motion of the defendant to set aside the verdict, and for that error its judgment must be reversed, and the case remanded for a new trial.

CARDWELL, J., absent.

(102 Va. 405)

VIRGINIA IRON, COAL & COKE CO. v.
CRANE'S NEST COAL & COKE CO.
(Supreme Court of Appeals of Virginia. Feb. 4,
1904.)

EJECTMENT—EQUITABLE TITLE.

1. No recovery can be had on an equitable title in an action of ejectment.

Error to Circuit Court, Wise County.

Action by the Crane's Nest Coal & Coke Company against the Virginia Iron, Coal & Coke Company. From a judgment for plaintiff, defendant brings error. Reversed.

D. D. Hull, Jr., and Bullitt & Kelly, for plaintiff in error. J. Norment Powell, for defendant in error.

CARDWELL, J. This is an action of ejectment, brought by the Crane's Nest Coal & Coke Company, defendant in error, against the Virginia Iron, Coal & Coke Company, plaintiff in error, to recover possession of the coal, with the right to mine the same, lying upon and under a parcel of 44 acres and 32 poles of land, situated in Wise county, Va.

At a trial of the cause, upon the plea of the general issue, all questions of law and fact were, by agreement of the parties, submitted for the determination of the judge of the circuit court without a jury, upon an agreed statement of facts; the right of either party being reserved at the hearing to object and have the court pass upon the admissibility, as evidence, of any of the facts set out in the agreement, etc. The judgment of the circuit court was for the plaintiff, and the case is before us upon a writ of error awarded the defendant, plaintiff in error here.

Both the plaintiff in error and the defendant in error claim title to the coal in question from a common source—Samuel Horn. About the year 1855, Samuel Horn, under color and claim of title, entered into the possession of two parcels of land in the county of Wise, the legal title to which he afterwards acquired, which two parcels to

gether constituted his "farm on Sandy Ridge," and which for more than 20 years prior to 1886 had been generally known and locally designated as "Samuel Horn's Sandy Ridge Tract." The coal in controversy lies upon and under one of these parcels of land, the title to which was conveyed to Samuel Horn by one G. W. Kilgore, as commissioner.

The deed from Horn to Greenway and Warner, trustees, under which plaintiff in error claims, was executed and delivered April 23, 1887, and recorded August 25, 1887, while the deed from Horn to Clayton Mead, under which the defendant in error claims, was executed and delivered May 21, 1887, and not recorded until April 19, 1889. The former deed was made pursuant to contract dated October 12, 1886, and the latter pursuant to contract dated April 6, 1886, neither of which contracts were recorded.

Mead's contract of April 6, 1886, is as follows:

"April the 6, 1886.

"Know all men by these presents, that I, Samuel Horne, sold this day to Clayton Mead a certain piece or tract of land, lying on Sandy Ridge, in Wise County, Va., say forty or fifty acres, more or less, for which I received of the said Mead a certain black mair for which I am to give the said Mead forty acres of land, the remainder the said Mead is to pay me three dollars per acre, in young cattle; day and date above written.

"Samuel Horne."

The deed from Horn to Mead, with covenant of special warranty, contains a description by courses and distances of 44 acres and 82 poles, taken from an ex parte survey caused to be made by Horn at some time between the date of his above contract with Mead and the date of his deed to him of May 21, 1887.

By the contract of October 12, 1886, which was an "option and coal sale" obtained from Samuel Horn, through one G. W. Bond, to G. V. Litchfield, Horn agreed to grant, bargain, and sell to Litchfield, his heirs and assigns, at the rate of 50 cents per acre, "all the coal lying and being upon and under my farms or tracts of land, containing twelve hundred and seven acres, and situated on Guest's River and Sandy Ridge, in the County of Wise and State of Virginia, being my land and adjoining the lands of one tract N. J. Horn, Wm. Horn and Samuel Counts, one tract D. S. Hoge, J. B. Miller and Widow Gray, one tract N. R. Fuller, D. K. Banner, W. V. Kiser, Hop Richardson, H. G. Kiser, and I. B. Dunn with the right of the said G. V. Litchfield, his heirs and assigns, of entry to mine the said coal with all the usual mining privileges, reserving to myself the fee simple of my said land and the right to mine coal thereon for my own household use, but not for sale."

This contract included the coal on three parcels of land, being the Bruce tract on

Guest river, supposed to contain 107 acres, and the two tracts designated and generally known as "Samuel Horn's Sandy Ridge Tract," aggregating a supposed area of 1,250 acres. But when, in pursuance of the contract, Horn and wife came to make the conveyance of April 23, 1887, to Greenway and Warner, trustees, it being found that he did not have the legal title to the Bruce tract of 107 acres, that tract was left out, and his conveyance with general warranty of title embraces "all the coal lying upon and under our farm, containing eleven hundred more or less acres situated on north side of Guest's River and Sandy Ridge on the waters of Big Tom's Creek and the waters of Caney Creek in the County of Wise, State of Virginia, being my land and adjoining the lands of on the 1st tract joins N. J. Horne, Wm. Horne, Sam'l Counts, W. H. Nash, the Sandy Ridge tract joins N. R. Fuller, D. K. Banner, W. V. Kiser, H. Richardson, H. G. Kiser, and I. B. Dunn, with the right of the said Jas. C. Greenway and Jas. C. Warner, Trustees, their heirs and assigns, of entry to mine said coal with all the usual mining privileges; reserving to ourselves the fee simple of the surface of said farm, also all timbers and all other minerals. I have sold the coal only and nothing more," etc. The coal in question underlies the land last described as the "Sandy Ridge tract," adjoining N. R. Fuller and others named.

It is conceded that the contract between Samuel Horn and Clayton Mead of April 6, 1886, is void for uncertainty in the description of the land referred to, and it must also be conceded that, if the deed from Samuel Horn to Greenway and Warner, trustees, of April 23, 1887, recorded August 25, 1887, was sufficient in description to include the coal upon and under the 44 acres and 82 poles of land claimed by Clayton Mead, the legal title thereto was no longer in Samuel Horn, and could not have been acquired by Mead by his deed of May 21, 1887, not recorded until April 19, 1889. A decision of the case must therefore turn upon whether or not the deed to Greenway and Warner, trustees, is sufficiently clear in the description of the premises conveyed to embrace the coal in question.

There is nothing whatever upon the face of the deed to indicate an intention on the part of Samuel Horn, the grantor, to exclude this coal from the operation and effect of the conveyance, while by its very terms, as we have seen, it conveys with general warranty of title all the coal lying upon and under the lands of the grantor known as the "Sandy Ridge Tract," adjoining N. R. Fuller, D. K. Banner, W. V. Kiser, H. Richardson, H. G. Kiser, and I. B. Dunn, with all the usual mining privileges, reserving to the grantor only the fee simple of the surface of the land and coal for home use. It is true that the description by adjoining owners is not a complete description of the en-

the lands upon and under which the grantor, Samuel Horn, conveys the coal, with the usual mining privileges to the grantees, Greenway and Warner, trustees, but from a plat of the "Properties and Leases on Sandy Ridge," verified by the signatures of counsel for the parties to this suit, made a part of the record, the description by adjoining landowners is all-sufficient to include the 44 acres and 32 poles of land (the Mead land), under which lies the coal in question. This land adjoins, as the plat shows and as the deed states, the lands of H. Richardson and W. V. Kiser, and while, if it be excluded, the Sandy Ridge tract would still adjoin these parties, it is the more rational view, we think, that, if it was not intended to convey the coal on the Mead land, he would have been named as an adjoining landowner, as well as H. Richardson and W. V. Kiser. A grantor in a deed will not be allowed to change the effect of his conveyance by a statement that he did not intend to include this or that parcel of land in his conveyance, which intention on his part was not made known to his grantee at the time and acquiesced in by the latter. The conveyance in this case is of the coal upon and under the grantor's lands in Wise county, known generally at that time and for 20 years prior as his "Sandy Ridge Tract," the boundaries of which, so far as necessary to embrace the coal upon and under the 44 acres and 32 poles of the Sandy Ridge tract, which Clayton Mead claims to have purchased of the same grantor under a mere parol agreement. The evidence in the case sustains unmistakably this construction of the conveyance. 2 Devlin on Deeds, § 1012; Minor's Insts. vol. 2, p. 1071.

The doctrine laid down in *Chapman v. Chapman*, 91 Va. 401, 21 S. E. 813, 50 Am. St. Rep. 846, cannot be invoked by the defendant in error, as the facts upon which the doctrine that "actual, notorious, and exclusive possession of land takes the place of the recordation of the instrument of title" was vested in that case upon a very different state of facts from the case here. There the possession was actual, notorious, exclusive, unambiguous, and unequivocal, of a definite tract of land. The equitable owner, though he had received no deed, had paid all the purchase money and been in the possession of a definite tract of land for more than 15 years, and the trustees, who claimed to be bona fide purchasers for value, without notice, knew of said possession, and one of them had knowledge of the interest that the party in possession had in the land. Here Mead had not paid all his purchase money. He had purchased no definite boundary, his contract calling for "a certain piece of land lying on Sandy Ridge, in Wise county, Virginia, say forty or fifty acres," out of a boundary generally known as the "Samuel Horn's Sandy Ridge Farm" of a thousand acres or more. The general location of the

land referred to in their agreement may have been understood between Horn and Mead, but the acreage and boundary lines thereof had not been determined. The ex parte survey, heretofore referred to, which Horn had made in 1886, was not accepted by Mead, so far as the record shows, until his deed of May 21, 1887, was taken, and there is not the slightest proof that Greenway and Warner, trustees, or G. V. Litchfield, or G. W. Bond, who obtained the contract from Samuel Horn of October 12, 1886, had knowledge of Mead's purchase or possession of any part of Horn's Sandy Ridge land. Nor does it appear that either of these parties had such knowledge when the deed from Samuel Horn to Greenway and Warner, trustees, of April 23, 1887, was executed and delivered; nor does it appear that Mead's possession was in any sense notorious, but rather the contrary, as G. W. Bond and W. A. Carico, who for years had lived within $2\frac{1}{2}$ or 3 miles of Mead, had never heard of it. Prior to Mead's contract from Horn he lived on the H. Richardson tract, near the dividing line between Richardson and Horn, and the only acts of ownership done by Mead are these: During the spring or early summer of 1886 he cleared about one acre on the Horn land within 25 yards of the cabin in which he lived on the adjoining land of H. Richardson, at a point that years before had been cleared, but which had again grown up in brush and timber, some of the trees on it being as much as a foot in diameter. In July or August of 1886 he planted turnips on about one-half of the land thus cleared, and between the 1st and 15th of July of the same year he rented the remainder, about one-half acre, to Franklin Horn (son of Samuel Horn), who planted millet, under a verbal agreement that Mead was to have one-third of the crop as rent for the land, but, as the crop failed, Mead received no rent. Some brush from this clearing was put around the cleared ground for the purpose of inclosing it, and made an indifferent fence. Prior to September 22, 1886, Mead made a further clearing on the Horn boundary for a house site, and prior to that date felled on or near the site some house logs or timber for building a cabin, which logs or timber remained where felled till Mead's one-room log cabin was built, the building of which did not begin till after October 12, 1886, and was not nearly enough completed for him to move into until the early summer of 1887, subsequent to the deed from Horn to Greenway and Warner, trustees, of April 23, 1887.

It is argued that W. V. Kiser, who lived on adjoining land, had the impression from the clearing of this house site and the felled timber near the same, independently of any other information, that some one intended to put up a log structure of some kind at that place, and he had been told by Mead, in advance, of the purpose for which the timber

was being felled; but, if the agreed statement as to what Kiser would have stated had he been formally examined as a witness be given the broadest interpretation, it would not warrant the conclusion that the acts of Mead upon the land were to be considered as acts of ownership, since they could as well have been regarded as the acts of a tenant or lessee of the land.

If it were conceded that it was competent for Samuel Horn to testify as to how he arrived at the acreage called for in his deed to Greenway and Warner, trustees, and that he deducted from the acreage called for in his title papers 43 acres, as being the acreage of the boundary he had theretofore sold to Mead, the statement would be entitled to no weight in this controversy, as Horn knew at the time that the Mead land contained 44 acres and 32 poles by his *ex parte* survey, which he carefully kept from the knowledge of Bond when he contracted with him to convey all the coal on his Sandy Ridge tract to Litchfield or his assigns, and also kept from Greenway and Warner, trustees, knowledge of his sale to Mead when he made the deed to them pursuant to his contract with Litchfield. He admits that he has no recollection of telling Litchfield about the deduction of the acreage of the Mead land, and the agreed facts are conclusive that no mention of this was made when the deed to Greenway and Warner, trustees, was executed and delivered. Mead admits that at the time he took his deed he had heard that Horn had sold his coal under his Sandy Ridge lands to the interest represented by G. W. Bond, but did not know the names in which the contract and deed were taken, or that it was claimed that the deed included all coal under the tract he himself had purchased. Considered in connection with this admission of Mead, and the further fact that he took a deed from Horn with only a covenant of special warranty, it is quite significant that when Mead came to convey the coal on the land claimed by him to Ross, trustee, through whom defendant in error claims, he also conveyed with only the covenant of special warranty.

We have gone thus into a consideration of the material facts in the case, not in recognition of the doctrine contended for that a plaintiff in an action of ejectment may recover upon an equitable title or on an equitable estoppel against the defendant, but to show that, if the doctrine prevailed in this state, the evidence of the delivery of the possession to Mead of the land upon and under which the coal in question lies and of his acts of ownership thereon is not sufficient to entitle defendant in error to recover in this action, since it could not be deemed sufficient to induce a court of equity to decree specific performance, which is the test in those jurisdictions in which the doctrine is recognized. Whatever may be the rights of the defendant in error as the successor

in title to any rights Clayton Mead may have had under his contract with Samuel Horn—as to which we express no opinion—it cannot recover in this action without the legal title to the coal in question. In a large number, if not the majority, of the states of the Union, and in all of them where not changed by statute, the rule, subject to a few exceptions, is that a plaintiff cannot recover in ejectment without the legal title. The principal exception to this general rule is where the plaintiff is in the possession of the land from which he is ousted under circumstances from which the jury may infer a conveyance of the legal title.

In a note to *Carter v. Ruddy* (166 U. S. 493, 17 Sup. Ct. 640, 41 L. Ed. 1090) 4 Am. & Eng. Dec. Eq. 161, it is said: "The action of ejectment being purely a common-law remedy, and ejectment on an equitable title being a mere substitute for a bill of specific performance, therefore governed by equitable principles, it follows that in such an action the legal title must prevail wherever the incidents of the action remain as at common law; and consequently no recovery can be had in an action of ejectment on a purely equitable title, without express statutory authority in those states in which the common-law and equity systems of jurisprudence are kept distinct."

Among the numerous authorities cited in the note are *Suttle v. E. F. & P. R. R. Co.*, 76 Va. 284; *Nelson v. Triplett*, 81 Va. 236; and *Jennings v. Gravely*, 92 Va. 377, 23 S. E. 763. See, also, *Russell v. Allmond*, 92 Va. 484, 23 S. E. 895.

The opinion in *Carter v. Ruddy*, *supra*, citing *Langdon v. Sherwood*, 124 U. S. 74, 8 Sup. Ct. 429, 31 L. Ed. 344, and *Johnson v. Christian*, 128 U. S. 374, 9 Sup. Ct. 87, 32 L. Ed. 412, says: "It is well settled that an action of ejectment cannot be maintained in the courts of the United States on a merely equitable title."

In *Jennings v. Gravely*, *supra*, Keith, P., reviews section 2741 and other sections of the Code of 1887, as well as the decisions by this court on the subject, and says: "The plaintiff may come into court upon an absolutely perfect equitable title, but will lose his case if the defendant can show an outstanding legal title in himself or a stranger, except in a few cases dependent upon certain technical principles."

In that case the defendant sought to set up, under section 2741 of the Code of 1887, an equitable title in defense to the right of the plaintiffs, shown to be the holders of the legal title to the land in question. And in *Suttle v. E. F. & P. R. R. Co.*, *supra*, the plaintiff came into a court of law in an action of ejectment, basing his right of recovery upon an equitable estoppel, and lost his case because he was unable to show a legal title in himself, and a present right of possession under it at the time of the commencement of the action. In *Jennings v.*

Gravely, *supra*, the opinion further points out clearly that the enactment of the statute, now section 2741 of the Code of 1887, was dictated not by a general, but by a restrictive policy, and could not be availed of, even by a defendant in an action of ejectment, in but a few classes of cases, which were selected and confined within narrow limits by careful and cautious provisions; and quotes from the opinion of Staples, J., in *Suttle v. R. F. & P. R. R. Co.*, *supra*, as follows: "The provisions of the statute * * * require that there shall be written evidence of the contract; that the vendee shall have fully complied with all of its terms, so that he would be entitled to the conveyance of the legal title without any condition imposed. * * * If, as now claimed, the holder of an equitable title may maintain or defend in ejectment, if a party in that action may rely upon a mere equitable estoppel in pais—the statutes cited are altogether unnecessary, and this court has utterly misapprehended the grounds upon which they were enacted."

We are of opinion that all evidence considered by the lower court relative to an alleged superior equity in the defendant in error as the successor of Clayton Mead in title to the coal in question was irrelevant, and should have been excluded, and that upon the relevant testimony contained in the agreed statement of facts and the exhibits therewith the case is clearly with the plaintiff in error. The judgment of the circuit court will therefore be reversed and annulled, and this court will enter such judgment as that court should have entered.

KEITH, P., absent.

(102 Va. 417)

**RICHMOND STANDARD STEEL SPIKE &
IRON CO. v. CHESTERFIELD
COAL CO.**

(Supreme Court of Appeals of Virginia. Feb. 4, 1904.)

**PLEADING—CONTRACTS—VARIANCE—TRIAL
—OFFERS TO PROVE.**

1. Where a plea alleged a contract between plaintiff and defendant whereby defendant was to buy from plaintiff all its coal for one year from the date thereof, and by the terms of which plaintiff was to furnish defendant two car loads of coal a week during the prescribed period, which defendant was to pay for at a certain rate, a contract which stipulated that plaintiff was to ship the coal in such quantities and at such times as the defendant should direct varied materially from that pleaded, and was properly excluded when offered in evidence, irrespective of any question as to its validity under the statute of frauds.

2. Defendant pleaded a contract between itself and plaintiff whereby plaintiff was to deliver coal at specified times and for a certain rate, and offered in evidence a contract varying from that pleaded in respect to the times of shipment. Its admission was objected to by plaintiff on the ground of variance and on other grounds, whereupon defendant stated that the contract offered was only a part of the contract really made between the parties, and that it

was incomplete on its face, in showing a want of date, and offered to show all the facts which led to the making thereof, in order that the want of date might be shown, and its true meaning explained. *Held*, that the contract was properly excluded, as the variance between it and that pleaded was not as to its date, but as to other matters, and the admission of evidence showing the correct date of the writing would not obviate the objection on the ground of variance.

Error to Corporation Court of Manchester.

Action by the Chesterfield Coal Company against the Richmond Standard Steel Spike & Iron Company. Judgment for plaintiff, and defendant brings error. *Affirmed*.

William L. Royall, for plaintiff in error.
Wm. Crump Tucker and Coke & Pickrell, for defendant in error.

BUCHANAN, J. The Chesterfield Coal Company instituted its action of assumpsit to recover the sum of \$233.56 for coal sold and delivered to the Richmond Standard Steel Spike & Iron Company. The defendant appeared, and issue was joined upon the plea of non assumpsit, and a special plea filed under section 3299 of the Code of 1887. Upon the trial there was a verdict for the plaintiff for the amount claimed in the declaration, for which the court rendered judgment, after overruling the defendant's motion to set aside the verdict because contrary to the law and the evidence.

To sustain the issue on its part, the defendant offered to introduce in evidence a writing which it stated was the contract relied on in its pleading. Objection was made to its introduction, which the court sustained, and refused to allow it to go in evidence.

The writing, the circumstances under which it was offered, the objection made to its introduction in evidence, appear from bills of exception numbered 1, 2, and 3, which are as follows:

Bill of Exception No. 1.

"Be it remembered that upon the trial of this cause, and after defendant had introduced as witnesses Meriwether Jones, who had completed his testimony, and J. T. Jewett, who was then being examined in chief, as set out in bill of exceptions No. 10 herein, which is hereby referred to and made a part hereof, the defendant, after asking said witness the sixth question set out in bill of exception No. 10, offered in evidence a certain letter from John S. Lear & Co. to J. C. Diminny, dated November 6, 1901, which letter the court admitted in evidence, with the provision that if the agency was not established the jury would be instructed to disregard it, whereupon the plaintiff moved the court to exclude said letter until the defendant had introduced in evidence the contract on which it relied, whereupon defendant's counsel offered in evidence a certain contract, which is in the words and figures following, to wit:

"Contract for Fuel.

"Agreement entered into this 20th day of May, 1902, by and between the Chesterfield Coal Co. of New York, N. Y., of the first part, and Richmond Standard Steel Spike & Iron Co., of Richmond, Va., of the second part. Witnesseth:

"That the party of the first part agrees and binds itself to furnish and deliver to the party of the second part, on board cars at Winterpock, Va., all of the Clover Hill R. O. M. coal, same quality as sample sent us, they may need from the date hereof until May 31, 1903, approximating a quantity of 2,500 (more or less) tons, and to ship the same in such quantities and at such times as the party of the second part may, from time to time, direct, during the continuation of this contract, and at the following prices per ton, 2,240 pounds, viz.: \$2.00 f. o. b. mines.

"Two dollars.

"The party of the second part agrees to buy from the party of the first part all of the Clover Hill R. O. M. coal it may need during the period hereinbefore specified, and to pay therefor to the party of the first part, at the price set forth above, on or before the 15th day of each calendar month for all shipments made during the previous month. All settlements to be made on railway scale weights as ascertained by initial lines and as shown on bills to be rendered by the party of the first part, in accordance with the usages of the coal trade.

"Deliveries of coal under this contract are subject to strikes, accidents, interruptions to transportation, and other causes beyond the control of the party of the first part, which may delay or prevent shipment.

"When such interruptions to deliveries occur, no deficit shall be made up after the time limit noted above in this agreement, except it be mutually agreed so to do by both parties to this agreement.

"In witness whereof, the parties hereto have set their hands this ____ day of ____, 190-. Chesterfield Coal Co. Richmond Standard Steel Spike & Iron Co., by Corbin Warwick, Vice-Pres. and Gen. Mgr.'

—To the introduction of which said contract the plaintiff objected, and moved the court to exclude the same under the circumstances and for the reasons appearing in the transcript of the evidence set out in bill of exceptions No. 10, which motion the court sustained, and excluded said contract from the evidence herein; to which ruling of the court sustaining said motion and excluding said contract the defendant, by counsel, excepted, and tenders to the court this, his first bill of exception, which he prays may be signed, sealed, and made a part of the record, which is accordingly done."

Bill of Exception No. 2.

"Be it remembered that upon the trial of this cause, and after defendant had introduced as witnesses Meriwether Jones and

J. T. Jewett, and while J. T. Jewett was being examined in chief as set out in bill of exception No. 10 herein, which is hereby referred to and made a part hereof, the defendant, by counsel, propounded to said witness a certain question, numbered 36 in his testimony as set out in said bill of exceptions No. 10, as follows:

"Please tell me what Mr. Warwick's orders were?"

—Which was objected to by plaintiff, whereupon counsel for the defendant stated to the court that he had stated all along that the written contract which he showed to the court was only a part of the contract really made between the parties; that that contract was on its face incomplete, in showing the want of a date; that he was then attempting to show all the facts which led to the making of the agreement, of which the writing is only a part evidence, in order that its want of a date may be shown, and its true meaning explained; which objection the court sustained, and refused to allow said question to be propounded to and answered by said witness, to which ruling of the court the defendant excepted, and tenders to the court this, its second bill of exceptions, which it prays may be signed, sealed, and made a part of the record, which is accordingly done."

Bill of Exception No. 3.

"Be it remembered that upon the trial of this cause, and after defendant had introduced as witnesses Meriwether Jones, who had completed his testimony, and J. T. Jewett, who was then being examined in chief, as set out in bill of exception No. 10 herein, which is hereby referred to and made a part hereof, the defendant, by counsel, after asking said witness the forty-fifth question, as set out in his testimony in said bill of exception No. 10, to which witness had replied, 'The Chesterfield Coal Company,' offered in evidence a certain written paper, dated May 20, 1902, signed by the Richmond Standard Steel Spike & Iron Company, by Corbin Warwick, vice president and general manager, and which is the same paper set out at large in bill of exception No. 1 herein; to the introduction of which said written paper in evidence the plaintiff objected, which objection the court sustained, and refused to allow said written paper to be introduced in evidence, to which ruling of the court the defendant excepted, and tenders to the court this, its third bill of exception, which it prays may be signed, sealed, and made a part of the record, which is accordingly done."

Bill of exception No. 10, to which the foregoing bills of exception refer, contains the following questions, answers, and objections, which throw some light upon the circumstances under which the writing was offered, the objections to its introduction in evidence, and the rulings of the court:

"Mr. Crump: I move to reject that letter and all testimony of this character until the Standard Steel Spike & Iron Company have offered to prove the contract on which it relies.

"Mr. Royall: This is the beginning of my proof now.

"Mr. Crump: I ask the court to ask the witness, or the counsel, whether that contract is not in writing; and, if it is, I object to this oral testimony.

"Mr. Royall: The contract is in writing, but I want to prove that the witness was the agent in making the contract.

"Mr. Crump: I object to any oral testimony until that contract is tendered in evidence, in order that it may be inspected by the court and counsel, and be seen if oral testimony is admissible.

"Mr. Royall: I will offer in evidence the contract relied upon in the pleading in this case.

"Mr. Crump: I object to it for three reasons: First, it is not described in the pleading. If the contract is the paper intended to be relied upon, there is a variance between the pleading and the proof. In the next place, it is unquestionably within the statute of frauds—a contract for one year and nine days on its face. And in the next place, because it is a contract made by a corporation that had no right to make it or tender it.

"35th Q. Now, Mr. Jewett, had you, prior to writing that letter, come to an understanding with Mr. Warwick about his (Warwick's) buying coal from Mr. Dinlany?

"A. Well, I had taken his orders.

"36th Q. Please tell me what Mr. Warwick's orders were?

"Mr. Crump: I object on two grounds: First, that the court has been assured by the counsel that the contract which was described in the pleading, and which was the basis of this action, and which was to be relied on in proof, was in writing, and that contract has been tendered in evidence and been exhibited to the court and been rejected, because of the contention of counsel that the written contract upon which the defendant at bar stated he rested his case was not properly described in the plea, and was, moreover, on its face, within the statute of frauds. On that ground I object to any oral testimony concerning the contract mentioned in the letter just read, which was stated before at the bar of the court by counsel for defendant to be the contract which he has tendered in evidence, and which has been rejected.

"Mr. Royall: Defendant's counsel replies that he has stated all along to the court that the written contract which he showed to the court is only a part of the contract really made between the parties; that that contract is on its face incomplete, in showing its want of date; and defendant's counsel is now undertaking to show all of the facts which led

to the making of the agreement between the parties, of which that writing is only a part evidence, in order that the want of date may be shown, and the true meaning may be explained.

"The Court: I shall sustain the objection. You will have to stand on the contract.

"38th Q. Did you put any agreement between you and Warwick in respect to the sale by you of the Chesterfield Coal Company's coal, and the purchase by Warwick of the Chesterfield Coal Company's coal? Did you put any such agreement into writing and send it to Warwick?

"A. There was no correspondence between Mr. Warwick and ourselves at all.

"39th. Q. I asked you, did you put any such agreement into writing, and send it to him for his signature?

"A. Yes, sir; we submitted that contract, and begged him to sign—solicited his signature, to be sent on to New York for the approval of the principal.

"40th Q. Look at the paper I now hand you, and say whether that is the agreement which you sent to Warwick?

"A. This is a carbon copy of the contract submitted to Mr. Warwick.

"By Mr. Royall: I now offer in evidence a paper signed by the Richmond Standard Steel Spike & Iron Company, by Corbin Warwick, vice president and general manager, purporting to be a contract between the Chesterfield Coal Company and the Richmond Standard Steel, Spike & Iron Company, described in its beginning as an 'Agreement entered into this 20th day of May, 1902,' and concluding as follows: 'In testimony whereof, the parties hereto have set their hands this — day of —, 19—,' the same being an agreement by which the Chesterfield Coal Company was to sell the Standard Steel Spike & Iron Company certain coal, and the Standard Steel Spike & Iron Company was to purchase same from the Chesterfield Coal Company, and being the same paper referred to in fortieth question above.

"The Court: The court rejects the paper, and states that it has already rejected the paper heretofore.

"By Mr. Crump: Counsel for plaintiff moves the court to exclude this paper, and not admit it in evidence, on the ground that it is obnoxious to the statute of frauds; and being the same paper as to which counsel for the defendant has made the statement that it is the paper described in the plea, and relied upon as the basis for this suit, it constitutes a variance between the pleading and proof. And defendant's counsel then and there excepted to said ruling and action of the court."

The special plea, after stating the circumstances under which the contract was entered into, sets forth its terms as follows:

"After this, plaintiff resumed its solicitations that defendant should buy its coal from it; and defendant, explaining to plaintiff the press of orders in its mill, entered into a contract with plaintiff in the month of May, 1902, to buy from plaintiff all of the coal for one year from the date of said contract that it should use in said year in its said furnaces, which is the only contract that was made between the plaintiff and defendant, and plaintiff's claim against defendant grows out of that contract. By the terms of this contract, plaintiff was to furnish defendant two car loads of its coal each week during the period of one year from the date of the same, of same quality as that supplied in the three car loads above described that defendant had used; and defendant was to pay plaintiff for same at the rate of \$2 per ton of 2,240 pounds, free on board of cars at the mines; and plaintiff was to send to defendant each week two car loads of said coal, which defendant was to pay for at said rate; and defendant was to pay the freight on same from said mines to defendant's mill."

The court refused to allow the contract set out in the writing to be introduced in evidence upon two grounds: First, because it varied materially from the contract set up in the special plea; and, second, because it was an agreement not to be performed within a year, and was not signed by the party to be charged. Code 1887, § 2840.

If there was a variance between the contract offered in evidence and that set up in the plea, it is wholly immaterial whether or not it was within the statute of frauds (as to which we express no opinion), so far as its admissibility in evidence was concerned, for neither an oral nor a written contract is admissible in evidence when there is a material variance between it and the contract set up in the pleadings, if objected to.

That there is material variance between the contract set up in the plea and that which was sought to be proved at the trial by the introduction of the rejected writing is clear. This we do not understand defendant's counsel to controvert, but his contention is that the court had no right to pass upon the question of variance until he had introduced all his evidence, since he was compelled by the court, at the instance of the plaintiff, to offer the writing in evidence when he did, although he insisted at that time that "it is an incomplete paper, and that it will be necessary for the court to consider much other matter in order that it may find out from it all what the contract between the parties is."

It is true, the defendant's counsel did not offer the writing in evidence until objection was made that, if the contract relied on was in writing, oral evidence as to the contents was not admissible; but, as soon as that objection was made, counsel for defendant declared that the contract relied on in the

pleading was in writing, and offered the writing in evidence of his own motion. When objection was made to a question asked one of the defendant's witnesses and sustained by the court, as disclosed by bill of exceptions No. 2, counsel for defendant stated to the court that he had stated "all along to the court that the written contract which he showed to the court is only a part of the contract really made between the parties; that that contract is on its face incomplete, in showing its want of a date; and defendant's counsel is now undertaking to show all of the facts which led to the making of the agreement between the parties, of which that writing is only a part evidence, in order that the want of date may be shown, and the true meaning may be explained." In that statement counsel only claims that the written contract offered in evidence was incomplete in one respect, and that was as to its date. There is no claim that the writing offered in evidence and rejected by the court did not contain the terms of the contract between the parties, except its date. The variance between the contract set out in the writing and the contract set up in the plea was not as to its date, but as to other matters, so that, if the court had allowed evidence to be introduced to show that the correct date of the writing was other than that which it bore, it would not have cured the objection made to its admissibility by reason of the variance.

When the court held that there was a material variance between the contract set up in the plea and that contained in the writing, the defendant might have asked leave to amend his plea, under section 3384 of the Code of 1887, which provides that if, at the trial of any action, there appears to be a variance between the evidence and the allegations or recitals, the court, if it consider that substantial justice will be promoted, and that the opposite party cannot be prejudiced thereby, may allow the pleadings to be amended on such terms as to the payment of costs or postponement of the trial, or both, as it may deem reasonable, or, instead of the pleadings being amended, the court may direct the jury to find the facts, and, after such finding, if it consider the variance such as could not have prejudiced the opposite party, shall give judgment according to the right of the case. But no such motion was made then or at any time during the trial.

There being a material variance between the contract sought to be proved and that set out in the plea, and no motion being made to amend the plea so as to conform its averments to the proof, or to otherwise take advantage of the provisions of section 3384 of the Code of 1887, the court did not err in excluding such evidence.

The court having rightly refused to allow a contract to be proved different from that set up in the plea, there was no error

in its other rulings, set out in bills of exception 2, 4, 5, 6, 7, 8, and 9, refusing to allow evidence to be introduced tending to prove that there was such a contract, and the damages that resulted from its breach.

Upon the evidence before the jury, which is set out in bill of exceptions No. 10, the verdict is clearly right, and the court did not err in refusing to set it aside and grant a new trial.

We are of opinion that the judgment must be affirmed.

CARDWELL, J., absent.

(123 N. C. 725)

STATE v. BIGGS.

(Supreme Court of North Carolina. Dec. 18, 1903.)

PHYSICIANS AND SURGEONS—PRACTICE WITHOUT LICENSE—CRIME—STATUTE—CONSTITUTIONAL LAW—POLICE POWER—MASSAGE AND PHYSICAL CULTURE.

1. An act passed in the supposed interest of a state medical society, limiting the practice of medicine and surgery, will be construed most strongly against the society.

2. Act 1903, p. 1074, c. 697, amending Code, § 3122, designating who are eligible to practice medicine and surgery, provides that, for the purpose of the act, the expression "practice of medicine or surgery" shall be held to mean "the management for fee or reward of any case of disease, physical or mental, real or imaginary, with or without drugs, surgical operation, surgical or mechanical appliances, or by any other method whatsoever," and excepts only midwives, nurses, and persons who minister to or cure the sick or suffering by prayer. *Held*, that the act does not confer and is not intended solely to confer protection on the public, but attempts to confer a monopoly on the method of treatment of disease by doctors of medicine or surgeons, and is violative of Const. art. 1, § 31, prohibiting monopolies.

3. Patients have a right to use methods of treatment requiring less skill and learning on the part of the practitioner than is requisite to constitute a doctor of medicine or a surgeon, and a legislative act which attempts to deprive them of such right is not warranted by any legitimate exercise of the police power.

4. Defendant was prosecuted for unlawfully practicing medicine and surgery, and the branches thereof, for fee or reward, without a license. The proof showed that the acts he was convicted of doing were administering massage baths, physical culture, manipulating muscles, bone, spine, and solar plexus, and advising his patients as to diet. The proof also showed that he did all those things without prescriptions being given to the patients, or any drugs or surgery used, that he charged and received fees therefor, and had no license. *Held*, that there is nothing in such treatment that calls for the exercise of the police power, and defendant could not be punished under a law, passed by virtue of the police power, prohibiting such treatment by unlicensed persons.

Appeal from Superior Court, Guilford County; W. R. Allen, Judge.

Andrew C. Biggs was convicted of unlawfully practicing medicine and surgery, and appeals. Reversed.

C. M. Stedman and E. J. Justice, for appellant. The Attorney General, for the State.

46 S.E.—26

CLARK, C. J. The defendant is indicted on a charge that he "did unlawfully and willfully begin, engage in, and continue the practice of medicine and surgery, and the branches thereof, for fee or reward, without having obtained a license so to do from the Board of Medical Examiners of the State of North Carolina." Upon the facts found, the court was of opinion that the defendant was guilty. The defendant appealed from the judgment imposed.

The special verdict found that the defendant advertised himself as a "nonmedical physician"; that he held himself out to the public to cure disease by a "system of drugless healing, and treats patients by said system without medicine, claiming not to cure by faith"; that he advertises to cure by natural methods, without medicine or surgery. The only acts that he is found by the verdict to have performed are that "he administers massage baths and physical culture, manipulates the muscles, bones, spine, and solar plexus, and kneads the muscles with the fingers of the hand; he writes no prescriptions as to diet, but advises his patients what to eat and what not to eat; all the above treatment is administered to the exclusion of drugs." It was admitted that the defendant was not licensed by the State Medical Board, and claims no exemption, under the provisions of the act of 1903, as a nurse, or midwife, nor as one curing by prayer; and then there is the important finding that "the defendant charges a fee or reward for his services," and has treated patients by the above treatment, and received payment therefor, since the passage of chapter 697, p. 1074, Laws 1903, "To Define the Practice of Medicine and Surgery."

Section 3124 of the Code requires that every person who applies for license to practice "medicine or surgery or any of the branches thereof" shall stand an examination in "anatomy, physiology, surgery, pathology, medical hygiene, chemistry, pharmacy, materia medica, therapeutics, obstetrics and the practice of medicine." There was added by section 2, c. 117, p. 180, Laws 1885, the following provision: "And any person who shall begin the practice of medicine or surgery in this state for fee or reward, after the passage of this act, without first having obtained license from said Board of Examiners [meaning the State Board of Medical Examiners] shall not be entitled to sue for or recover before any court any medical bill for services rendered in the practice of medicine or surgery or any of the branches thereof, but shall also be guilty of a misdemeanor and upon conviction thereof shall be fined not less than \$25, nor more than one hundred dollars or imprisoned at the discretion of the court for each and every offense."

The constitutionality of this last act has been vigorously assailed in the courts, on the ground that every one had an "inalienable right to life, liberty and the pursuit of happiness," as our great Declaration phrases it, and that by that guaranty it is the right of every

one to earn his livelihood by pursuing any calling or vocation not unlawful, and that to place his liberty to do so within the power of a committee chosen by those already pursuing any given calling would be to infringe upon section 7 of article 1 of our state Constitution, which forbids exclusive privileges and emoluments to any set of men, and section 31 of the same article, which prohibits "monopolies and perpetuities." Of late years there has been added the argument that such act is also obnoxious to the fourteenth amendment to the Constitution of the United States, which prohibits any state "to deny to any person the equal protection of the law." There was undeniably great force in the argument on that side. The lawmaking power slowly, in this state and in others, yielded to the view that it could or should pass such act. In 1858-59 (Acts 1858-59, p. 356, c. 258) it first incorporated "The State Medical Society," and authorized the above examination, and prohibited any one to practice medicine or surgery or prescribe for the cure of diseases, for fee or reward, without such license, but was careful to add a proviso that no one who should practice without such license should be guilty of a misdemeanor, the only penalty being that if he practiced on credit he could not recover his fees in the courts. The law remained thus till the above recited act passed in 1885, and which was made prospective. The constitutionality of this last statute was fully considered, and after a most able argument against it by counsel was sustained by this court, but not without great hesitation, and upon the ground solely that the act was "an exercise of the police power for the protection of the public against incompetents and impostors, and in no sense the creation of a monopoly or special privilege." *State v. Call*, 121 N. C. 646, 28 S. E. 517. If the object of the act could be construed as intended to give special and exclusive privileges to a special body of men, and not solely and in truth for the protection of the public, the Legislature was prohibited by the Constitution from enacting it, nor could the Legislature restrict the cure of the body to the practice of "medicine and surgery," or establish any state system of healing. *State v. McKnight*, 131 N. C. 723, 42 S. E. 580, 59 L. R. A. 187. After these decisions, moderation and wisdom would have suggested that the matter rest. Those who wish to be treated by practitioners of medicine and surgery had the guaranty that such practitioners had been duly examined and found competent by a board of gentlemen eminent in that high and honorable profession, and those who had faith in treatment by methods not included in the "practice of medicine and surgery," as usually understood, had reserved to them the right to practice their faith and be treated, if they chose, by those who openly and avowedly did not use either surgery or drugs in the treatment of diseases. The courts have declared that they possessed this right, and that the Legislature

could not, under the Constitution, restrict all healing to any one school of thought or practice. What is "the practice of medicine and surgery" is as well understood, and its limits, as the practice of dentistry. The courts have also held that of the many schools of "medicine and surgery" the Legislature could not prescribe that any one was orthodox and the others heterodox, but that those professing the different systems—"allopathic," "homeopathic," "Thompsonian," and the like—should be examined upon a course such as is taught in the best colleges of that school of practice, but that it is not essential that a member of each, or of any special school, should be upon the Board of Examiners.

At the last session of the General Assembly the following act (Act 1903, p. 1074, c. 697) was passed amendatory of section 3122 of the Code: "For the purpose of this act the expression 'practice of medicine and surgery' shall be construed to mean the management for fee or reward of any case of disease, physical or mental, real or imaginary, with or without drugs, surgical operation, surgical or mechanical appliances, or by any other method whatsoever; provided that this shall not apply to midwives nor to nurses; provided further that applicants not belonging to the regular school of medicine shall not be required to stand an examination except upon the branches taught in their regular colleges, to-wit, the osteopaths shall be examined only upon descriptive anatomy, general chemistry, histology, physiology, urinalysis, and toxicology, hygiene, regional anatomy, pathology, neurology, surgery, applied anatomy, bacteriology, gynecology, obstetrics and physical diagnosis; provided this act shall not apply to any person who ministers to or cures the sick or suffering by prayer to Almighty God, without the use of any drug or material means."

Chief Justice Pearson, in *McAden v. Jenkins*, 64 N. C. 801, noted, as of common knowledge, and reiterated in *Railroad v. Jenkins*, 63 N. C. 506, that railroad charters are drafted by "promoters," and hence should be construed most strongly against the grantees and in the interest of the public. The same construction can fairly be applied to this act amendatory of the charter of this corporation, in whose supposed interests it was evidently drafted, and not solely in the interest of the public. Under the guise of "construction" of those well-understood terms, the "practice of medicine and surgery," the act essays to provide that the expression "'practice of medicine and surgery' shall be construed to mean the management 'for fee or reward' of any case of disease, physical or mental, real or imaginary, with or without drugs, surgical operation, surgical or mechanical appliances, or by any other method whatsoever." That is, the practice of surgery and medicine shall mean practice without surgery or medicine, if a fee is charged. If no fee is charged, then the words "surgery and medicine" drop back to their usual and ordinary meaning, as

by long usage known and accustomed. Where, then, is the protection to the public, if such treatment is valid when done without fee or reward? Yet, unless the act confers, and is intended solely to confer, protection upon the public, it is invalid. The Legislature cannot forbid one man to practice a calling or profession for the benefit or profit of another.

Again, the act means more than its friends probably intended, for it says, "any case of disease, physical or mental, real or imaginary." Is not a disease of the eye physical, and is not a disease of the ear, or of the teeth, or a headache, or a corn, physical? Then every dentist and aurist and oculist is indictable unless he has also license from the State Medical Society as an M. D., as is also every corn doctor who relieves aching feet, and every peripatetic of stentorian lungs on the courthouse square who banishes headache, real or imaginary, by rubbing his hands over some credulous brow. He, too, must be an M. D. Then there is the closing expression, forbidding treatment "for fee or reward" by other than an M. D. "by any other method whatsoever." This would take in all the old women and the herb doctors, who, without pretending to be professional nurses, relieve much human suffering, "real or imaginary," for a small compensation. Then it is forbidden to relieve a case of suffering, "physical or mental," in any method unless one is an M. D. It is not even admissible to "minister to a mind diseased" in any method, or even dissipate an attack of the "blues," without that label, duly certified. Is not this creating a monopoly, and the worst of monopolies, that diseases shall not be cured or alleviated, whether real or imaginary, mental or physical, though without medicine or surgery, "if for a fee," unless one has undergone an examination on "anatomy, physiology, surgery, pathology, medical hygiene, chemistry, pharmacy, materia medica, therapeutics, obstetrics and the practice of medicine?" Such examination is eminently proper for one who holds himself out as an M. D., and those who wish to employ an M. D. should certainly have the guaranty that is given by his license that the M. D. is competent. But how about those who are too poor, or too ignorant, or too perverse, to wish that kind of treatment? Is it requisite that the man who treats a diseased ear shall really be competent in obstetrics, or that it is a penalty to treat a disease of the eye unless the operator understands chemistry, or that it is indictable in this state to remove corns or to plug teeth without full knowledge of the materia medica, or to banish headache by the application of the hands without having passed a satisfactory examination on anatomy, or to apply a fomentation without being able to "pass up" on therapeutics, or to sell a little herb tea for the stomach ache without being scientifically versed in pathology and physiology? The act is too sweeping. Besides, the Legislature

could no more enact that the "practice of medicine and surgery" shall mean "practice without medicine and surgery" than it could provide that "two and two make five," because it cannot change a physical fact. And when it forbade all treatment of all diseases, mental or physical, without surgery or medicine, or by any other method, for a fee or reward, except by an M. D., it attempted to confer a monopoly on that method of treatment, and this is forbidden by the Constitution.

Our early legislation naturally gave physicians no special privileges, but it was directed solely to fixing a limitation upon their charges and providing penalties for malpractice. Were a monopoly of all treatment of diseases conferred upon M. D.'s, it would necessarily follow that the Legislature would have to prescribe their scale of charges again. That matter could not, with due regard to the public interest, be left to a monopoly.

Those not M. D.'s contend that the allopathic system of practice is contrary to the discoveries of science and injurious to the public. Some M. D.'s doubtless believe that all treatment of disease, except by their own system, is quackery. Is this point to be decided by the M. D.'s themselves, through an examining committee of five of their own number, or is the public the tribunal to decide, by employing whom each man prefers, whether allopath, homeopath, osteopath, or the defendant? The law says that the M. D.'s may examine and certify whether an applicant is competent to be one of their number, and no one can practice medicine and surgery without it; but they cannot decide for mankind that their own system of healing is now and ever shall be the only correct one, and that all others are to be repressed by the strong arm of the law. This act admits Christian Scientists to practice to cure diseases without such examination. By what process of reasoning can massage, baths, and the defendant be excluded? In the cure of bodies, as in the cure of souls, "orthodoxy is my doxy, heterodoxy is the other man's doxy," as Bishop Warburton well says. This is a free country, and any man has a right to be treated by any system he chooses. The law cannot decide that any one system shall be the system he shall use. If he gets improper treatment for children or others under his care, whereby they are injured, he is liable to punishment; but whether it was proper treatment or not is a matter of fact, to be settled by a jury of his peers, and not a matter of law, to be decided by a judge, nor prescribed beforehand by an act of the Legislature.

The practice of medicine and surgery, in the usual and ordinary meaning of that term, is of the highest antiquity and dignity. In the Code of Hammurabi, King of Babylon, 15 centuries older than the Code of Moses, and which, engraved on a column of black diorite, was but recently dug up at Susa, in ancient Elam, there are found (sections 215-

225) regulations of the medical profession, fixing a scale of fees, and penalties for malpractice. Physicians are mentioned in both the Old and New Testaments. Jeremiah asks, "Is there no balm in Gilead? Is there no physician there?" The public have a right to know that those holding themselves out as members of that ancient and honorable profession are competent, and duly licensed as such. The Legislature can exert its police power to that end, because it is a profession whose practice requires the highest skill and learning. But there are methods of treatment which do not require much skill and learning, if any. Patients have a right to use such methods if they wish, and the attempt to require an examination of the character above recited for the application of such treatment is not warranted by any legitimate exercise of the police power. The effect would be to prohibit to those, who wish it those cheap and simple remedies, and deprive those who practice them of their humble gains, by either giving a monopoly of such remedies to those who have the title M. D., or prohibiting the use of such remedies altogether, neither of which results the Legislature could have contemplated, and both of which are forbidden by the provisions of the Constitution above cited.

In this case the defendant is found guilty of the following acts, and no more: (1) Administering massage baths and physical culture; (2) manipulating muscles, bones, spine, and solar plexus; (3) kneading the muscles with the fingers of the hand; (4) advising his patients what to eat and what not. And all this without prescriptions, without any drugs or surgery. These acts, by the terms of the statute, are harmless and not indictable, "unless done for fee or reward." There is nothing in this treatment that calls for an exercise of the police power by way of an examination by a learned board in obstetrics, therapeutics, materia medica, and the other things, a knowledge of which is so properly required for one who would serve the public faithfully and honorably as a doctor of medicine.

It is not only in the scope of the police power for the state to regulate the "practice of medicine and surgery," and to throw around the public any reasonable protection against unfit members of that honorable profession, and provide against malpractice, but the General Assembly can prohibit any pretended art of healing which is calculated to deceive and injure the public. It is also within its power to protect the public against the ignorant and vicious who profess knowledge and skill in any art or profession of healing in which technical knowledge and learning are required to safely and properly practice it. But it is not found here that the defendant is deceiving and injuring the public, or is ignorant and incompetent, to the detriment of the public, in the application of the methods he uses. It may be that if he were

not there some of the patients might call in an M. D., but that is due possibly to the ignorance or perversity of the patients, who may prefer the defendant's methods and scale of fees. The police power does not extend to such cases. The law is thus stated in *Lawton v. Steele*, 152 U. S. pp. 137, 138, 14 Sup. Ct. 501, 38 L. Ed. 885: "The Legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its determination of what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts." After citing cases, it is said on page 138, 152 U. S., page 501, 14 Sup. Ct., 38 L. Ed. 885: "In all those cases the acts were held to be invalid as involving an unnecessary invasion of the rights of property, and a practical inhibition of certain occupations, harmless in themselves, and which might be carried on without detriment to the public interests." See, also, *State v. Pendergrass*, 106 N. C. 667, 10 S. E. 1002; *Ohio v. Gardner*, 58 Ohio St. 599, 51 N. E. 136, 41 L. R. A. 689, 65 Am. St. Rep. 785.

License is required for the practice of pharmacy, of dentistry, of law, and many other skilled professions. We have a state system of law, for the "law is the state," and laws are prescribed by the Legislature; and we also have a state system of education. Yet it is not indictable for one not a lawyer to draw wills, deeds, bills of sale, or any other legal instrument whatever; nor is it made punishable to settle litigation out of court by arbitration or otherwise, without the aid of a lawyer, nor to teach in other than the state schools. Though there are many methods of treating diseases, among which the Legislature is not authorized to select one as the state system, excluding all others, yet this act, if valid, would make it punishable by law to charge a fee for treatment of "any disease, real or imaginary, mental or physical, by any method whatever," unless the party has been admitted by a committee from one school of treatment, upon examination of that system, thus denying mankind any relief from pain and suffering, except at the hands of that particular school of medical thought. It may be, and probably is, the best system. But that is a matter which must be decided by those who seek and must pay for the relief—not by the M. D.'s themselves, nor by the courts. Judges are lawyers, and are not competent to decide, except for themselves as individuals, which is the best system of treatment, and those practitioners who eschew medicine and surgery have a right to object to leaving the question whether "medicine and surgery" is the only permissible method of treatment to be decided by the practitioners of that method.

The defendant is not charged nor shown to be an osteopath, and disclaims being one.

His learned counsel contends that Acts 1903, p. 1074, c. 697, is further unconstitutional because of the following (quoted from his brief): "There is no provision for the examination of any but allopaths and osteopaths. It provides that all persons, except midwives, nurses, and those who profess to heal by prayer, who minister to the sick for fee or reward, 'by any other method whatsoever,' shall be construed to be practicing medicine or surgery, and then follows this language: 'provided further that applicants not belonging to the regular school of medicine shall not be required to stand an examination except upon the branches taught in their regular colleges, to-wit, the osteopaths shall be examined only upon descriptive anatomy, general chemistry, histology, physiology, urinalysis and toxicology, hygiene, regional anatomy, pathology, neurology, surgery, applied anatomy, bacteriology, gynecology, obstetrics and physical diagnosis.' The osteopath is required to stand an examination in surgery and every other branch that those belonging to the regular school of medicine are required to be examined in, except pharmacy, materia medica, therapeutics, and the practice of medicine, and, in addition, he is required to stand an examination in branches that the regular medical student is not required to be examined on, as follows: 'histology, urinalysis and toxicology, regional anatomy, neurology, bacteriology, gynecology and physical diagnosis.' But it is remarkable that he is not required to pass examination in the branches that his profession recognizes and teaches to be of special importance in the practice of osteopathy, such as principles of osteopathy, osteopathic manipulations, and osteopathic diagnosis." As his client is not an osteopath, we are not called upon in this case to pass upon the alleged discrimination against osteopaths in the prescribed course of study. But if it be objected that we have only shown that the defendant's practice did not call for the examination required, as above set out, for an allopath, it may be as well to say that the acts of which he was convicted of doing "for a fee," to-wit, using massage baths, physical culture, manipulating muscles, bone, spine, and solar plexus, and advising his patients as to diet, could be done as safely to the public, so far as shown, without an examination on "histology, urinalysis and toxicology, bacteriology, neurology, and gynecology," which are some of the things added to the course by the aforesaid act, for the comfort and convenience of those wishing to obtain license to practice osteopathy, and, of course, only to protect the public against incompetents in that line of practice.

It is possible, however, that an expert knowledge of gynecology is not essential in administering baths, and there is room for serious doubt whether bacteriology and toxicology are connected with massage in any way. The term "practice of medicine and surgery" embraces probably the larger, and certainly by far the most profitable, part of

the "treatment of diseases," but is not coextensive with the latter term, and cannot be made so, unless "surgery and medicine" are adopted as the state system of treatment—a monopoly—and all other methods are made indictable. On the other hand, the State Medical Society would hardly wish to broaden out so as to take in all methods of treatment of diseases, for this would be to take in practitioners and practices which they would not wish to recognize. All the law so far has done or can do is to require that those practicing on the sick with knife and drugs shall be examined and found competent by those "of like faith and order." Dr. Oliver Wendell Holmes, in an address before the Medical Society in Massachusetts, said: "If the whole materia medica was sunk to the bottom of the sea, it would be all the better for mankind and all the worse for the fishes." An eminent medical authority in this state has said that out of 24 serious cases of disease, 3 could not be cured by the best remedies, 3 others might be benefited, and the rest would get well anyway. Stronger statements could be cited from the most eminent medical authorities the world has known. Medicine is an experimental, not an exact, science. All the law can do is to regulate and safeguard the use of powerful and dangerous remedies, like the knife and drugs, but it cannot forbid dispensing with them. When the Master, who was himself called the Good Physician, was told that other than his followers were casting out devils and curing diseases, he said, "Forbid them not."

Upon the special verdict, the defendant should be adjudged not guilty. Reversed.

WALKER and CONNOR, JJ., concur in result.

(119 Ga. 389)

EAGLE & PHENIX MILLS v. HERRON.

(Supreme Court of Georgia. Jan. 15, 1904.)

INJURY TO EMPLOYE—PETITION—SUFFICIENCY—INSTRUCTIONS.

1. A petition for damages which charges negligence on the part of the "defendant, its servants or agents," is not subject to demurrer on the ground that this allegation is equivocal and ambiguous, in that it charges negligence against either the defendant or its servants or its agents; the evident and unmistakable intention of the language and of the whole petition being to charge negligence against the defendant, acting through the medium of its servants or agents.

2. It is not error for the trial judge, in charging the jury, to summarize the pleadings, and instruct them that "that makes the issue that you are sworn and impaneled to pass upon," without further charging them upon a theory of defense not set up in the defendant's plea, and upon which a charge is not requested by counsel, and is not demanded by the evidence.

3. It was not cause for a new trial that the judge read in charge to the jury a Code section, part of which was applicable to the case under consideration, and part not; it not appearing that the reading of the inapplicable part was calculated to mislead the jury, erroneously affected their verdict, or was prejudicial to the rights of the complaining party.

4. Where the defendant (a cotton mill company) in an action for damages on account of injuries alleged to have been sustained by reason of the operation of a defective pulley on one of its machines admitted "that there was a small piece of the rim broken off on the side [of the pulley] next the machine," but denied "that the pulley was thereby made defective," it was not error for the court, in charging the jury, to refer to the break as a defect; they being expressly instructed that the plaintiff could not recover unless this break or defect caused the injuries sued for.

5. It was not error, after charging that, regardless of whether the defendant was negligent or not, if the plaintiff, a child, could have avoided his injuries by the use of such care as his mental and physical capacity fitted him for exercising, he could not recover, for the court to add: "If you believe that the child, * * * in the exercise of all his mental capacity, such as he was possessed of at the time, did not know that the same was dangerous, and the accident happened by reason of this defect in the pulley, then he would be entitled to recover."

6. There was no error in any charge complained of in the motion which is not herein specifically considered; the requests to charge, so far as legal and pertinent, were fully covered by the charge as given; and the evidence warranted the verdict, which was not excessive.

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; W. B. Butt, Judge.

Action by William F. Herron, by his next friend, against the Eagle & Phenix Mills. Judgment for plaintiff. Defendant brings error. Affirmed.

Goetchins & Chappell, for plaintiff in error.
Hatcher & Carson, for defendant in error.

CANDLER, J. This was an action by an employé of a cotton mill company to recover damages on account of personal injuries sustained in the discharge of his duties, and alleged to have been caused by the negligence of the employer. The plaintiff was a minor, 12 years old, and sued by his mother, as next friend. From his petition it appears that he was employed by the defendant in the capacity of "alley boy"; his duties being to look after a number of carding machines, and to keep the lint from accumulating around and under them, so as to prevent their becoming clogged. At stated times he was required to get down under the machines and clean them, and it was while so doing that his injuries were received. He alleged that, in order for him to clean the machines, it was necessary for him to get down on the floor in a very small space between the machine and a wooden box, or conveyer, which was situated just in front of it, and that his undivided attention to the work in hand was required to prevent his fingers from being caught in the machinery. Under and parallel with the box before mentioned, and immediately in front of the machines, was certain shafting, attached to which was a pulley, and when the machine was in operation a leather belt extended from the pulley on the shafting to another pulley attached to the machine. In stopping the machine to permit of its being cleaned, it was customary "to slip the belt off the pulley

attached to the carding machine, when the pulley to the shafting would continue in motion, and would turn in the loose leather belt aforesaid." While cleaning the machine, on account of the small space in which it was necessary for him to get, the plaintiff's feet and legs extended "near to and in proximity with the said revolving shafting and pulley." It was alleged that, while the plaintiff was engaged in cleaning one of the machines, "the leather belt having been slipped off the pulley of the carding machine, and it being stopped so as to enable petitioner to clean it off with his hands, the leather belt wrapped around shafting near the floor, and caught the foot of petitioner in it, and caused his leg and foot to wrap around said shafting, and broke his leg and foot, which necessitated the amputation of one foot between the ankle and knee." The petition charged that the injuries were due to the negligence of the defendant, in that the pulley attached to the shafting was defective and dangerous, having on its surface a triangular broken place, which tended to, and did, cause the belt to catch and wind around the shafting; that this defect had existed for a considerable time, and was, or ought to have been, known to the defendant, its servants or agents, but could not have been discovered by the plaintiff in the exercise of ordinary care, because it was kept in motion, and while so moving was covered by the belt, which concealed it from view. It was also charged that the defendant was negligent "in allowing the loose belt, when removed from the carding machine, to dangle and lie on the floor when the pulley on the shafting was in motion, as was the custom, and as plaintiff was directed to let it do," and in putting the plaintiff, a child 12 years old, at work with the machine in its broken condition, without warning him of the danger to which he was exposed. The defendant demurred generally and specially. Its demurrer was overruled, and it excepted pendente lite. The jury found for the plaintiff \$5,000, and the defendant made a motion for a new trial, which was overruled. The bill of exceptions to this court assigns error upon the overruling of the demurrer and of the motion for a new trial.

1. There can be no doubt that the petition was good as against a general demurrer, and we do not think it fairly subject to the attack made upon it by the special demurrer. The ground that the petition does not charge that the defendant, or any one whose knowledge is chargeable to it, knew of, or had reason to know of, the alleged defect in the shafting pulley, is not well taken, in view of the distinct allegation "that said broken place in said pulley had existed for some time, and was known to defendant, its servants or agents, or ought to have been known." The demurrer does not make the point that the petition fails to set out which of the defendant's agents or servants were responsible for the alleged defect, or were guilty of negli-

gence in failing to have it repaired; but stress is laid upon the contention that the allegation of negligence on the part of "defendant, its servants or agents," is equivocal and ambiguous, in that it charges negligence against either the defendant or its servants or its agents, without definitely alleging that any particular person or persons was or were guilty of negligence. It is true that pleadings are to be construed most strongly against the pleader; and it is also true that, taking the words "defendant, its servants or agents," alone, they might be given an entirely disjunctive meaning. In other words, the ellipsis marked by the comma after the word "defendant" may be supplied by the word "or," instead of the word "and." But the rule of strict construction of pleadings is one of law, and not of grammar; and where it is plainly evident that a petitioner intends to charge negligence against a defendant corporation through the medium of its servants or agents (by whom alone it can do any act), that rule does not require that his words shall be grammatically distorted into a meaning which was far from the pleader's mind, and which, under the circumstances, is unwarranted. The cases cited by counsel for the plaintiff in error on this point have, in our opinion, no application to the case now under consideration. In all of them the use of the word "or" gave to the language employed a distinct disjunctive meaning, which rendered it open to the attack made on it; and, if it be conceded that in the present case the plaintiff intended to use the words in the meaning sought to be placed upon them by counsel for the defendant, there is no doubt that the demurrer should be sustained. What we hold, however, is that the allegation that the plaintiff's injuries were caused by the negligence of "defendant, its servants or agents," does not mean that either the defendant or its servants or its agents was at fault, but that the negligent acts complained of were done by the defendant, acting through its agents or servants. As against the demurrer filed, the allegations of negligence in the petition are set forth with sufficient particularity to enable the defendant to prepare its defense, and we find no reason for reversing the judgment on this ground.

2. In his charge to the jury, the trial judge, after summarizing the allegations of the plaintiff's petition, said: "To this declaration the defendant comes into court, and denies every material allegation set forth in the petition of the plaintiff, and says that the plaintiff was hurt by his own carelessness; and that makes the issue that you are sworn and impaneled to pass upon." Error is assigned upon this charge, because "It excluded the issue, supported by proof, that the plaintiff was hurt by 'unavoidable accident,' and nowhere else is the error cured by submitting to the jury whether said hurt was the result of unavoidable accident." An examination of the defendant's answer fails to disclose

any reference to this theory as a defense to the suit. For the most part, the plea was a categorical admission or denial of the allegations of the petition; the concluding paragraph being "that, if plaintiff was injured and damaged by the accident as claimed in said petition, the same was the result of his own carelessness and negligence, and without any fault on the part of this defendant." In charging the jury as before indicated, the court was simply outlining the issues made by the pleadings, and, as will have been seen, this was accurately done. It does not appear that counsel for the defendant made any request for a charge on the subject of unavoidable accident, and, as the evidence introduced did not demand such a charge, the failure to give it will not be cause for a new trial.

3. In charging the jury as to the duty of a master to his servant, the court read section 2611 of the Civil Code of 1895 in its entirety. The motion complains that the first clause of the section in question, to wit, "The master is bound to exercise ordinary care in the selection of servants, and not to retain them after knowledge of incompetency," was inapplicable to this case, and should not have been given, and error is assigned on the charge for that reason. It is true that there was not involved in this case any question as to the diligence or negligence of the master in the selection or retention of its servants, and it would, perhaps, have been best if the clause quoted had been omitted from the charge. It is not made to appear, however, in what way, if any, this charge injuriously affected the rights of the defendant company; and it is difficult to conceive that the jury were misled or in any way influenced by it, or that it could have affected the verdict. The refusal to grant a new trial on this ground will not, therefore, work a reversal of the judgment.

4. Complaint is also made that the court erred in using the following language in charging the jury: "It is admitted and stated by the defendant that there was a slight defect in this pulley, to wit, that there was a slight break in the edge of the same; but they deny that the injury was caused by reason of this defect;" and: "The plaintiff must show in this particular case that the injury was caused by this defect in the machinery, to wit, this break in the pulley." The objection urged against this charge is that while the defendant, in its answer, admitted that there was a break in the pulley, it denied that this break constituted a defect; and it is urged that the charge was error, in that it assumed as true an assertion that was expressly controverted, viz., that the pulley was defective. What constitutes a defect, in machinery as in men, is not always easy to determine. Ordinarily a pulley with a piece broken out of it would be considered defective to the extent that it fails to come up to the standard of a perfect pulley, just

as a one-armed man or one with a besetting sin is considered defective in failing to measure up to physical or moral standards of human perfection. If a pulley with a small piece broken out of it is not defective, then why not make them all with pieces broken out, and effect a saving in raw material? A pulley with a piece broken out of it may nevertheless be capable of good service, in the same way that a man may be a highly useful member of society in spite of a physical affliction or a moral weakness; but, as a matter of terminology, is it not still a defective pulley? The real question was whether the break in the pulley—call it a "defect," or what you will—was responsible for the plaintiff's injuries; and this question the trial judge fairly and ably presented to the jury.

5. The court, after charging the jury that if the plaintiff, in the exercise of such care as his mental and physical capacity fitted him for exercising in the actual circumstances under investigation, could have avoided the injury, he would not be entitled to recover, regardless of whether or not the defendant was negligent, added the following qualification: "If you believe that the child, or the plaintiff in this particular case, in the exercise of all his mental capacity, such as he was possessed of at the time, did not know that the same was dangerous, and the accident happened by reason of this defect in the pulley, then he would be entitled to recover. How this is, it is for you to say, and not for the court." We see no error in this qualification. It can certainly make no difference if, as contended by counsel, it is an independent proposition of law under the name of a proviso, so long as it is a correct one; and the objection that the judge failed, in this qualifying charge, to instruct the jury that the plaintiff could not recover if his injuries were caused by his own negligence, is met by the fact that this proposition was fully announced in the original charge, to which the "proviso" was added.

6. The foregoing disposes of every contention made by the motion for a new trial which, in our opinion, merits extended discussion. It was not error to qualify a charge to the effect that the defendant would not be liable for injuries due to a defect in its machinery if it used ordinary care in selecting such machinery, by a proviso that it did not know of the defect which caused the injury. Of the two requests to charge set out in the motion, one was unsound and was properly refused, while the other was fully covered by the charge as given. The evidence was in many respects conflicting, but the conflicts were reconciled by the jury, whose duty it is to pass upon disputed issues of fact, in favor of the plaintiff. We need hardly add that a verdict for \$5,000 damages for injuries to a twelve year old boy, resulting in the loss of his leg, and in his being

thus maimed and crippled for life, was not excessive.

Judgment affirmed. All the Justices concur.

(119 Ga. 301)

KESSLER v. STATE.

(Supreme Court of Georgia. Jan. 12, 1904.)

DISORDERLY HOUSE—LEASING—PRINCIPALS—EVIDENCE.

1. One who owns or controls a house, and leases it to another for the purpose of keeping a lewd house, or who rents it to another knowing that it is to be used for this purpose, or, after having leased the house, knowingly permits the occupant to use it for the practice of fornication or adultery, maintains and keeps a lewd house, and is indictable under the provisions of Pen. Code, § 391. The offense being a misdemeanor, all concerned in the perpetration are indictable as principals.

2. The evidence authorized the verdict, and no reason has been shown for reversing the judgment refusing a new trial.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Henry Kessler was convicted of crime, and brings error. Affirmed.

M. R. Freeman and Estes & Jones, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

COBB, J. If the owner of a house leased it to another for the purpose of keeping a lewd house, or if he leased it with the knowledge that it was to be so kept, he was guilty of a misdemeanor at common law. 9 Am. & Eng. Enc. L. (2d Ed.) p. 527; 5 Am. & Eng. Enc. L. (1st Ed.) p. 699; 2 Clark & Mar. Crimes, p. 1125; 2 Bish. Crim. Proc. § 119; Hughes, Cr. L. & Proc. § 2099; 2 Whart. Cr. L. (10th Ed.) § 1459. Pen. Code, § 391, which declares that "if any person shall maintain and keep a lewd house, or place for the practice of fornication or adultery, either by himself or others, he shall be guilty of a misdemeanor," is but a codification of the common law. To sustain an indictment under the section just quoted it is necessary to show only that the accused contributed to or aided, directly or indirectly, in maintaining and keeping a lewd house. Clifton v. State, 53 Ga. 241. One placing another in possession of a house for the purpose of being used for lewd purposes, or giving possession with knowledge that it is to be so used, directly aids him who is thus placed in possession in the unlawful enterprise by him therein carried on, and is liable to indictment as the keeper of a lewd house, under the provisions of Pen. Code, § 391. As the offense is a misdemeanor, all persons aiding, directly or indirectly, in its perpetration, are indictable as principals; and it is upon this principle of the common law that the numerous authorities holding that the owner or controller of

¶ 1. See Disorderly House, vol. 17, Cent. Dig. § 6.

the house is indictable as keeper and main-tainer are based. The charges complained of were in accord with the principles above laid down, and were therefore not erroneous. Judgment affirmed. All the Justices concurring.

(119 Ga. 380)

GAMMAGE v. STATE.

(Supreme Court of Georgia. Jan. 15, 1904.)

FALSE SWEARING—INDICTMENT.

1. An indictment for the statutory offense of false swearing, in that the accused falsely swore, in an affidavit to a specified account, that the person against whom the account was made out was indebted to him the amount of the same, need not allege that the affidavit was material, nor that it was made for the purpose of influencing or misleading any one, or under circumstances that would influence or mislead any one.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; L. S. Roan, Judge.

T. C. Gammage was convicted of false swearing, and brings error. Affirmed.

Jos. W. & Jno. D. Humphries, for plaintiff in error. O. D. Hill, Sol. Gen., for the State.

FISH, P. J. T. C. Gammage was indicted for the statutory offense of false swearing. Upon the overruling of his demurrer to the indictment, he excepted. The part of the indictment material to be considered in deciding the questions made in the record charge that the accused on September 22, 1902, willfully, knowingly, absolutely, and falsely swore in an affidavit made before S. H. Landrum, a justice of the peace in and for Fulton county, that one J. B. Thompson was indebted to the accused in the sum of \$16.40 on an itemized account set out in the indictment. The demurrer to the indictment was: "(1) Because it is not alleged that said affidavit was in any way material to said account. (2) Because it is not alleged that said affidavit was in any manner whatever material. (3) Because it is not alleged that said affidavit was made with any purpose whatever to influence or mislead any one whatever, nor under any circumstances that would influence or mislead any one."

Perjury consists "in willfully, knowingly, absolutely, and falsely swearing, * * * or affirming, in a matter material to the issue or point in question, in some judicial proceeding, by a person to whom a lawful oath or affirmation is administered." Pen. Code 1895, § 256. False swearing consists "in willfully, knowingly, absolutely, and falsely swearing, * * * or affirming, in any matter or thing (other than a judicial proceeding) by a person to whom a lawful oath or affirmation is administered." Pen. Code 1895, § 258. The Legislature evidently intended, in this latter section, to make false swearing penal where it would not be punish-

able as perjury under the common-law or statutory definitions of that offense. In perjury the false oath must be "in a matter material to the issue or point in question, in some judicial proceeding," while a false oath "in any matter or thing (other than a judicial proceeding)" will constitute the offense of false swearing, when made by a person to whom a lawful oath or affirmation is administered. It is manifest that the materiality of the oath does not constitute an essential element of the latter offense, and therefore it need not be alleged. Nor is it necessary to allege that the purpose of the oath was to influence or mislead any one, or that it was made under circumstances that would influence or mislead any one. The indictment substantially followed the section of the Penal Code defining false swearing, and, we think, it was good against the demurrer filed thereto, but whether or not the indictment is subject to other exception is not now determined. The present ruling goes only to the extent of holding that the points made in the demurrer were not well taken.

Judgment affirmed. All the Justices concur.

(119 Ga. 307)

ECHOLS v. STATE.

(Supreme Court of Georgia. Jan. 12, 1904.)

CRIMINAL LAW—INSTRUCTIONS.

1. It is error to charge the jury as to a state of facts not authorized by the evidence.

(Syllabus by the Court.)

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

J. M. Echols was convicted of crime, and brings error. Reversed.

Robt. McMillan and J. B. Jones, for plaintiff in error. W. A. Charters, Sol. Gen., for the State.

SIMMONS, C. J. An indictment was found against Echols for adultery and fornication. He was convicted, and his motion for a new trial was overruled. He excepted.

One of the grounds of the motion complained of the following charge of the court: "If a man goes to [a brothel] and remains there for some time alone with a common prostitute in a room, it might be considered by you as sufficient proof of the crime." One complaint of this charge was that there was no evidence upon which to base it. After a careful study of the evidence contained in the record, we find that the complaint is well founded. While the evidence showed that the accused frequently visited the house of the woman with whom he was charged with having had illegal intercourse, and that the reputation of the house was bad, there was no evidence that the accused

was ever alone in the house with her, or that they were ever in the same room of that house. We think, therefore, that it was error for the judge to assume the state of facts set out in his charge when the same could, at most, be arrived at only by an inference by the jury. In view of the evidence that the accused had frequently visited the house, the charge complained of was calculated to injure the case of the accused before the jury.

Judgment reversed. All the Justices concurring.

(119 Ga. 315)

FANNING v. BOARD OF COM'RS OF WILKES COUNTY.

(Supreme Court of Georgia. Jan. 12, 1904.)
ROAD DUTY—LIABILITY OF DEFAULTER.

1. One liable to road duty under the alternative road law (Pol. Code 1895, § 574) must either work the roads as required, or pay the commutation tax. He cannot escape liability as a defaulter in this public duty by proof that he relied on some person's promise to pay the tax, any more than he could depend on the undertaking of any third person to work the road in his stead.

2. The contentions of the plaintiff in error not covered by the first headnote were not insisted upon before this court, and will not be considered.

(Syllabus by the Court.)

Error from Superior Court, Wilkes County; H. M. Holden, Judge.

Action by the board of commissioners of Wilkes county against Jack Fanning. Judgment for plaintiff. Defendant brings error. Affirmed.

B. S. Irwin and F. H. Colley, for plaintiff in error. W. M. Sims, for defendant in error.

TURNER, J. Judgment affirmed. All the Justices concurring.

(119 Ga. 153)

BROWN et al. v. BOWMAN.

(Supreme Court of Georgia. Dec. 10, 1903.)
CONTRACT—SUBSEQUENT CONSIDERATION—ACTION FOR BREACH—PLEADING—AMENDMENT.

1. Though a promise may be a nudum pactum when made because the promisee is not bound, it becomes binding when he subsequently furnishes the consideration contemplated by doing what he was expected to do. Accordingly, where, by a written agreement, the owner of a designated tract of land gave to another the exclusive right to prospect for gold thereon, and agreed to give a half interest in all the gold he might locate and develop, "with all rights of mining and mineral privileges, wood, water, and right of way," and the latter, at considerable expense and much labor in sinking shafts, etc., located and developed gold on the land, he was entitled to a half interest in the same, and, if the owner afterwards sold the land to an innocent purchaser, the party locating and developing the gold had a right of action against the owner for half the value thereof.

2. Where, in an action brought in such a case by the promisee against the owner of the land

to recover one-half of the gold so located and developed, the petition failed to allege the value of such gold, it was not erroneous to sustain a demurrer upon a special ground thereof attacking the petition for this defect therein.

(a) In view of the fact that the demurrer was both general and special, and was expressly sustained upon all the grounds thereof, and the probability that, if the judge had intimated or announced his intention to sustain this special ground, the plaintiffs would have prevented a dismissal of their petition by offering a proper amendment thereto, and the further fact that the petition presents a meritorious case, the judgment is affirmed, with direction that the plaintiffs be allowed to amend the petition, in the respect above indicated, before the judgment of this court is made the judgment of the court below.

(Syllabus by the Court.)

Error from Superior Court, Paulding County; A. L. Bartlett, Judge.

Action by B. W. Brown and others against L. N. Bowman. Judgment for defendant, and plaintiffs bring error. Affirmed.

H. F. Sharpe and Rowell, Copeland & Rowell, for plaintiffs in error. W. E. Spinks, John W. Akin, and R. R. Arnold, for defendant in error.

FISH, P. J. 1. Bowman's agreement, which appears in the foregoing statement of facts, was evidently without consideration when made, as Brown and Taylor at that time neither did nor agreed to do anything. It was therefore, when made, unenforceable for want of mutuality. When, however, Brown and Taylor within a reasonable time, and in the absence of any revocation of the agreement by Bowman, by much labor and considerable expense, as the petition alleged, located and developed gold in the land in question, they did the very thing they were expected to do, and thereby furnished the contemplated consideration, which changed the nudum pactum into a valid and binding contract. "A contract is often such that, until something is done under it, the consideration is imperfect; yet a partial performance, or a complete performance on one side, supplies the defect. If, for example, one promises another, who makes no promise in return, to pay him money when he shall have done a specified thing, if he does it, not only is the contract executed on one side, but also the consideration is perfected, and payment can be enforced. And, in more general terms, when from any cause the party from whom the consideration moves is not compellable to render it, if he does render it, the contract becomes thereby perfected." Bishop, Contracts, § 87. To the same effect, see Parsons on Contracts, *451; Clark on Contracts, pp. 169, 170; Story on Contracts, § 569; 7 Am. & Eng. Enc. L. 115. In Hammond on Contracts, p. 683, it is said: "The test of mutuality is to be applied, not as of the time when the promises are made, but as of the time when one or the other is sought to be enforced. A promise may be unenforceable for want of mutuality when made, and

yet the promisee may render it valid and binding by supplying a consideration on his part before the promise is withdrawn." This doctrine is well settled by many adjudged cases cited by the above-named text-writers, and has been fully recognized by this court. *Sivell v. Hogan* (this day decided) 46 S. E. 67, and cases therein cited.

Counsel for defendant in error cite *Peacock v. Deweese*, 73 Ga. 570; *Grizzle v. Gaddis*, 75 Ga. 350; *Lindsay v. Warnock*, 93 Ga. 619, 21 S. E. 127; *Morrow v. Southern Express Co.*, 101 Ga. 810, 28 S. E. 998; *Perry v. Paschal*, 103 Ga. 134, 29 S. E. 703; and *Marietta Paper Co. v. Bussey*, 104 Ga. 477, 31 S. E. 415—but nothing was decided in any of these cases in conflict with the principle above announced. The contract in *Peacock v. Deweese* was purely unilateral when made, and it was not even claimed that the promisee did anything afterwards which furnished a consideration. Under the facts the court held that a specific performance could not be decreed in behalf of the promisee. It was held in *Grizzle v. Gaddis* that: "A parol contract, by which it was agreed that, if a man and his family would take possession of certain land, and cultivate and improve it, they should have it as their home during the lives of himself and wife, paying therefor a reasonable rent, and that if, at any time after paying such rent from time to time, he should become able to purchase, the owner would convey to him a title for such price or sum as it was then worth, was too vague, uncertain, and wanting in mutuality to furnish a foundation for a decree for a specific performance requiring a conveyance from the other party to the contract, or one who purchased from him with notice." There the insufficiency of the contract resulted more from its vagueness and uncertainty than from its lack of mutuality. See remarks of Mr. Justice Cobb in *Perry v. Paschal*, 103 Ga. 139, 29 S. E. 703. The facts in *Lindsay v. Warnock* were very similar to those in the present case, and the decision there made is really in line with the well-settled rule as stated in the text-books to which we have hereinbefore referred. It was held in that case: "Where, by a written contract, the owner of a tract of land stipulated to convey to the other contracting party a half interest in all the minerals that the latter might find, open, and develop to the extent that it will justify the employ of labor, with timber and water for mining purposes, the other party stipulating in the writing to prospect the land within a specified time at his own expense, and the latter having complied with this stipulation, and discovered, opened, and developed a mineral of unknown name, but of sufficient value to justify the employment of labor in mining the same, equity will, at his instance, compel the former to specifically execute his contract to convey in accordance with its terms. There was no want of mutuality in the terms of the contract as set

forth in the writing, and the failure to sign the writing by the party who performed his undertaking is of no consequence after full performance on his part." In *Morrow v. Southern Express Co.*, the agreement was entirely without consideration, and Mr. Justice Little, who delivered the opinion, said: "There are instances in which a promise, though a mere nudum pactum when made, because the promisee is not bound, may become binding on him afterwards, furnishing the consideration contemplated." Nor does the case of *Perry v. Paschal* help the defendant in error, for it was there held: "Where one by written agreement binds himself to convey to another a designated tract of land upon the payment of a sum stated, and by the same agreement likewise undertakes to extend the time of payment to a definite time in the future, and the vendee upon his part undertakes to pay a certain sum annually by way of rent for the immediate use of the premises, the vendee has the election at any time to tender the full amount of the purchase money, with interest, and then to demand a conveyance; and, a continuing tender being made by him in accordance with the terms of the contract, the right of the vendor to demand rent thenceforth ceases." In *Marietta Paper Co. v. Bussey* the ruling was only as to the allowance of an amendment, and the case is not in point. Counsel for defendant in error further contend that the agreement was merely a license, a gratuitous privilege granted by Bowman to Brown and Taylor to make a certain use of Bowman's land, and that, as there was no consideration for such license, it was recoverable at any time. Granting that the written instrument involved in this case was originally a mere license, revocable at the will of the licensor, still, after the licensees had done the work and gone to the expense contemplated by the agreement, the right of revocation was lost, certainly there could not then be an unconditional revocation. Even a parol license is not revocable after the licensee has executed it, and in doing so has incurred expense. Civ. Code 1895, § 3069. See *City Council of Augusta v. Burum*, 93 Ga. 68, 19 S. E. 820, 26 L. R. A. 340. After Brown and Taylor had, as alleged in the petition, by much labor, and at considerable expense, located and developed gold in the land, Bowman could not revoke the license, and free himself from liability for one-half of the value of the gold so located and developed. We conclude, therefore, that the petition set forth a good cause of action for the recovery of one-half of the value of the gold which was located and developed in the land by the defendants, and hence the first, second, third, and fourth grounds of the demurrer should not have been sustained.

2. The judgment of the court was not only general, but it expressly sustained the demurrer upon all the grounds taken therein. This judgment must be affirmed, as one of the spe-

cial grounds of the demurrer was good. That ground was that the petition did not allege the nature, character, and value of the minerals located and developed. The petition did not allege the value of the gold located and developed. It alleged that the plaintiffs "developed and located valuable minerals, including gold," but was silent as to the amount or value of the gold; and the defendant was entitled to be informed what the plaintiffs expected to prove upon this subject. It is true that the petition alleged that by the discovery, location, and development of the valuable minerals the land was increased in value from \$100 to \$1,500, and that, therefore, the plaintiffs were entitled to recover \$750. But the plaintiffs were not entitled to recover the value of a one-half interest in the land, nor were they entitled to recover anything for the enhanced value of the land. What they were entitled to recover for was a one-half interest in the value of the gold which they had located and developed. It is apparent that there was no sufficient averment as to the value of the gold. In view of the fact that the trial judge did not base his judgment simply upon this special ground, but expressly placed it upon all the grounds taken in the demurrer, and the probability that, if he had intimated or announced his intention to sustain this special ground, the plaintiffs would have prevented a dismissal of their case by offering a proper amendment; and the further fact that the plaintiffs, by their petition, seem to present a meritorious case—we affirm the judgment, with direction that plaintiffs be allowed to amend the petition before the judgment of this court is made the judgment of the court below.

Judgment affirmed, with direction. All the Justices concurring.

(119 Ga. 315)

JOINER v. STATE.

(Supreme Court of Georgia. Jan. 12, 1904.)

CRIMINAL LAW—CONFESSIONS—EVIDENCE—
DECLARATIONS OF PROSECUTING WIT-
NESS—WIFE-BEATING.

1. Evidence of a third party as to statements of a wife that her husband had just beaten her, made in the presence of the husband without denial on his part, and under such circumstances that his silence amounted to an admission, is admissible on the trial of the husband for wife-beating, although the wife declines to testify at the trial against her husband. Knight v. State, 39 S. E. 928, 114 Ga. 48, 88 Am. St. Rep. 17.

2. While it is true that one accused of crime cannot be convicted upon his confessions alone, yet if, on the trial of one charged with wife-beating, it is shown that he and his wife had been together in his house, that the wife had run crying from the house, called a policeman, and showed him a swollen eye, and a bowl of bloody water in which she had bathed her nose, the jury may properly regard this as sufficient corroboration of the husband's confession to show the corpus delicti, and to justify a conviction. Pen. Code 1895, § 1005, and cases cited.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Jim Joiner was convicted of assault, and brings error. Affirmed.

Julian F. Urquhart and M. W. Harris, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

SIMMONS, C. J. Judgment affirmed. All the Justices concur.

(119 Ga. 301)

SIMPSON v. STATE.

(Supreme Court of Georgia. Jan. 12, 1904.)

CRIMINAL LAW—APPEAL—REVIEW.

1. No error of law was complained of, and the evidence authorized the verdict.

(Syllabus by the Court.)

Error from City Court of Hamilton; J. B. Burnside, Judge.

B. F. Simpson was convicted of crime, and brings error. Affirmed.

B. H. Walton and H. C. Cameron, for plaintiff in error. R. A. Russell, for the State.

SIMMONS, C. J. Judgment affirmed. All the Justices concurring.

(119 Ga. 369)

COXWELL, Marshal, v. GODDARD.

(Supreme Court of Georgia. Jan. 13, 1904.)

BUSINESS TAX—EXEMPTIONS—CONFEDERATE
SOLDIER.

1. The uncontradicted evidence showed that petitioner was a disabled Confederate soldier, and entitled to an exemption as such; and it was not error to grant an injunction restraining a sale of his personal property levied on under a fi. fa. issued by a municipality for a business tax.

(Syllabus by the Court.)

Error from Superior Court, Taylor County; W. B. Butt, Judge.

Action by E. A. Goddard against W. W. Coxwell, marshal. Judgment for plaintiff. Defendant brings error. Affirmed.

On September 12, 1902, Goddard filed an equitable petition, asking for an injunction to restrain Coxwell, marshal of the town of Reynolds, from selling property of the plaintiff under an execution issued against him for the amount of a business tax in said town. Petitioner claims that he was a disabled Confederate soldier, and entitled to do business without having a license, under Pol. Code, § 1642; that in August, 1901, he had been summoned to appear before the mayor of the town to answer for the offense of carrying on his said business in said town for that year without paying the business tax; that he exhibited a certificate showing that he was a disabled Confederate soldier, before the mayor's court, which decided that the certificate was a protection, and discharged petitioner; that the aldermen, knowing

of said decision, thereafter had an execution issued, and had Coxwell, the marshal, to levy the same on petitioner's personal property. This petition was sworn to, and used as an affidavit on the hearing. Petitioner also offered in evidence a certificate of the ordinary, dated October 7, 1901, that Coxwell was a Confederate soldier, with an additional certificate thereon, dated March 21, 1902, signed by the ordinary, that the word "disabled" had been originally omitted by mistake on his part. The defendant objected to the admission of the certificate, and assigns error on the ground that the taxes appear to have been for the year 1902; that, if the certificate was a protection, it did not operate as such until after its amendment; and that the amendment was made after the tax accrued. The defendant introduced no testimony, further than its sworn answer, in which it denied the material allegations of the petition. The tax execution and the tax ordinance were not introduced in evidence, and it nowhere appears when the tax execution was issued, nor the date when taxes were required to be paid. The judge granted the injunction.

R. S. Foy, for plaintiff in error. O. M. Colbert and H. P. Wallace, for defendant in error.

LAMAR, J. The record does not show whether the business tax became due before or after the amendment to the certificate, and there is therefore not enough to enable us to consider the assignment of error based upon its admission as evidence.

Sections 1643-1645 of the Political Code grant to Confederate soldiers over 50 years old, who have resided 8 years in this state, the right to do business without the payment of a tax, provided they first make the oath and obtain the certificate therein required. But the exemption under section 1642 is rooted in the sole fact of the owner of the business being a disabled Confederate soldier, not in the certificate, which is only prima facie evidence of the fact. It appearing from the amended certificate of the ordinary, and also from the allegations in the verified petition, which was offered as evidence, that Goddard was a disabled Confederate soldier, the judge rightly granted the injunction.

Judgment affirmed. All the Justices concur.

(119 Ga. 306)

MCCOLLUM v. STATE.

(Supreme Court of Georgia. Jan. 12, 1904.)
INTOXICATING LIQUORS—SALES TO MINOR—
EVIDENCE—SENTENCE—NEW TRIAL.

1. A witness may testify as to his own age, notwithstanding all the information he has upon the subject is derived from his mother, who is living in the county where the trial occurs.

2. An inappropriate charge is not cause for a new trial when it is manifest that the complaining party was not injured thereby.

3. The sentence was not excessive, and, if it were, this would not be cause for a new trial.

4. The evidence authorized the verdict.
(Syllabus by the Court.)

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

David McCollum was convicted of selling liquor to a minor, and brings error. Affirmed.

Fermor Barrett, for plaintiff in error. W. A. Charters, Sol. Gen., for the State.

FISH, P. J. David McCollum was convicted of unlawfully selling intoxicating liquor to a minor—one John D. Ayers. A new trial having been refused, the accused excepted. Upon the trial, in September 1903, Ayers testified that he was 19 years old in the summer of that year; that he purchased the liquor from the accused in the early part of the year 1902, before the bill of indictment was found, in March of that year. He further swore that all that he knew about his age was what his mother told him, and that she was then living in the county where the trial was had. Counsel for the accused moved to rule out the testimony of Ayers as to his age, upon the ground that his mother, who knew the fact and was living in the county, was a competent witness, and what she had told her son in reference to his age was hearsay and inadmissible. The court refused to rule out the testimony, and complaint was made of this ruling in the motion for a new trial. The ruling of the court was not erroneous. It is well settled that a witness may testify as to his own age. *Central Railroad v. Coggin*, 73 Ga. 689; 1 Greenleaf, Ev. § 430k; *Underhill*, Crim. Ev. § 342; 22 Am. & Eng. Enc. L. 647; 1 Enc. Ev. 735. In *Bain v. State*, 61 Ala. 75, it was held: "A witness may testify as to his own age, though he states that his knowledge is derived from what his mother told him; and the fact that his mother, who is not shown to be dead, or out of the jurisdiction of the court, was not introduced, does not affect the admissibility of the evidence, though the jury may consider it, with the other circumstances of the case, in determining its credibility." It was held in *Cherry v. State*, 68 Ala. 29, that "a person may testify to his own age, and his testimony is not rendered inadmissible by his further statements, given as reasons for his testimony as to the fact, 'that his mother told him so; that it was written down in a book which his father had in the courthouse.'" And in *Pearce v. Kyzer*, 16 Lea (Tenn.) 521, 57 Am. Rep. 240, it was held: "A defendant in a suit, who relies upon the defense of infancy, is a competent witness to prove his own age, and it is no objection to his testimony that he obtained the information as to the year of his birth from his mother, who is living in the county in which the suit is tried." In *State v. Cain*, 9 W. Va. 559, it

was held that it was competent for a witness to testify as to his own age, with a view of proving that he was a minor at the time of a sale of intoxicating liquors to him, notwithstanding there was evidence given to the jury tending to show that his father and mother were living. See, also, *People v. Ratz*, 115 Cal. 132, 46 Pac. 915. Our Civil Code of 1895 (section 5177) provides: "Pedigree, including descent, relationship, birth, marriage, and death, may be proved either by the declarations of deceased persons related by blood or marriage, or by general repute in the family, or by genealogies, inscriptions, 'family trees,' and similar evidence." This section, however, does not, as contended by the plaintiff in error, render a witness incompetent to testify to his own age, when his father or mother is living and within the jurisdiction of the court. The section, in providing that pedigree, etc., may be proved by the declarations of deceased persons related by blood or marriage, refers to the declarations of third persons, which, according to the authorities, are not admissible unless such persons be dead. See cases above cited.

2. Upon cross-examination, Ayers swore that no one was with him when he bought the liquor from the accused, and that he did not tell the accused, at a given time and place, that one Watson was with him, at the house of the accused, when the liquor was bought, but that he told the accused that he left Watson some two or three hundred yards from the house of the accused when he went to buy the liquor, and that he carried it back to where Watson was, and he and Watson drank it. Watson testified that he was never at the house of the accused with Ayers. The accused, in his statement, said that Ayers told him, at the time and place referred to, that Watson was with him (Ayers) at the time that he bought the liquor. The accused also stated that he never sold Ayers any liquor at any time. The court charged the jury: "If a witness has been impeached in any of the modes known to the law, or in any manner known to the law, it is the duty of the jury to disregard his testimony, unless corroborated in material particulars; and if a witness has been impeached as required by law, so that the jury would disregard his entire testimony, still it is their right and privilege to believe him, if he is corroborated by other testimony in the case—corroborated in material particulars in the case, although impeached. In the motion for a new trial, error was assigned upon this charge, because there was no corroborating evidence to sustain the witness sought to be impeached. The exception to the charge was well taken. Ayers was the only witness for the state, and there was nothing to corroborate his testimony. We do not think, however, that this error of the court was such as to require the grant of a new trial, as it is manifest that the accused was in no way prejudiced by the charge. There was ab-

solutely no evidence which the charge could have misled the jury to consider as corroborating Ayers' testimony, and if, in the minds of the jury, Ayers had been impeached they would, under the instruction given, and in the absence of any corroboration whatever, have disregarded his testimony. It is evident that they did not believe the statement of the accused, for in it he said he had never sold any liquor to Ayers; and, if they had believed that the statement successfully impeached Ayers, they certainly, it seems, would have believed the balance of the statement, that the accused had never sold the liquor as charged, and have acquitted him. It has been frequently held by this court that the statement of the accused is not, strictly speaking, evidence, and it may be doubted if the mere statement of the accused will authorize a charge upon the subject of the impeachment of witnesses. It is perfectly obvious that the testimony of Watson did not even tend to impeach Ayers.

3. The fine imposed by the court upon the accused was \$500. Complaint was made in the motion for a new trial that this was excessive. Under the statute the court could have imposed a fine not to exceed \$1,000, and a fine within that limit was within the discretion of the trial judge, and is not the subject of review. *Baldwin v. State*, 75 Ga. 482. Moreover, if it were excessive, this would not be cause for a new trial. *Beltinger v. State*, 116 Ga. 545, 42 S. E. 747.

4. The evidence fully warranted the verdict, and the court did not err in refusing to grant a new trial.

Judgment affirmed. All the Justices concurring.

(119 Ga. 381)

BENTON v. HUNTER.

(Supreme Court of Georgia. Jan. 15, 1904.)
PARTNERSHIP—DISSOLUTION—ACTION AT LAW
—DEMURRER—REMARKS OF COUNSEL
—INSTRUCTIONS.

1. A petition brought by one man against another who had formerly been his partner in business, which proceeds upon the idea that the partnership has been dissolved, its affairs wound up, and an accounting had between its members, and which seeks to recover a sum of money made up partly of an alleged individual indebtedness independent of the partnership relation, and partly of a sum alleged to be due by reason of the existence of the partnership and growing out of its dissolution, the latter sum being in no way affected by any debts due by or to the firm, is not subject to demurrer on the ground that it is a suit at law by one partner against his copartner to recover money due by reason of partnership transactions.

2. Where such a petition sets out the items of the alleged indebtedness sued on, but alleges that, on account of the wrongful failure of the defendant to furnish the plaintiff with the partnership books, a more complete bill of particulars cannot be set forth, there is no merit in a special demurrer based on the failure to set out the details of the items of indebtedness making up the sum for which suit was brought.

3. The jury, after retiring to their room, returned and requested information as to whether, in the event they should find for the defendant,

the plaintiff would be barred from suing in equity. Counsel for the plaintiff, in the presence of the jury, requested the court to charge that such a verdict would be a bar to an equitable proceeding. No motion for a mistrial was made by counsel for the defendant, nor does it appear that he requested of the court any specific instructions. *Held*, that it was not, under such circumstances, error for the court to fail to instruct the jury to disregard the remarks made by counsel for the plaintiff, or to fail to instruct them "that it was their duty to endeavor to find a verdict regardless of whether their verdict would prejudice the case of either party, and regardless of whether either party would or not be barred from suing in a court of equity."

4. The evidence warranted the verdict, and there was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from City Court of Columbus; J. L. Willis, Judge.

Action by G. P. Hunter against J. A. Benton. Judgment for plaintiff. Defendant brings error. Affirmed.

J. H. Martin and A. W. Cozart, for plaintiff in error. J. E. Chapman, for defendant in error.

CANDLER, J. This was a suit on open account for \$861.10 principal, besides interest, in which the jury returned a verdict for the plaintiff for \$264.22. The defendant brought the case to this court by bill of exceptions, complaining of the overruling of his demurrer to the plaintiff's petition and the refusal to grant his motion for a new trial.

It appears from the petition that prior to the bringing of the suit there had been a partnership between the plaintiff and the defendant, "which was formed on or about February 22, 1899, and was dissolved seventeen months thereafter." The sum sued for was made up of various items set forth in a bill of particulars attached to the petition, some of which seem to relate to partnership transactions, and others not. It was alleged that on the dissolution of the firm all the books and accounts of the partnership became, by agreement, the property of the plaintiff, but that they were "left by petitioner in the possession of said defendant, under an agreement between petitioner and defendant that as petitioner was going out of business, and defendant was to continue in said business, the said books and accounts, the property of petitioner, were to be left in the possession of defendant, who would collect on said books and accounts all the money he could and turn it over to petitioner, after retaining ten per cent. of the amount collected by defendant as his full compensation for making said collections." It was also alleged that "said books are now in the possession of defendant, who now refuses to return them to petitioner," which rendered it impossible for petitioner to give detailed information in regard to several items in the bill of particulars. Subsequently the petition was amended by setting out the dates of

some of the transactions out of which it was alleged the indebtedness arose. The demurrer was upon the grounds that no cause of action was set out; that the petition failed to allege that the partnership owed no debts to third persons, or that no debts were due it, or that there were no funds on hand, or that the profits already on hand had been equally divided; that it did not appear from the petition that the partnership was at an end; and that it was not set out when certain of the items of alleged indebtedness accrued. Besides the complaint that the verdict was contrary to law and the evidence, the motion for a new trial contained only one ground. From that it appeared that, after the jury had retired to make up their verdict, they returned and asked the court, through their foreman, "to withdraw the case from their consideration, or, if he would not do this, they wanted to know if it would prejudice the plaintiff's right to sue in a court of equity if they found a verdict for the defendant." Counsel for the plaintiff asked the court, in the presence of the jury, to charge that a verdict for the defendant would bar the plaintiff from suing in equity. The court made no reply to this request, but "instructed the jury that it was their duty to make a verdict if they could, and to make no verdict except one authorized by the evidence; but after they had faithfully tried to make a verdict, if they then failed to do so, there was a provision of law for the granting of a mistrial." The assignment of error is that "the court erred in not instructing the jury to disregard the remark of [counsel for the plaintiff], and in not instructing them that it was their duty to endeavor to find a verdict, regardless of whether their verdict would prejudice the case of either party, and regardless of whether either party would or would not be barred from suing in a court of equity."

1. Counsel for the plaintiff in error sought to bring this case within the rule that an action at law will not lie in favor of a partner against his copartner during the continuance of the partnership, and in support of their position the case of *Miller v. Freeman*, 111 Ga. 654, 36 S. E. 961, 51 L. R. A. 504, is cited. It is true that "it is a general rule that an action at law will not lie in favor of one or more partners or their representatives against one or more copartners or their representatives upon a demand growing out of a partnership transaction until there has been a settlement of accounts and a balance struck." 15 Enc. Pl. & Pr. 1005. The petition in the present case, however, proceeds upon the idea that all partnership relations between the plaintiff and the defendant have come to an end, that a balance has been struck, and that an indebtedness is due by the defendant to the plaintiff which cannot be affected by any transactions between the partnership and its creditors or debtors. Strictly speaking, it is not an action by a

member of a firm against his copartner, but an action by one man against another who had formerly been his partner, upon an indebtedness a part of which grew out of the formerly existing partnership between them. "The reason most frequently assigned for the rule under consideration rests upon the principle that one cannot be both a plaintiff and a defendant in the same suit, either singly or with others;" but "the objection to the maintenance of this class of actions between partners lies deeper than any mere question of procedure or forms of action. The real reason for the rule is found in the inherent nature of the partnership relation, and consists simply in the fact that prior to an accounting and settlement of the partnership affairs no cause of action exists between partners founded solely upon partnership dealings." 15 Enc. Pl. & Pr. 1011, 1015. And in 2 Bates, Part. § 878, it is said: "The real test is not solely whether the action can be tried without going into the partnership accounts, but whether the defendant has bound himself personally to the plaintiff." Applying the reasoning of the authorities quoted to the case now under consideration, it is quite clear that as to this ground the demurrer was properly overruled. The partnership had been dissolved, and upon the dissolution, according to the petition, a fixed and definite liability arose from the defendant to the plaintiff. As to the matters involved in the suit the partnership relation had ceased, and that of debtor and creditor begun. We do not lose sight of the distinction sought to be drawn by counsel for the plaintiff in error between a dissolution of the partnership and a final winding up of its affairs; but such a distinction can in no way affect the merits of this case, because, under the allegations of the petition, each item of the attached bill of particulars was a personal obligation due by the defendant to the plaintiff, which could in no event be affected by any debts which the partnership might owe. On the general subject which we have been discussing, see *Goodson v. Oooley*, 19 Ga. 599; *Pool v. Perdue*, 44 Ga. 454 (6); *Wadley v. Jones*, 55 Ga. 329 (5).

2. It is equally clear that there is no merit in those grounds of the demurrer which attack the petition because of the failure to allege circumstantial details as to some of the transactions out of which the suit grew. Some of these details were supplied by amendment to the petition, others were not necessary to support the petition, and as to others still a valid reason for not setting them out was shown in the wrongful failure of the defendant to allow the plaintiff access to the records containing the information desired.

3. The ground of the amendment to the motion for a new trial, to which reference was had in a preceding portion of this opinion, discloses no error on the part of the trial

judge. The request of the jury that the case be withdrawn from their consideration, and their desire for information as to the effect upon the plaintiff's right to sue in equity of a possible verdict for the defendant, were, it must be admitted, most extraordinary. No motion was made for a mistrial, however, and the court did all that well could be done under the circumstances, viz., instructed the jury to return to their room and find the truth of the case as shown by the evidence. We cannot understand by what rule of law or ethics the request made by counsel for the plaintiff, that the court charge the jury that a verdict for the defendant would bar his client's right to sue in equity, can be considered an improper remark; and certainly, in the absence of a request by opposing counsel for specific instructions on the subject, it cannot be said that it was error for the court to fail to charge as indicated in the motion for a new trial.

4. There is no merit in the contention of counsel for the plaintiff in error that the verdict was not sustained by the evidence. It may be conceded, as claimed, that the proof did not correspond with the allegations of the petition as to the nature of some of the transactions between the former partners, and still the verdict would stand, because a portion of the amount sued for was alleged and proven to have been an individual indebtedness, entirely independent of any partnership relations between the plaintiff and the defendant, and the amount of the verdict returned was less than a single item of this individual indebtedness. We see no reason why the verdict should have been set aside.

Judgment affirmed. All the Justices concur.

(119 Ga. 305)

PEOPLE'S BANK OF TALBOTTON v. EXCHANGE BANK OF MACON.

(Supreme Court of Georgia. Jan. 13, 1904.)

ACTION—DISMISSAL—RIGHT OF PLAINTIFF.

1. The general rule that the plaintiff may voluntarily dismiss his case is applicable in a case which has been referred to an auditor, exceptions to the auditor's report filed and sustained, and a judgment rendered by the Supreme Court reversing the judgment sustaining the exceptions, and in effect declaring that judgment should be entered in conformity to the auditor's report. The right of the plaintiff to voluntarily dismiss exists until the trial judge announces a decision striking or overruling the exceptions and ordering a decree entered in conformity to the report. It is not knowledge of the possible result of a case, but of the actual result, which takes away the right to dismiss.

(Syllabus by the Court.)

Error from Superior Court, Talbot County; W. B. Butt, Judge.

Action by the Exchange Bank of Macon against the People's Bank of Talbotton. From a judgment of dismissal, defendant brings error. Affirmed.

Persons & McGehee and J. H. Martin, for plaintiff in error. Bacon, Miller & Brunson, J. J. Bull, and Hatcher & Carson, for defendant in error.

COBB, J. The Exchange Bank of Macon filed an equitable petition against the People's Bank of Talbotton praying that the defendant be required to transfer on its books certain shares of capital stock which had been transferred to plaintiff by one Estes. The defendant answered that Estes was largely indebted to the defendant, and set up that it had a charter lien upon the stock to secure the payment of the debt. The defendant did not, in its answer, pray for any affirmative relief against the plaintiff either by way of set-off or otherwise. The case was referred to an auditor, who was authorized to pass on all questions, both of law and fact. The auditor heard the case, and filed his report, finding that Estes was largely indebted to the defendant, and that it had a lien on the stock in controversy. The plaintiff filed exceptions of law and fact, and by consent the presiding judge passed upon the case without the intervention of a jury. The court rendered a decree in favor of the plaintiff requiring the defendant to transfer the stock in question. The defendant brought the case to this court, and the judgment was reversed. 116 Ga. 820, 43 S. E. 289. On the first day of the term of the superior court following the judgment of reversal, the remittitur having been duly transmitted, the judgment of the Supreme Court was made the judgment of the superior court. On the following day the case was called, and counsel for plaintiff moved to dismiss the case. Counsel for defendant objected on the ground that it was entitled to a decree in conformity with the judgment of the Supreme Court, which was, in effect, a confirmation of the auditor's report. The court allowed the plaintiff to voluntarily dismiss the case, and to this judgment the defendant excepted.

The Code declares that the plaintiff in any case in any court may dismiss his action, either in vacation or term time. Civ. Code 1895, § 5044. And that a petitioner may dismiss his petition at any time, either in term or vacation, so that he does not thereby prejudice any right of the defendant; but that if claims by way of set-off or otherwise have been set up by the answer, the dismissal of the petition shall not interfere with the defendant's right to a hearing and trial on such claims in that proceeding. Civ. Code 1895, § 4970. It has been held that the plaintiff's right to dismiss cannot be exercised after a verdict, or a finding by the judge, which is equivalent thereto, has been reached, if he has acquired actual knowledge of the verdict or finding, whether the same has been published or not. Merchants' Bank v. Rawls, 7 Ga. 191, 50 Am. Dec. 394; Peoples v. Root, 48 Ga. 592; Cher-

ry v. Building & Loan Association, 55 Ga. 19; Meador v. Bank, 56 Ga. 605 (4); Brunswick Grocery Company v. Railroad Company, 106 Ga. 272, 32 S. W. 92, 71 Am. St. Rep. 249. The principle at the foundation of these decisions is that, after a party has taken the chances of litigation, and knows what is the actual result reached in the suit by the tribunal which is to pass upon it, he cannot, by exercising his right of voluntary dismissal, deprive the opposite party of the victory thus gained. It is knowledge of the actual, not of the possible, result of a case which precludes the exercise of the right of dismissal. When a verdict in favor of the defendant has been reached, but not returned into court, and the plaintiff in some way acquires actual knowledge of the finding, he cannot exercise his right to voluntarily dismiss. The right of voluntary dismissal exists even though the case has been referred to an auditor and is in process of determination by him. Jackson v. Roane, 96 Ga. 40, 23 S. E. 118. It has also been held that it was the right of a plaintiff in ejectment, after a judgment in his favor had been set aside by the Supreme Court, to dismiss his action at any time before the case was tried again. Bleckley v. White, 98 Ga. 594, 25 S. E. 592. When a case has been referred to an auditor, and he has made his report finding in favor of the defendant, and exceptions both of law and fact have been filed by the plaintiff, his right to voluntarily dismiss the case exists until he has actual knowledge of what is the determination of the questions raised by the exceptions by the tribunal authorized by law to pass upon them; and, if the case be brought to the Supreme Court, and under the decision of that court in the then condition of the pleadings the court below would be compelled to give the case a certain direction when it came before him for final decision, the right of voluntary dismissal exists until the judge of the court below has duly announced that a judgment will be rendered carrying into effect the decision of the Supreme Court. It was argued that the judgment of the Supreme Court reversing and remanding the case was equivalent to a verdict. The effect of that judgment was simply to remand the case to the court below to be finally disposed of according to the law as declared by the Supreme Court. The exceptions of law and fact being undisposed of by any order of the superior court, and no decree having been entered in the case, the right of the plaintiff to voluntarily dismiss the case existed until there was an order of the judge, oral or otherwise, directing a decree entered in accordance with the decision of the Supreme Court, or at least until the judge had announced what would be his decision in the case in the light of the judgment of the Supreme Court. The plaintiff knew what would be the probable result of the case when it reached the superior court,

and what was the only legally possible result of the suit; but its right to dismiss existed until it knew the actual result of the case in the superior court. The court having done nothing to attempt to carry into effect the decision of the Supreme Court, there was no error in allowing the plaintiff to voluntarily dismiss the case. Great stress was laid in this court on the hardship resulting from the dismissal of this case and placing the plaintiff in a position where it could again litigate with the defendant the questions passed upon by the auditor, the judge of the superior court, and the Supreme Court. No greater hardship results in this case than in any other case where the plaintiff has been allowed to dismiss his case after a trial and before there has been a termination of the litigation by verdict or judgment, of which the plaintiff had knowledge. Very great hardship may result to the defendant from allowing the plaintiff to exercise its right of dismissal, but the statute, the decisions of the Supreme Court, and the practice of years all authorize it under the limitations above referred to, and after a careful consideration of the present case we can see no reason to take it out of the general rule.

Judgment affirmed. All the Justices concur.

(119 Ga. 332)

MACON & B. R. CO. v. REVIS.

(Supreme Court of Georgia. Jan. 12, 1904.)

RAILROADS—KILLING STOCK—PRESUMPTIONS—EVIDENCE.

1. As has heretofore been ruled by this court in a number of cases, while the law raises against a railway company a presumption of negligence whenever the fact is made to appear that live stock was killed by the running of its cars, yet this presumption cannot withstand positive and uncontradicted evidence that the company's employes exercised ordinary diligence, both as regards maintaining a lookout for stock and endeavoring to avoid injury to the same when discovered; and relevant testimony in behalf of the company on the part of its servants cannot, if they be unimpeached, arbitrarily be disregarded by court or jury, upon the assumption that it is not, in point of fact, in accord with the truth.

(a) The facts of the present case bring it within these rulings, and the court below erred in not granting the defendant company a new trial.

(Syllabus by the Court.)

Error from City Court of La Grange; W. T. Tuggle, pro hac Judge.

Action by C. H. Revis against the Macon & Birmingham Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

Longley & Longley, for plaintiff in error.
E. R. Bradfield, Jr., for defendant in error.

TURNER, J. 1. The plaintiff below, in support of his contention that the defendant railway company was liable to him in dam-

ages for the negligent killing of his horse, introduced testimony which tended to establish the following state of facts: The horse was killed in a cut some 10 feet deep at a point on the railroad track 590 feet below a crossing "on an upgrade." A few moments before the train by which the horse was killed approached this crossing he was seen "standing about 30 feet from the track," and when the train reached the crossing the horse "jumped on the track at the mouth of the cut," 285 feet below the crossing, and ran in this cut, in front of the train, a distance of 305 feet, before being struck. The horse was killed on a curve, which extended a considerable distance above the crossing, and therefore could not have been seen by the engineer until about the time the train arrived at the crossing, at which time "the danger signal" was blown. The "local train," and perhaps others, had been known to stop within a distance of 590 feet from this crossing, which was near a station; but the train which ran over the horse was "the fast train," which did not stop at that station, and had never been seen to come to a stop within that distance. The railway company undertook to overcome the prima facie case thus made out by the plaintiff, and to this end called as witnesses the engineer and conductor in charge of its train on the occasion above mentioned. The engineer testified: "The train was on schedule time, and running at 35 or 40 miles an hour. I first blew the whistle for the crossing. As the engine turned the curve, I saw the horse standing off about 25 or 30 feet from track. Nothing to indicate his coming toward the track. Just about the time I reached the crossing, the horse walked to the edge of the cut and jumped down on the track. I immediately shut off steam, applied the emergency brakes, and sounded the danger or cattle alarm. It was on a curve to the left. I was looking to the front, and the brakes worked perfectly. I did all in my power to stop the train, using every appliance on the engine. I did not reverse the engine. Engines are no longer reversed since the improved air brakes are used, such as we had on this engine. After the horse jumped down on the track, he ran for some distance, until finally struck by the engine. At the time he was struck the speed had been reduced to something under five miles an hour, and would have been stopped before the second car passed by him. The train never came to a standstill, because I was signaled to go ahead by conductor. If it had been a member of my family, or my wife, on the track, as this horse was, and under the same circumstances, I couldn't have stopped the train. I can't state the exact distance the train run after the horse jumped on the track. A train like the one I had could, in my judgment, be stopped in 150 or 175 yards. We only had two passenger coaches, but a train of six coaches, with good air brakes, can be stopped in as short a space as one with

two coaches. The local passenger train has been stopped a number of times within the distance testified about by plaintiff's witnesses, because it was not running as fast, and for the further reason we are always watching for signals, and approach the stations slower." The curve tended to "impede my sight from crossing to where horse was killed. There was a slight upgrade from crossing. There was a dip in the road, and from the crossing to where the horse was killed was slightly upgrade." The testimony of the conductor merely went to corroborate the statement given by the engineer as to the circumstances under which the horse was killed. The further fact was brought out that the fireman on that train at that time was no longer in the employ of the company.

In view of the uncontradicted testimony of the company's engineer, which showed not only that he exercised due diligence in maintaining a lookout for stock, but that he used every possible effort to avoid injury to the plaintiff's horse, we cannot but agree with counsel for the defendant company that a verdict against it was wholly unwarranted. See, in this connection, *Georgia R. R. Co. v. Wall*, 80 Ga. 202, 7 S. E. 639, and the cases cited in support of the ruling announced in *Seaboard Air-Line Ry. v. Walthour*, 117 Ga. 427, 43 S. E. 720. No appearance was made in this court in behalf of the prevailing party in the court below, so the theory upon which he relied for a recovery is purely a matter of conjecture. The witnesses introduced in his behalf did not undertake to say, even as matter of opinion, that his horse might sooner have been discovered, or that the train could have been stopped within a shorter distance than that between the crossing and the point at which the animal was overtaken and hurled from the track. Accordingly, the plaintiff's case was essentially weaker than that relied on by the plaintiffs in *Central of Ga. Ry. Co. v. Waxelbaum & Co.*, 111 Ga. 812, 35 S. E. 645, in which this court held that the testimony introduced by the defendant "was practically uncontradicted, for the mere differences of opinion among the witnesses as to time, distances, the range of vision, etc., did not involve questions of credibility or produce conflict as to the actual facts of the occurrence." There was in this case no dispute or difference of opinion as to the distance between the crossing and the place at which the plaintiff's horse jumped upon the track, or as to the distance the train ran after the engineer discovered the presence of the animal in a situation of peril. On the contrary, the engineer testified, "I can't state the exact distance the train ran after the horse jumped on the track;" and he certainly did not undertake to say that the witnesses in behalf of the plaintiff did not correctly give the distance from the crossing to the place where the horse got upon the track, or were mistaken as to the distance the train ran, after reaching that point, before the

horse was overtaken and killed. That the engineer further testified that, in his judgment, a "train like the one" he had could "be stopped in 150 or 175 yards" cannot be regarded as authorizing the conclusion that he testified falsely when he said, in effect, that it was impossible for him to stop the train in time to avoid injury to the animal. He clearly was not undertaking to impeach himself, or to in any way qualify his unequivocal and positive statement that he did everything in his "power to stop the train, using every appliance on the engine," without avail. At best, his estimate of the distance within which a train such as that he had could be stopped was merely the expression of an opinion not supported by the actual physical facts to which he swore. The better view would therefore seem to be, not that he deliberately committed perjury when he testified as to what efforts he made to stop the train, but that the opinion he expressed was, considered in the light of the facts disclosed by him, obviously erroneous, and entitled to no weight whatsoever. Even had this opinion been elicited from another witness, who professed to be an expert on the question as to the distance within which a train of a certain description, running at a specified rate of speed, could be stopped upon a grade similar to that upon which the company's train was running when the plaintiff's horse was killed, it would be a matter of grave doubt whether or not the verdict of the jury could lawfully be permitted to stand. Indeed, this court, in the case of *Atlanta & Charlotte Air-Line Ry. Co. v. Gravitt*, 93 Ga. 370, 20 S. E. 550, 28 L. R. A. 553, 44 Am. St. Rep. 145 (7), expressly ruled that: "The mere opinion of a locomotive engineer that a heavy passenger train consisting of a locomotive and six cars, running downgrade at forty-five miles an hour, could be stopped within a distance of one hundred yards, is not sufficient to overcome the positive and uncontradicted evidence of the engineer and fireman upon the identical train that all was done which could possibly be done to stop it, and that nevertheless it was not stopped within a distance of over four hundred yards, especially when the evidence of these witnesses was strongly corroborated by others who were experts in such matters." In other words, physical facts, when established by evidence which stands uncontradicted, and is therefore to be taken as in accord with the truth, have a persuasive insistence which cannot be lightly or arbitrarily disregarded.

It may further be noted that the defendant company accounted for the absence of the fireman who was on its train at the time the killing of the plaintiff's horse occurred, the fact being made to appear that this employé was no longer in its service. In view of this showing as to the reason he was not introduced as a witness by the company, it is clear that no inference unfavorable to it regarding the manner in which it conducted

its defense could arise. *Weinkle v. B. & W. R. R. Co.*, 107 Ga. 367, 372, 33 S. E. 471 (4); *Knox v. State*, 112 Ga. 373, 37 S. E. 416 (2); *Central Ry. Co. v. Bernstein*, 113 Ga. 175, 180, 38 S. E. 394 (5), and citations. Certainly, the mere fact that the fireman was not produced and sworn as a witness cannot be considered as strengthening the plaintiff's case, or as warranting the jury in disregarding the testimony of the company's engineer and conductor.

It is difficult to conceive how a railway company can successfully resist an action for damages brought against it for the killing of live stock if the defense made in the present case can properly be said not to be such as demanded a finding in its favor. The jury, because of personal knowledge, which enabled them to conclude that the company's train might have been stopped within a distance of 590 feet, notwithstanding it was running at the rate of "35 or 40 miles an hour," may have been entirely satisfied that the exercise of due diligence by the engineer would have averted the casualty. But, if so, they necessarily predicated their verdict, not upon the evidence adduced on the trial of the case, but upon what they knew, or thought they knew, concerning the questions of fact upon which they were called on to pass. We cannot undertake to say, as matter of personal knowledge, within what distance such a train as that which killed the plaintiff's horse could, under the circumstances disclosed by the evidence in this case, be brought to a standstill; nor are we at liberty to take judicial cognizance that 590 feet was (or was not) a sufficient distance within which to bring about that result. If, in point of fact, the train of the defendant company could and ought to have been stopped within a shorter distance, the plaintiff should have sought by the introduction of evidence to establish the real truth in this regard. The grant of a new trial—which will be the effect of our judgment in this case—will afford him an ample opportunity to do so.

Judgment reversed. All the Justices concurring.

(119 Ga. 346)

WALL et al. v. MERCER.

(Supreme Court of Georgia. Jan. 12, 1904.)

BILL OF EXCEPTIONS—EVIDENCE—ASSIGNMENT OF ERRORS—VENUE—JOINT TRESPASSERS—INJUNCTION.

1. What purports to be the evidence introduced in this case before the judge on an application for injunction consisting of numerous affidavits and other papers, being set forth in full as exhibits to the bill of exceptions, without any attempt to abbreviate or brief the same, this court will not consider any assignment of error which is dependent upon the evidence.

2. Joint trespassers residing in different counties may be sued for damages in the county of the residence of either; and joint wrongdoers who reside in different counties, who are insolvent and who threaten to commit trespasses,

may, in a proper case, be enjoined from the commission of such wrongs in one petition brought in the county of the residence of any one of them.

3. The allegations of the petition were of such a character as to authorize the granting of the injunction which is complained of.

(Syllabus by the Court.)

Error from Superior Court, Terrell County; H. C. Sheffield, Judge.

Suit by J. R. Mercer against J. M. Wall and others. Judgment for plaintiff. Defendants bring error. Affirmed.

W. H. Gurr, H. A. Wilkinson, and Perry & Tipton, for plaintiffs in error. M. C. Edwards and J. R. Irwin, for defendant in error.

COBB, J. This was an application for an injunction. Mercer filed his petition, addressed to the superior court of Terrell county, against Melton Hay, alleged to be a resident of that county, John M. Wall, whose place of residence was alleged to be unknown, "on account of the fact that he is a bird of passage, alternating between Terrell and Worth counties," and N. Powell, alleged to reside in Terrell county. The petition sets forth that Mercer was the owner of a tract of land containing 40 acres, situated in Terrell county, and that Wall, without any pretense of right, set up claim of title to the same property. The petition alleges in great detail negotiations between Mercer and Wall which it is claimed resulted in the purchase by Mercer from the wife of Wall of a tract of land which embraced the 40 acres in dispute. It was alleged that Hay, Wall, Powell, and other persons not named, had colluded to drive the tenant of Mercer from the property in dispute and take possession of the same; that these parties had actually taken possession of a house located on the tract of land; that they threaten to shoot Mercer's tenant if he attempts to enter the house, keep weapons on the premises, have issued a number of warrants for the tenants, and misuse and maltreat them continuously; that Hay, Wall, and Powell are all insolvent; that they are threatening to gather the crop, although they did not plant or cultivate it, are preventing Mercer's hands from cultivating the crop, and are threatening to destroy the crops growing in the field; that on account of the menaces, threats, and unlawful acts on the part of Hay and Wall, Mercer has already suffered damage, and will suffer irreparable damage in the future, unless the defendants are enjoined from acts of violence and trespass of the character already committed. The prayers of the petition were that Hay, Wall, and Powell, and all others in collusion with them, be restrained from keeping possession of the premises, or attempting to keep petitioner and his tenants out; from gathering the crops made on the premises; from having petitioner's tenants and employes arrested for occupying the premises or gathering the crops thereon;

from proceeding in any court to seize the premises, or the crop grown thereon; from interfering in any manner with petitioner, his tenants, employes, or other persons acting for him in the performance of such legal acts in connection with the premises; from doing anything in connection with the property, except by appropriate proceedings in this case; and for general relief. Upon this petition the judge granted an order restraining the defendants from doing the acts therein named, and a rule nisi calling upon them to show cause why an injunction should not be granted. At the hearing the defendant Hay appeared, and showed for cause against the granting of the injunction a plea to the jurisdiction, alleging that he was not a resident of Terrell county, but was at the time the petition was filed a resident of the county of Worth; and also an answer, in which he denied all of the material allegations of the petition, so far as they concerned him, alleging that he was an employe of Wall to temporarily occupy the premises referred to, and that he had no interest at all in the matters at issue between Wall and Mercer. Wall appeared, and showed for cause against the granting of the injunction a plea to the jurisdiction, in which he alleged that he did not reside in Terrell county, but was a resident of Worth county, at the date of the filing of the petition; and also a demurrer, in which it was set up that the petition did not allege such facts as to give the court jurisdiction of his person; that there is no equity in the petition; that it appears that Mrs. Wall is a necessary party to the petition; and various other grounds amplifying these grounds of the demurrer; and also an answer, denying the material allegations of the petition, so far as they alleged wrongful acts on his part. Powell filed no demurrer, plea, or answer. Numerous affidavits were introduced, and after hearing evidence the court passed an order enjoining the defendants from interfering in any manner with the plaintiff, his agents or tenants, in working, gathering, or marketing the crops growing on the land in dispute; from interfering in any manner with the plaintiff in going upon or over the land, or attempting to prevent plaintiff, his agents or servants, from the free use and possession of that part of the land now in his possession, and in cultivation by him; from instituting any legal proceedings other than what might be appropriate in this case to dispossess the plaintiff; and from seizing the crops by any process other than such as might be issued under the authority of an order in this case. That part of the prayer which sought to enjoin the defendants from keeping possession of that part of the premises which was already in their possession was denied, there being nothing in the order to disturb the status of the parties as it existed at the time the petition was filed. The order, interpreted in the light of the pleadings, indicated that

the judge had found from the evidence that the plaintiff was in possession of one part of the property, and that the defendants were in possession of another part; and he enjoined the defendants from interfering with the possession of the plaintiff, and refused to enjoin them from keeping possession of that part which they had acquired possession of before the petition was filed. To the granting of this order, Hay and Wall excepted, alleging that the court erred in holding that it had jurisdiction of either of them; that it was error to proceed with the case in the absence of Mrs. Wall, who was a necessary party; that the court erred in holding that there was equity in the petition; in holding that plaintiff was in lawful possession of the land, or had any rights in the crops growing thereon, as it was shown that Wall was in lawful possession of the land and the crops in dispute; in holding that Wall was not in possession of the land; in passing an order which was in its nature mandatory, and having the effect to dispossess the defendants; and that the order itself was uncertain, indefinite, and contradictory.

1. There was no bona fide attempt to brief the evidence. Affidavits and other papers are set out in full, with no attempt at abbreviation. This court cannot treat as a brief of evidence any document which is not briefed in the manner required by law. *Price v. High*, 108 Ga. 145, 33 S. E. 956; *Anslley v. Davidson*, 110 Ga. 279, 34 S. E. 611; *Collins Park R. Co. v. Ware*, 110 Ga. 307, 35 S. E. 121; *Buchanan v. McLain*, 110 Ga. 479, 35 S. E. 665; *Bond v. Winn*, 113 Ga. 18, 38 S. E. 328. No question made in the record which is dependent upon the evidence can, therefore, be considered, but it will be presumed that there was sufficient evidence to authorize the judge's findings.

2. It remains, therefore, to be determined whether the order passed was authorized by the pleadings. The order indicates that the judge found from the evidence that the plaintiff was in possession of a certain portion of the land, and the defendants were simply enjoined from interfering with the plaintiff's possession. He also found that the defendants were in possession of the house, and he refused to pass any order having the effect to disturb this possession. There were in the petition averments which were sufficient to show that prior to the filing of the petition the defendants had been guilty of acts amounting to a trespass upon the plaintiff's right of possession, and that they were threatening to commit similar acts in the future. In the light of the fact that the defendants were insolvent, it seems that the petition set forth sufficient reasons for the interposition of a court of equity to restrain the threatened trespass. It is said, though, that, even if this be true, the court had no jurisdiction to enjoin either Hay or Wall, because they were not residents of Terrell

county. So far as Hay is concerned, it was distinctly alleged in the petition that he resided in Terrell county; and, while this was denied in his plea to the jurisdiction, the judge must have reached the conclusion that the evidence was not sufficient to establish his claim of nonresidence. The petition did not in distinct terms allege that Wall was a resident of Terrell county. In fact, the averments of the petition might be construed as a failure to allege anything in reference to his residence. But let it be conceded that he is a resident of Worth county. The allegations of the petition are sufficient to show that he and Hay were colluding to disturb the possession of the plaintiff; that, as a result of this collusion, they severally and jointly committed acts of trespass; and that both were threatening to continue in the commission of such acts in the future. The allegations were sufficient to make them joint wrongdoers. For past acts of trespass they were joint trespassers, and, under the Constitution, both could be sued in the county of the residence of either. And where an appeal is made to a court of equity to enjoin the commission of future acts of trespass by them, we see no reason why the superior court of the county of the residence of either might not take jurisdiction to restrain them from the commission of joint wrongs which they were threatening to commit. If this were not true, then, where a large number of insolvents who reside in different counties conspire to commit acts of trespass, it would be incumbent upon the person who was to become the victim of the joint wrong, if actually committed, to file separate applications for injunction in every county where any of the wrongdoers may reside. Such, of course, cannot be the law. This case is clearly distinguishable from *Townsend v. Brinson*, 117 Ga. 375, 43 S. E. 748. In that case no equitable relief at all was prayed against the resident defendant, and the equitable relief prayed against the nonresident was of such a nature that the resident defendant was not in any manner concerned therein. If at the final hearing in the present case it should be found by the jury that neither Hay nor Wall was a resident of Terrell county, and that they were not in collusion with Powell, no final decree can be entered against either Hay or Wall. And if they should find that Hay was and Wall was not, no decree can be entered against Wall in reference to any matter not connected with the combination entered into between him and Hay and Powell to disturb the possession of Mercer. The allegations of the petition were such as to authorize the judge to pass the order complained of, and no satisfactory reason appears to us why there should be a reversal of the judgment, either in whole or in part. It is true that the judge enjoined the defendants from instituting legal proceedings against the plaintiff, except by appropriate proceedings in the

superior court of Terrell county as a court of equity. Of course, if the defendants should make it appear at any time that they should be permitted to institute legal proceedings in other courts, the judge would modify the order so as to permit this to be done. In the meantime the effect of the order will be simply to prevent the defendants from instituting legal proceedings for the purpose of harassing the plaintiff, and a court of equity can legitimately exercise its power of injunction to prevent such wrongs.

Judgment affirmed. All the Justices concurring.

(119 Ga. 354)

CHESTATEE PYRITES CO. v. CAVENDERS CREEK GOLD MIN. CO.

(Supreme Court of Georgia. Jan. 13, 1904.)

EMINENT DOMAIN—RIGHT TO EXERCISE—FOREIGN CORPORATIONS.

1. A corporation chartered under the laws of another state cannot exercise the right of eminent domain in this state without the consent of the Legislature expressly given.
2. Sections 650-657 of the Political Code of 1895, giving to private mining corporations the right of eminent domain, even if constitutional, apply only to corporations chartered within this state.

3. Under the facts of the present case the remedy at law was not as complete as the one in equity.

(Syllabus by the Court.)

Error from Superior Court, Lumpkin County; J. J. Kinsey, Judge.

Action by the Chestatee Pyrites Company against the Cavenders Creek Gold Mining Company. Judgment for defendant, and plaintiff brings error. Reversed.

H. H. Perry and W. A. Charters, for plaintiff in error. J. W. Underwood, R. H. Baker, and H. H. Dean, for defendant in error.

SIMMONS, C. J. The Chestatee Pyrites Company filed an equitable petition against the Cavenders Creek Gold Mining Company. The petition alleged that the plaintiff owned and possessed certain tracts of land through which ran the Chestatee river; that it had developed on said land at great expense a pyrites mine, from which it was actually engaged in taking out ore; that it had purchased the land on both sides of a large water power in the Chestatee river, a nonnavigable stream, owned this water power, and had also purchased the right to overflow the adjoining lands by the erection of a dam in this stream; that it had purchased this water power for the purpose of developing and working its mine; that the Chestatee river is partially formed by four named streams which empty into it above the plaintiff's land and augment the waters of the river which flow over plaintiff's lands. The plaintiff also alleged that all of the water is essential to the proper operation of its mine, but that the defendant, a corporation chartered under

¶ 1. See *Eminent Domain*, vol. 12, Cent. Dig. § 24.

the laws of North Carolina, had bought lands above the property of plaintiff for the purpose of operating a gold mine, and had given notice that it would proceed under Pol. Code 1895, § 650 et seq., and Civ. Code 1895, § 4685, to condemn the water in the four tributary streams above mentioned, and divert it from the river by means of ditches and canals to its mine, returning it to the river below the land of plaintiff, and had fixed a date for arbitrators to meet to pass upon the necessity for such condemnation and the amount of damages to the plaintiff. The petition charged that the defendant was a foreign corporation, and had no power or authority under the Code and the acts amendatory thereof to condemn private property for its own use. It further alleged that, even if the Code applied to foreign corporations, the sections under which the proceedings were to be had were unconstitutional; that these sections sought to give the power to condemn for a private use, and not for a use by the public. The answer admitted that the defendant was a corporation organized under the laws of North Carolina, but insisted that the Code sections apply as well to foreign as to domestic corporations. The view we take of the case renders it unnecessary to decide upon the validity of these Code sections.

1. The right of eminent domain is a sovereign right of the state. It is inherent in every sovereignty, and existed before constitutions were adopted. It lies dormant until the Legislature sets it in motion. As the Legislature cannot in every case supervise the condemnation, it may confer the power upon agencies. These agencies may be individuals or corporations, and the Legislature may even confer this power upon foreign corporations or individuals living in another state. The power thus conferred is always to be strictly construed, and will not be permitted to be exercised except where it is affirmatively granted. Its grant is in derogation of common right, and is the exercise of one of the highest of the powers of sovereignty. Where, therefore, a private individual or corporation seeks to take the property of another under the power of eminent domain, affirmative authority for the exercise of the power must be shown. The power may be conferred either by a special act creating the corporation or by general acts relating to all corporations of designated classes. If a foreign corporation undertakes in this state to condemn private property, it must show legislative authority to do so. We have searched the authorities diligently to ascertain if any court has ever decided that a foreign corporation could exercise the right of eminent domain without legislative authority from the state wherein it proposes to exercise the right, and have been unable to find a single case so holding. All the courts seem to hold that this right of eminent domain does not exist as a matter of comity between the states, and all hold, so

far as we can find, that a foreign corporation must have affirmative authority from the state in which it proposes to exercise the right. "A railroad company or other quasi public corporation cannot exercise the right of eminent domain in another state than that by which it was created, unless it is expressly or impliedly authorized to do so by the laws of such other state. Such power does not come within the rule of comity." Clark & Mar. Priv. Corp. p. 2734, § 854. Judge Thompson, in his excellent and valuable work on Corporations (vol. 6, § 7932), says: "The power of a private corporation to acquire private property for the public purposes for which it may have been chartered is a power which comes to it alone through the delegation by the state of its sovereign right of eminent domain. The power cannot, therefore, be exercised by a foreign corporation on a mere principle of comity, because it will never be presumed, in the absence of affirmative legislation, that the state delegates any part of its sovereignty to a foreign corporation. It may be stated with confidence in every case that this power cannot be exercised by a corporation created under the laws of one state or country within the limits of another state or country, without the consent of the Legislature of that other state or country affirmatively expressed." We are satisfied to close this part of the opinion with this authority from so eminent an author.

2. The defendant in error claimed, however, that sections 650-657 of the Political Code of 1895 are broad enough to include foreign corporations. We think that they should not be so construed. We think that the Legislature cannot be held to have granted the right of eminent domain—one of the highest of the sovereign rights of the state—to any and every corporation which may be created by any other state or country. These sections must be construed strictly. We cannot believe that the Legislature, by the use of the words "any corporation," intended to confer part of the sovereignty of the state upon every corporation created in any state or country in the world which might be engaged in one of the businesses designated in these sections. As Judge Thompson says in the quotation above: "It will never be presumed, in the absence of affirmative legislation, that the state delegates any part of its sovereignty to a foreign corporation. * * * This power cannot be exercised by a [foreign] corporation * * * without the consent of the Legislature * * * affirmatively expressed." Had the Legislature intended to confer this power upon foreign mining corporations, it would have done so, as it did in conferring similar powers upon foreign telegraph companies in the act of 1889 (Civ. Code 1895, § 2347), where it said, "Any telegraph company chartered by the laws of this or any other state of the United States," etc. This last-cited act and Code section express-

ly confer the power upon telegraph companies chartered by a sister state, which is an answer to the argument of counsel that the cases of Savannah Ry. Co. v. Postal Tel. Cable Co., 112 Ga. 941, 38 S. E. 353, Id., 113 Ga. 916, 39 S. E. 399, and Id., 115 Ga. 554, 42 S. E. 1, recognized that land in this state may be condemned by a corporation chartered by another state. Our Code declares that "any * * * corporation who may be actually engaged in the business of mining" certain metals or minerals shall have the right to condemn private property. This language seems very broad—broad enough to include both domestic and foreign corporations doing business of the designated kind in any state or country; but, as has been shown, statutes conferring the right of eminent domain must be construed strictly, and courts will never assume, in the absence of affirmative legislation, that it was intended to grant such powers to corporations over which the Legislature had no control. Since the adoption of the Code of 1863, the Legislature has reserved to itself the right to change or modify the charters of corporations of its creation, and to control the conduct of such corporations. It has no such powers with regard to a foreign corporation. In an act governing procedure, or of a remedial nature, such words as are used in these Code sections would probably be held to embrace all corporations, foreign and domestic, for such an act would receive a liberal construction. But acts granting powers in derogation of common right must always be construed strictly, and these words held not to include foreign corporations.

3. It was argued that the plaintiff had a complete remedy at law. After much reflection, we have concluded that the remedy at law was not as complete as the remedy in equity. The remedy at law pointed out by counsel for the defendant in error was for the plaintiff to go before the arbitrators, and there make the questions raised by his petition in this case, and, in the event of an adverse decision, to renew the points on an appeal to the superior court. In the first place, we think that the arbitrators could not entertain a motion to dismiss the condemnation proceedings on the ground that the gold mining company had no authority to institute them. Under the Code the arbitrators' only duties are to pass upon the necessity for the condemnation and the amount of damage to the owner of the property condemned. Even if they could have decided as to the authority of the gold mining company to institute the proceedings, and had decided in favor of such authority, and there had been an appeal to the superior court, the gold mining company could have tendered the amount of damages fixed, and could then have proceeded to dig its ditches and divert the water regardless of the appeal. Equity, on the other hand, immediately stops the illegal proceedings, and prevents any illegal act. We think,

therefore, that the remedy at law was not as complete as the one in equity. For the reasons given, we think that the court should have granted the injunction, and that it was error to refuse it.

Judgment reversed. All the Justices concurring, except CANDLER, J., disqualified.

(119 Ga. 351)

BANK OF CULLODEN v. BANK OF FORSYTH.

(Supreme Court of Georgia. Jan. 12, 1904.)

SUPREME COURT—JURISDICTION—BILL OF EXCEPTIONS—RETURN DAY.

1. Parties cannot by consent confer jurisdiction upon this court to hear and determine a case at a term prior to that to which the case is by law returnable.

2. The return term fixed by law for ordinary bills of exceptions is the first term of this court which begins after the expiration of 30 days from the filing of the bill of exceptions in the office of the clerk of the trial court.

3. The bill of exceptions in the present case, having been filed in the office of the clerk of the trial court within less than 30 days before the first day of the October term, 1903, was properly placed on the docket of the March term, 1904, notwithstanding the bill of exceptions and record reached the office of the clerk of the Supreme Court more than 20 days before the first day of the October term, 1903, and therefore before the return day for that term.

4. The ruling in *Logan v. Western & Atlantic Railroad Company*, 12 S. E. 586, 86 Ga. 493, followed.

(Syllabus by the Court.)

Error from Superior Court, Monroe County.

Action between the Bank of Culloden and the Bank of Forsyth. From a judgment the Bank of Culloden brings error. Motion to transfer denied.

Robt. L. Berner, for plaintiff in error.
Hardeman, Davis, Turner & Jones, for defendant in error.

COBB, J. The bill of exceptions in this case was filed in the office of the clerk of the trial court on the 10th day of September, 1903, which was less than 30 days before the first day of the October term, 1903. The bill of exceptions and record reached the office of the clerk of this court on the 11th day of September, 1903, which was more than 20 days before the commencement of the October term, 1903, and therefore before the return day for that term. As the case was brought to this court upon an ordinary writ of error, the clerk entered the case upon the docket of the March term, 1904. Under the ruling of this court in *Logan v. Western & Atlantic Railroad Company*, 86 Ga. 493, 12 S. E. 586, the clerk had no authority to do other than docket the case as he did. Counsel for both parties now unite in an application to have the case transferred from the docket of the March term, 1904, to the docket of the October term, 1903. As this court has no jurisdiction of the case until the March term arrives, it has no authority to transfer

the case as prayed, and neither counsel nor parties can by consent confer upon this court jurisdiction of the case. The motion to transfer must be denied.

Motion denied. All the Justices concur.

(119 Ga. 331)

WESTERN & A. R. CO. v. ROBINSON.

(Supreme Court of Georgia. Jan. 12, 1904.)

RAILROADS—KILLING STOCK—EVIDENCE.

1. When this case was here before, this court decided that the positive and uncontradicted evidence of the servants of the company overcame the presumption of negligence, and that the plaintiff could not recover. On the second trial the evidence was the same, except that the plaintiff introduced expert witnesses who testified that in their opinion the train could have been stopped in a shorter distance than the engineer stated. Under the ruling in the case of *Central of Ga. Ry. Co. v. Waxelbaum*, 35 S. E. 645, 111 Ga. 812, this expert evidence did not impeach or contradict the fact testified to by the engineer, that he used all the means at his command (stating what he had done), and that he could not stop the train before running over the animal. This is especially so when the experts testified that they would take his testimony as to the fact in preference to their opinion, and when, also, their opinion was based on the hypothesis that every car in the train was equipped with air brakes, and the evidence showed that not more than two-thirds of the cars were so equipped.

(Syllabus by the Court.)

Error from Superior Court, Catoosa County; A. W. Fite, Judge.

Action by W. S. Robinson against the Western & Atlantic Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

For former opinion, see 39 S. E. 950.

Payne & Tye and R. J. & J. McCamy, for plaintiff in error. Payne & Payne, for defendant in error.

SIMMONS, C. J. Judgment reversed. All the Justices concurring.

(119 Ga. 376)

SMITH v. FOSTER.

(Supreme Court of Georgia. Jan. 13, 1904.)

EXECUTORS AND ADMINISTRATORS—WIDOW'S SUPPORT.

1. The mere fact that litigation is pending between a widow and the representative of her deceased husband's estate over the return of appraisers appointed to assign dower will not authorize the granting of a second year's support.

(Syllabus by the Court.)

Error from Superior Court, Talbot County; W. B. Butt, Judge.

Proceeding by Joanna Foster against E. T. Smith, administrator, for a year's support. Judgment for Foster, and defendant brings error. Reversed.

J. J. Bull, for plaintiff in error. Persons & McGehee, for defendant in error.

COBB, J. The Code declares that, "when an estate is to be kept together for a longer time than twelve months, and there are no debts to pay, and a widow and minor children to be supported out of said estate, they shall have a year's support for each year that such estate may be kept together." Civ. Code 1895, § 3486. It has been held that this provision is applicable in a case where there is a widow and no minor children. *Woodbridge v. Woodbridge*, 70 Ga. 733. This court has never distinctly decided what is meant by the clause "when an estate is to be kept together." In *Hill v. Lewis*, 91 Ga. 796, 18 S. E. 63 (2), it was said: "Whatever the statute may mean by the phrase 'when an estate is to be kept together,' the keeping of it together by the mere choice or election of the widow herself cannot be recognized as a basis for allowing her continued support from year to year." As under the law no estate is required to be divided within less than 12 months from the date of the qualification of the legal representative, and a testator may by will provide that his estate shall be kept together for a longer period of time, it might with some force be asserted that it was the intention of the General Assembly in enacting the law under consideration to provide an additional year's support only in those cases where a will required an estate to be kept together for a longer time than twelve months. But in the case of *Woodbridge v. Woodbridge*, supra, an additional year's support was allowed in a case where there was no will, and the estate had been kept together for three years by the mere failure of the administrator to wind up the same. In the present case the estate has been kept together in the hands of the administrator for more than twelve months, as the result of a controversy growing out of the widow's application for dower. The widow applied for dower, and appraisers were appointed to admeasure it. They failed to make their return to the term of court next succeeding their appointment, and it is claimed that this failure was the fault of the widow, as it was her duty to see that the appraisers made their return in the earliest time required by law. As a result of this failure to make the return at the next succeeding term of the court the administrator was required to keep the estate together in his hands. After the return was made to the second term of the court after the appointment of the appraisers the administrator filed a traverse to the return of the commissioners, making various objections as to the manner of the admeasurement and as to the quantity of land set apart. The sole reason for keeping the estate together is this pending litigation over the widow's application for dower. Without attempting now to determine definitely what is meant by the clause "when an estate is to be kept together," we hold in this case that the mere fact that there is litigation pending over the widow's right to dower will not alone authorize

the granting of a second year's support. There is no question raised as to the widow's right to dower, and therefore it will be eventually set apart. When dower is set apart in land the widow is entitled to an accounting for the rents, issues, and profits of the dower land from the date of her husband's death to the date that she enters upon the dower estate. *Austell v. Swann*, 74 Ga. 278; *Johnson v. Moon*, 82 Ga. 249, 10 S. E. 193; *Johnson v. Gordon*, 102 Ga. 354, 30 S. E. 507. In ordinary cases the widow is entitled to a year's support and also to her dower, and, if she takes dower, to no further interest in the real estate. No matter how long the estate may be kept together, if at the time of the winding up of the estate she has elected to take her dower, has had her first year's support, has had her dower assigned to her, and has received the rents, issues, and profits of the land from the date of her husband's death to the date she entered as dowress, she has all that the law ordinarily authorizes. Mere litigation over her right to dower does not give her the right to ask a year's support in addition to that set apart for the first year. It was claimed in the present case that the estate was kept together as a result of the widow's fault in not speeding her application for dower, but we have determined the case without reference to this point. We do not think she would be entitled to a second year's support, even if she was without fault with reference to this matter. The *Woodbridge Case* should not be extended.

Judgment reversed. All the Justices concurring.

(119 Ga. 341)

AMERICAN FREEHOLD LAND MORTG. CO. OF LONDON, Limited, v. WALKER.

(Supreme Court of Georgia. Jan. 12, 1904.)

HOMESTEAD — SALE ON EXECUTION — MORTGAGE BY WIFE—AGENT—ESTOPPEL.

Real estate of a husband, set apart as a homestead, was levied on and sold. The purchaser at the sheriff's sale conveyed the land to the wife, a beneficiary under the homestead. She borrowed \$1,000, and secured the same by a deed to the land, which was signed by her husband, acting as her agent. The holder of the security deed brought ejectment against the wife, and, having recovered a verdict, obtained a writ of possession. The husband, for himself and as the head of a family, sought a perpetual injunction against its enforcement. The jury found generally for the plaintiff. *Held*:

1. While the verdict was right in enjoining any interference with the homestead estate, it was too broad, in that it restrained the creditor from enforcing the writ after the termination of the homestead.

2. Where one, as agent for another, signs a deed conveying property, he is estopped from thereafter asserting against the grantee any adverse right based on a title or interest outstanding in such agent at the time of the execution of the deed.

3. What one induces another to regard as true is to be treated as the truth between them,

if the party who acts has been misled to his damage by the conduct or statements of the other.

(Syllabus by the Court.)

Error from Superior Court, Taylor County; W. B. Butt, Judge.

Action by A. M. Walker against the American Freehold Land Mortgage Company of London, Limited. Judgment for plaintiff, and defendant brings error. Reversed.

Real estate of A. M. Walker, which had been set apart as a homestead for the benefit of his wife and minor children, was subsequently levied on and sold under a *fi. fa.* against him. Waters, the purchaser at the sheriff's sale, conveyed the land to Mrs. Alice Walker, the wife of A. M. Walker, and a beneficiary under the homestead. She borrowed from Sherwood \$1,000, and secured the same by a deed to the land, which was signed by her husband as her agent. The debt and security were transferred by Sherwood to the American Freehold Land Mortgage Company, which company brought ejectment against Mrs. Walker, and, having recovered a verdict, obtained a writ of possession. A. M. Walker, for himself and as head of the family, sought a perpetual injunction against its enforcement. The jury found generally for the plaintiff, and the mortgage company excepted.

W. E. Simmons, for plaintiff in error. A. M. Colbert and Allen & Tisinger, for defendant in error.

LAMAR, J. It was conceded on the argument here that a verdict finding that the writ of possession should not be enforced during the continuance of the homestead estate was demanded by the evidence, but we think the plaintiff in error is right in its contention that the verdict was too broad. Under it the mortgage company would be perpetually enjoined from dispossessing A. M. Walker individually, even after the termination of the homestead estate. If the levy was only on the homestead interest, and if Waters got no title at the sheriff's sale, and, if Mrs. Walker acquired no title or a defective title under her deed from Waters, yet her deed to Sherwood purported to convey the fee. This was signed by A. M. Walker as agent for his wife, and, whether she has title or not, forever estopped him from asserting his own title as against the grantee or his assigns. He has the power to sell the reversion (*Williams v. O'Neal* [Ga.] 45 S. E. 978), and could by estoppel bring about that result. The deed may have been the act of Mrs. Walker, but the recitals of fact and the representations bound the conscience of the agent, and estopped him from using any right or title then outstanding in himself to the prejudice of Sherwood, who loaned the money in the belief that the property belonged to Mrs. Walker. The agent's signature justified the lender in act-

ing on the theory that, whoever else owned it, the agent did not. Even where one attests a deed, there is a presumption that he knows of its contents; and, unless this presumption is removed, he is estopped from asserting, against the grantee therein, an interest based on any right then outstanding in himself. *Butt v. Maddox*, 7 Ga. 504 (4); *Ga. Pac. Ry. Co. v. Strickland*, 80 Ga. 776, 6 S. E. 27, 12 Am. St. Rep. 282; *Fleming v. Ray*, 86 Ga. 533, 12 S. E. 944. As held in *Kirk v. Hamilton*, 102 U. S. 76, 28 L. Ed. 79, what one induces another to regard as true is the truth as between them, if the party who acts has been misled by the conduct or statements of the other. Civ. Code 1895, §§ 5150, 3823, 3609.

Judgment reversed. All the Justices concur.

(119 Ga. 386)

STEWART et al. v. GARRETT.

(Supreme Court of Georgia. Jan. 15, 1904.)
CEMETERIES—OWNERSHIP OF LOTS—INTEREST ACQUIRED.

1. One who purchases a lot in a public cemetery for burial purposes, though the right of interment therein be exclusive, does not acquire any title to the soil, but only a mere easement or license, which will not support an action of ejectment.

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; *W. B. Butt, Judge.*

Action by J. A. Stewart and others against H. W. Garrett. Judgment for defendant, and plaintiffs bring error. Affirmed.

Reese Crawford and McNeill & Levy, for plaintiffs in error. Charlton E. Battle, for defendant in error.

TURNER, J. This bill of exceptions was founded upon an action of ejectment brought in the superior court of Muscogee county, for a lot in a cemetery in the city of Columbus, known and distinguished in the plan of said cemetery as lot No. 184 in section or extension C of said cemetery, "the said tract or parcel of land being a cemetery lot for burial purposes." The action was founded on the several demises of James A. Stewart and others, also of "the city of Columbus," and also of "the mayor and council of the city of Columbus," these two latter demises being framed to cover the different names by which the municipality was designated in the acts of the General Assembly. To the petition in this case an abstract of title was appended, the particulars of which need not be set out in full. The defendant filed a general demurrer, the substance of which may be stated in the language of the fourth ground thereof as follows: "Because the petition shows upon its face that the land sued for is a cemetery lot contained in the public cemetery in the city of Columbus,

known as 'Linwood Cemetery,' and, said tract or parcel of land being, as described in said petition, a cemetery lot for burial purposes, the right and title of the plaintiffs, if any, in such property, is not of such a character as will support an action of ejectment, the right of burial in such cemetery lot being merely a license, or at best an easement, in said property, and ejectment will not lie for the recovery of a license or an easement." The court below sustained the demurrer and dismissed the case. The plaintiffs excepted in due form, and brought the case to this court.

The question is whether an action of ejectment will lie for the recovery of a tract or parcel of land averred to be a cemetery lot for burial purposes. The courts in many of the states have held that the purchaser of a lot in a public cemetery, though under a deed absolute in form, does not take any title to the soil, but that he acquires only a privilege or license to make interments in the lot purchased, exclusively of others, so long as the ground remains a cemetery. See the cases collected in 6 Cyc. Law & Proced. 717. And there would seem to be good reason for holding that, when a cemetery lot is conveyed for burial purposes, it cannot be devoted to any other use, whatever may be the form of the conveyance. In the case of *Jacobus v. Congregation of the Children of Israel*, 107 Ga. 518, 33 S. E. 853, 73 Am. St. Rep. 141, the same being styled an "equitable petition," this court held that even punitive damages could be recovered for an unlawful interference with a cemetery lot; and Mr. Justice Fish, reasoning upon the case, used this language (page 521, 107 Ga., page 854, 33 S. E., 73 Am. St. Rep. 141): "As a general rule, one who purchases and has conveyed to him a lot in a public cemetery does not acquire the fee to the soil, but only the easement or license of burial therein." The opinion then proceeds to cite an array of authorities to the effect that damages may be recovered from any person who wrongfully trespasses upon, desecrates, or invades the burial lot of another. And, in a proper case, the courts will, by injunction, restrain a trespass upon a burial lot. See 6 Cyc. Law & Proced. 720, and authorities cited.

The case of the New York Bay Cemetery Co. v. Buckmaster, 49 N. J. Law, 449, 9 Atl. 591, cited by counsel for the plaintiffs in error, on examination does not seem to support his view that one who has the right of burial in a cemetery lot can maintain an action of ejectment against another who wrongfully enters thereon. While the deed under consideration in that case recited that the premises were to be had and held for the uses of sepulture only, and for no other uses whatever, the law of New Jersey (P. L. 1850, p. 194) required the cemetery company to grant the fee to the purchasers of lots, and for that reason the court held that an

action of ejectment would lie for the recovery of the lot. We have also examined the other cases cited by the able counsel for the plaintiffs in error, but we have not found them sufficient to overcome the great weight of authority which supports the view which we have adopted.

In the present case the parcel of land sought to be recovered being averred to be a cemetery lot for burial purposes, any conveyances upon those terms would carry only a limited use or an easement. Such a use is also sometimes called a mere license. To recover such an easement or license, an action of ejectment will not lie. Adams on Ejectment, *16; Perley on Mortuary Law, pp. 177, 178, 187; 6 Cyc. Law & Proc. 717 (note 50); 10 Am. & Eng. Enc. L. (2d Ed.) 474; Union Petroleum Co. v. Bliven Petroleum Co., 72 Pa. 173; Hancock v. McAvoy, 151 Pa. 460, 25 Atl. 47, 18 L. R. A. 781, 31 Am. St. Rep. 774. If for any public reason the disestablishment of a cemetery is necessary, the police power is adequate. It may be added that, while the action of ejectment has its uses, its quaint fictions and devices do not seem appropriate to the ascertainment of any right in a burial lot. If any fiction is pardonable in a case of this kind, it would be fitter to hold that the fee in these sacred premises belongs to the dead. Within these hallowed precincts no court would desire to send the sheriff with a writ of possession. This instinct of humanity is loyalty to a statute impressed upon all hearts. Its influence is not confined to the weak and ignorant. The plaintive appeal which marks the grave of Shakspeare is said to have been inspired by his fear of a removal of his bones to a charnel house:

"Good friend, for Jesus' sake forbear
To dig the dust enclosed here."

Judgment affirmed. All the Justices concur.

(119 Ga. 312)

CALHOUN v. STATE.

(Supreme Court of Georgia. Jan. 12, 1904.)

COMMON CHEAT—EVIDENCE.

1. One who makes a contract to purchase of another an article of merchandise, and agrees to pay therefor a sum of money, and, after the contract is completed, agrees that, if the purchase price of the article is not paid at the time stipulated, service or labor to the value of such purchase price will be performed for the other contracting party, is not, upon a failure to pay the purchase price, or perform the service referred to in lieu thereof, indictable under the provisions of the act approved August 15, 1903 (Acts 1903, p. 90).

(Syllabus by the Court.)

Error from City Court of Sandersville; P. R. Talliaferro, Judge.

Tobe Calhoun was convicted of swindling, and brings error. Reversed.

Evans & Evans, for plaintiff in error. J. E. Hyman and Gus H. Howard, Sol., for the State.

COBB, J. The accused was arraigned in the city court of Sandersville upon an accusation charging him with a violation of the provisions of an act approved August 15, 1903 (Acts 1903, p. 90). Having waived trial by jury, the judge, after hearing evidence, entered a judgment declaring the accused to be guilty. To this judgment the accused excepted upon the ground that, under the uncontradicted evidence, no offense against the laws of this state had been proven. The act under which the accused was tried is as follows:

"Section 1. If any person shall contract with another to perform for him services of any kind with intent to procure money, or other thing of value thereby, and not to perform the service contracted for, to the loss and damage of the hirer; or after having so contracted, shall procure from the hirer money, or other thing of value, with intent not to perform such service, to the loss and damage of the hirer, he shall be deemed a common cheat and swindler, and upon conviction shall be punished as prescribed in section 1039 of the Code [1895].

"Sec. 2. Be it further enacted, that satisfactory proof of the contract, the procuring thereon of money or other thing of value, the failure to perform the services so contracted for, or failure to return the money so advanced with interest thereon at the time said labor was to be performed, without good and sufficient cause and loss or damage to the hirer, shall be deemed presumptive evidence of the intent referred to in the preceding section."

There was only one witness sworn in the case, and the following is his entire testimony, as it appears in the record: "I am the prosecutor in this case, and on the 26th of August I met the defendant in the road. I had a barrel of fish, which I was selling in bunches. I did not know the defendant at that time, but he asked me to sell him a string of fish, which I told him I would for twenty cents. I sold him the fish for twenty cents. He did not have the money, but I agreed that he might pay it on the next Saturday. He then agreed that, if he did not pay the money on the next Saturday when it was due, that he would work the same out with me on the next Monday following the day when the money was due. He did not pay the money on the next Saturday when it was due, and he did not come on the next Monday to work it out, as he had promised to do. The defendant was in the employ of W. L. Henderson when I made the trade with him, and he was driving his wagon at the time. I would not have sold him the fish, except for the promise made. I have never received my money, nor the fish back. I saw the defendant next day after he had promised to work, and asked him about it, and he gave no excuse for not coming, but said he would come that day, but he didn't." Taking this testimony in its entirety, it establishes that

there was a sale of the fish by the prosecutor to the accused for the sum of 20 cents. This was the contract. It does not distinctly appear that the fish were immediately delivered, but it does appear that, after this contract was entered into, the accused agreed that, if he did not pay the money at the time stipulated, he would perform labor or service for the prosecutor to the extent of the purchase price of the fish. There is nothing to indicate that the contract of sale, which called for a bunch of fish, to be paid for with 20 cents in money, was in the least modified or changed. We do not think this transaction falls within either the letter or the spirit of the act above referred to. The act relates to transactions where a person makes a contract with another to perform service with intent to procure money or other thing of value. In the present case there was no contract of this character. There was a contract to pay money for an article, and a subsequent agreement that, if the money was not paid, the purchase price of the article would be paid in service. Criminal laws are to be construed strictly, and, giving the act the strict construction which the law requires, we do not think the transaction detailed in the record comes within the provisions of the act. We have reached this conclusion without reference to whether the act is unconstitutional for any reason. For the purposes of this case, we have treated it as a valid law, but nothing herein said is to be construed as indicating any opinion on the question of the constitutionality of the legislation. Under the view we have taken of the case, there is nothing in the record which requires a decision at this time upon any question relating to the constitutionality of the act. This legislation was probably the result of the decision in *Ryan v. State*, 45 Ga. 128, which was approved in *Ratteree v. State*, 77 Ga. 774, and in *Holton v. State*, 109 Ga. 129, 34 S. E. 358. Whether it is in the power of the General Assembly to change the rule laid down in these cases in the manner indicated in the act of 1903 will be determined when that question is directly raised.

Judgment reversed. All the Justices concurring.

(119 Ga. 371)

LOUISVILLE & N. E. CO. v. CODY.

(Supreme Court of Georgia. Jan. 13, 1904.)

CARRIERS—LIVE STOCK SHIPMENT—NEGLIGENCE—PLEADING—PETITION.

1. It is not incumbent upon a plaintiff, when he elects to bring an action *ex delicto* against a railway company for damages arising from a failure on its part to properly perform its duties as a common carrier of live stock, to set forth in detail, by way of an exhibit to his petition or otherwise, the precise terms of the contract of affreightment. But it is necessary that he should specifically allege, when called upon to do so by an appropriate special demurrer, that he actually sustained loss by reason of such failure of duty, and also state the particular facts upon which he relies in support of his

contention that the carrier was negligent touching the transportation of the live stock intrusted to its care for shipment.

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; W. B. Butt, Judge.

Action by W. E. Cody against the Louisville & Nashville Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

Goetchins & Chappell, for plaintiff in error. Hatcher & Carson, for defendant in error.

TURNER, J. This case originated under an attachment sued out by W. E. Cody against the Louisville & Nashville Railroad Company for the value of a mule alleged to have been killed through the negligence of the defendant, the mule being averred to be of the value of \$135. The declaration in attachment alleged that the defendant company "received from petitioner" at Murray, Ky., 19 horses and 4 mules, to be transported by it, as a common carrier of freight, to Columbus, Ga.; that the horses and mules were in good order when delivered to the defendant, and by it, in consideration of certain freight to be paid it by petitioner, were to be, with all due care and diligence, and without fault or negligence of its servants and agents, safely carried and delivered to petitioner at Columbus, Ga.; that, notwithstanding the promise and undertaking of the defendant as aforesaid, upon arrival at Birmingham, Ala., of the train upon which these horses and mules were shipped, one of the latter, of the value of \$135, was down in the car, trampled to death; that "said mule was knocked down, bruised, and injured through the fault and negligence and want of due care and caution of said defendant, its servants and agents, in the handling of the train of cars in which said mule was being transported from Murray, Ky., to Birmingham, Ala.; and that from said bruises and injuries said mule died"; and that, in order to recover the value of said mule, the plaintiff had sued out an attachment against the defendant, returnable to the superior court. The plaintiff prayed the judgment of the court against the defendant company for the value of the mule and for costs incurred, etc.

The defendant appeared at the first term of the court and demurred to the plaintiff's petition on various grounds. Its demurrer was overruled, and it filed exceptions pendente lite to this ruling of the court. In the further progress of the case, after the introduction of the plaintiff's evidence, the defendant asked a nonsuit, which was refused. The jury found a verdict for the plaintiff for the amount sued for; a motion for a new trial was filed by the defendant, on numerous grounds, which motion was overruled; and the defendant then sued out a bill of ex-

ceptions to this court, assigning error upon the overruling of its demurrer, upon the refusal of the trial court to order a nonsuit, and upon its refusal to grant the defendant a new trial.

After giving due consideration to the first of these assignments of error, we have reached the conclusion that the defendant's demurrer should have been sustained. Accordingly we shall not undertake to deal with either of the other assignments of error, for, as the overruling of the defendant's demurrer was erroneous, all subsequent proceedings in the trial court are properly to be regarded as of no effect. *Southern Ry. Co. v. Dyson*, 109 Ga. 104, 34 S. E. 997; *Morgan v. Giblan*, 115 Ga. 148, 41 S. E. 495, and citations.

On the argument before this court, counsel for the plaintiff in error insisted upon only three of the grounds of its demurrer, which were as follows: (1) "The alleged contract on which said cause of action is based is not sufficiently set forth to advise defendant of the terms thereof, nor is a copy of said contract exhibited, as by statute provided"; (2) "It is not therein sufficiently alleged when, where, or in what manner the alleged damage was done to the mule alleged to have died, nor in what particular the defendant was negligent in the carriage of said mule"; and (3) "It does not appear in said declaration that the plaintiff was in any wise injured or damaged or suffered any loss on account of said mule for the alleged negligence of defendant, or its failure to perform its alleged contract of carriage, nor does it appear how or in what manner plaintiff was damaged or suffered any loss on account of the alleged injury to and death of said mule."

The obvious reply to the first of these objections is that the plaintiff, as it was his right to do, elected to bring a suit against the defendant company, sounding in tort, because of its alleged failure of duty as a common carrier rather than to sue for a breach of the contract of affreightment. *Southwestern Railroad v. Thornton*, 71 Ga. 61; *Seals v. Railroad Co.*, 102 Ga. 817, 29 S. E. 118; *L. & N. R. Co. v. Spinks*, 104 Ga. 696, 39 S. E. 969; *State Mutual Life Ass'n v. Baldwin*, 116 Ga. 859, 860, 43 S. E. 262. And this being so, it was not necessary that the plaintiff should set forth the precise terms of such contract, but simply that he should allege, by way of inducement, facts showing that the relation of carrier and shipper existed between the defendant company and himself, and that there had been a failure on its part to perform its duties in the premises. Furthermore, our statute (Civ. Code 1895, § 4963) provides merely that a contract which is declared on shall be incorporated in or attached as an exhibit to a petition only in the event such contract is evidenced by a writing; and the petition filed in the present case does not disclose that the contract therein referred to was, as matter of fact, in writing. The defendant's complaint that there is no "copy of

said contract exhibited" is therefore not well taken. The defendant was not justified in filing a "speaking" demurrer, but, if reliance was put on a special contract in writing, it should have been set up and taken advantage of by filing an appropriate plea. *Boaz v. Central R. Co.*, 87 Ga. 465, 13 S. E. 711; *Nicoll v. Railway Co.*, 89 Ga. 260, 15 S. E. 309.

The point raised by the demurrer that the plaintiff did not allege in his petition that he had been injured or damaged, or had suffered any loss, on account of the alleged negligence of the defendant, seems justified by the loose and equivocal allegations of his petition; and, it being directly assailed by a special demurrer based upon this ground, we are compelled to hold that the petition was defective in this respect. See, in this connection, *Mathews v. Burch*, 103 Ga. 539, 29 S. E. 697; *Mayor, etc., of Eastman v. Cameron*, 111 Ga. 110, 36 S. E. 462; *W. U. Tel. Co. v. Griffith*, 111 Ga. 563, 564, 36 S. E. 859.

The declaration was also open to special demurrer on the ground that it did not with sufficient particularity aver wherein the alleged negligence of the defendant consisted, or in what manner the injury to the mule was brought about. By recurring to the foregoing abstract of the declaration, it will be seen that the plaintiff merely alleges that, upon the arrival at Birmingham of the train on which the horses and mules were being transported, one of the mules was down in the car, trampled to death; that "said mule was knocked down, bruised, and injured through the fault and negligence and want of due care and caution of said defendant, its servants and agents, in the handling of the train of cars; * * * and that from said bruises and injuries said mule died." While these allegations, in a very loose and general way, disclose that the plaintiff's complaint is that there was a negligent handling of the train of cars, whereby the injured mule was knocked down and trampled on, they are not such as to put the defendant company upon reasonable notice of the acts of negligence relied on by the plaintiff, so as to enable it to properly prepare and present its defense. *W. U. Tel. Co. v. Griffith*, supra. In the case of *Miller v. Merchants' & Miners' Transportation Co.*, 115 Ga. 1009, 42 S. E. 335, it appears that Miller sued the transportation company to recover damages for personal injuries alleged to have been sustained by him on account of its negligence. The petition alleged that he was an employé of the defendant; that one of its vessels, while lying at or near a wharf, had two piles of lumber loaded on her deck, one on the port and the other on the starboard side, and on these piles of lumber were loaded a number of cross-ties; that as he was going along between the two piles of lumber, engaged in loading the vessel, it suddenly listed to the starboard, causing one of the cross-ties which had been loaded on the port side to fall upon and injure him, etc.

The petition further alleged that he was free from negligence, "did not know of the condition of the ship which caused it to list, and was then unaware of any improper distribution of the cargo," and that his "injuries were due to the fault and negligence of said company in not properly loading and distributing the cargo of said ship, the latter being defective in construction, and therefore liable to list unless care was observed in loading the same, all of which was unknown to" him, and could not have been discovered by the exercise of reasonable care on his part; and that "said improper loading and defective construction of said ship was known to said defendant, or should have been known by the exercise of ordinary care and diligence." The defendant demurred specially to the petition upon several grounds, two of which were (1) that the declaration did not disclose "in what manner the cargo of said ship was improperly distributed"; and (2) that it was not shown "in said declaration in what manner said ship was defective in construction." The demurrer was sustained upon these two grounds, and, the plaintiff failing to amend, the petition was dismissed by the trial court. In passing upon an exception taken by the plaintiff to this ruling, this court said (page 1011, 115 Ga., page 386, 42 S. E.): "It will be observed that the negligence of the defendant which the plaintiff alleged caused his injuries was the improper loading and distribution of the ship's cargo, and the defective construction of the ship. The defendant, in order to prepare its defense, was entitled to be put on notice of the particular manner in which the plaintiff expected to show that the cargo was improperly distributed, and also the particular defects which plaintiff expected to prove existed in the construction of the ship. The defendant, by an appropriate special demurrer, called for the information to which it was entitled. The plaintiff declined to amend the petition in the respects indicated, and we are of the opinion that the court did not err in sustaining the demurrer and dismissing the petition. In *Blackstone v. Railway Co.*, 105 Ga. 381, 31 S. E. 90, it was held: 'Where * * * the cause of injury was alleged to be a pole concerning which the petition, in general terms, only alleged that it was "too near the track," and the defendant, by special demurrer, made the point that the petition did not allege "how near said pole was to the track," the petition ought to have been amended so as to set forth the facts as to this matter more fully and explicitly; and, in the absence of such an amendment, this court will not reverse a judgment sustaining the demurrer and dismissing the action.' " And the court, in the course of the same opinion, cited the case of *W. U. Tel. Co. v. Jenkins*, 92 Ga. 398, 17 S. E. 620, in which it was held that a declaration filed by the wife of an employé of the company was good as against a general demurrer, though subject to a special demurrer, it being alleged in her

declaration that her husband was killed without fault on his part, and wholly through the negligence of the company, his homicide having been caused by the falling of a rotten pole which he had climbed in the performance of his duties, its defective condition being unknown to him.

Following the decisions announced in these cases, we hold that the plaintiff in this case should have averred in his declaration the particular manner in which he expected to show the defendant company improperly handled its train, what caused the injured mule to be knocked down and trampled on, and in what respect the company or its servants had been negligent, and how its want of due care and caution resulted in loss to the plaintiff.

Judgment reversed. All the Justices concurring.

(119 Ga. 348)

FARGASON v. FORD.

(Supreme Court of Georgia. Jan. 12, 1904.)

APPEAL—ASSIGNMENT OF ERROR—LEASE—PARTIES—LANDLORD'S LIEN.

1. An assignment of error, in general terms, that the court erred in granting a nonsuit, sufficiently presents for determination the question whether there was any evidence to sustain the case as laid in the petition.

2. The word "trustee," following a person's name, is merely descriptive personæ.

3. Where a rent contract is made with A., "trustee," as landlord, he may foreclose a lien in his own name for money furnished the tenant by him, as landlord, with which to make the crop upon the rented premises, though the land and such money belong to another person, whom he represented in the transaction.

(Syllabus by the Court.)

Error from City Court of Dawson; A. M. Raines, Judge.

Action by D. S. Fargason, trustee, against L. C. Ford. Judgment for defendant, and plaintiff brings error. Reversed.

Marlin & Irwin, for plaintiff in error. W. H. Gurr and H. A. Wilkinson, for defendant in error.

FISH, P. J. The parties to this case executed the following contract:

"Georgia, Terrell County. This agreement between D. S. Fargason Trustee, of the first part and L. C. Ford of the second part, Witnesseth: That the said party of the first part, D. S. Fargason Trustee does hereby lease, rent and let, to the said L. C. Ford, the party of the second part, a certain four horse farm, known as the Gammage place, in the 12th. dist. of Terrell County, for the term of five years, to begin on the 1st. day of Jany. 1902, and the said lease to expire on the 31st. day of Dec. 1906. And the said Fargason, Trustee, agrees to furnish and loan to the said Ford, the sum of \$150.00 during the year 1902 with which to enable the said Ford to cultivate said farm during said year. Said sum to be advanced as follows, \$50.00

at once, and the balance \$100.00 to be advanced along during the year, as might be needed by the said Ford. The said \$150.00 to be repaid by said Ford to said Fargason, Trustee, by the first day of Dec. 1902 with interest, at 8%. * * * D. S. Fargason, Trustee. L. C. Ford."

On December 2, 1902, "D. S. Fargason, trustee," foreclosed a lien for money loaned against the crops grown on the rented premises during the year 1902. Ford filed a counter affidavit. Upon the trial of the issue thus made it appeared, from the evidence submitted by the plaintiff, that the title to the land in question was in D. S. Fargason, as trustee for his wife and minor daughter, and that it was their money which he furnished to Ford with which to make a crop. Fargason testified that the land in question belonged to his wife and minor daughter, and he managed it for them; that Ford did not owe him, individually, anything, but the money was owing to him as trustee. The court granted a nonsuit, to which ruling the plaintiff excepted, the assignment of error being as follows: "Plaintiff now comes and excepts to the order granting nonsuit, and assigns the same as error."

1. Upon the call of the case in this court, defendant in error moved to dismiss the bill of exceptions, upon the ground that there was no sufficient assignment of error. This motion was not meritorious, as the assignment of error sufficiently presents for determination the question whether there was any evidence to sustain the case as laid in the foreclosure proceeding. *Anderson v. Walker*, 114 Ga. 505, 40 S. E. 705; *Kelly v. Strouse*, 116 Ga. 872, 4 S. E. 280.

2. The word "trustee," following the name "D. S. Fargason," was merely descriptive personae. *Crusselle v. Chastain*, 76 Ga. 840; *Irvine v. Wynn*, 107 Ga. 402, 33 S. E. 415; *State v. Sallade*, 111 Ga. 700, 36 S. E. 922.

3. As the word "trustee" after Fargason's name was merely descriptive, the contract was with him in his individual capacity, and the foreclosure proceeding brought by him was in a like capacity. The question, therefore, is, did the fact that he testified that the money furnished by him as landlord belonged to his wife and daughter, whom he represented in the transaction, and that therefore the defendant was not indebted to him in his individual capacity, authorize the granting of a nonsuit? We think not. Under Civ. Code 1895, § 3037, subd. 3, in all cases where the contract is made with an agent in his individual name, though his agency be known, he has a right of action on the contract made for his principal. So, it was held in *Spence v. Wilson*, 102 Ga. 762, 29 S. E. 713, "Where one rents land from the agent of the owner, the contract being made with the agent in his individual name, the latter may maintain an action on such contract, though the fact of his agency was known by the renter; and accordingly the payment of such rent may be

enforced by a distress warrant sued out by the agent in his own name." Under Civ. Code 1895, § 2800, landlords have a lien on crops grown on the rented premises for money furnished their tenants to make the same; and it has been held that, in order for a landlord to have a lien upon his tenant's crop for money or supplies under this section, the landlord must furnish the articles as landlord. *Swann v. Morris*, 83 Ga. 143, 9 S. E. 767; *Brimberry v. Mansfield*, 86 Ga. 792, 13 S. E. 132; *Rodgers v. Black*, 99 Ga. 189, 25 S. E. 23. In the present case Fargason, as landlord, furnished the defendant the money with which to make the crop levied upon, and we think it is clear that he had a lien under section 2800 of the Civil Code. The fact that the land rented and the money furnished belonged to his wife and daughter, whom he represented, makes no difference. The tenant agreed to pay him as landlord, and was bound by his agreement, nor could the tenant deny his title. There is nothing in *Swann v. Morris*, supra, in conflict with the ruling here made, for there the landlords did not sell or furnish the guano to the tenant, but sold it to him as agents for another, and took a note for the price of the same, payable to their principal, which they subsequently paid, and then sought to foreclose a lien upon the tenant's crop. The point upon which the decision in that case turned was that the landlords did not furnish the guano to the tenant, but the tenant purchased the same from a third person.

Judgment reversed. All the Justices concurring.

(119 Ga. 314)

BLACKWELL v. STATE.

(Supreme Court of Georgia. Jan. 12, 1904.)

AFFRAY—EVIDENCE—REVIEW.

1. The use of profane and violent language by two persons, each to the other, although in a public place, is not sufficient, without more, to constitute an affray, under the laws of this state; but the offense is made out by proof of the conduct indicated under the circumstances mentioned indulged in by both parties, and accompanied by such acts as drawing a razor, making a threatening gesture with a plank, and taking hold of each other, by which conduct citizens are terrorized and disturbed; it not appearing that either party was justifiable in all that he did. *Hawkins v. State*, 13 Ga. 322, 58 Am. Dec. 517.

2. Whether or not the accused was justifiable in the part that he took in the affair was, under the facts of this case, a question for the jury. They found that he was not. There was some evidence to sustain their finding, the trial judge signified his approval of it by refusing to grant a new trial, and this court will not say that his refusal was erroneous.

(Syllabus by the Court.)

Error from City Court of Elberton; P. P. Proffitt, Judge.

Nathan Blackwell was convicted of an affray, and brings error. Affirmed.

I. C. Van Duzer, for plaintiff in error.
Thos. J. Brown, Sol., for the State.

CANDLER, J. Judgment affirmed. All the Justices concurring.

(119 Ga. 304)

OWEN v. STATE.

(Supreme Court of Georgia. Jan. 12, 1904.)

LARCENY—INSTRUCTIONS—EVIDENCE—CONFESSIONS—REASONABLE DOUBT.

1. There was ample evidence upon which to predicate the charge of the court as to the effect of recent possession of stolen goods. Under the evidence offered by the state, a charge on this subject was demanded, and there is no complaint that the charge as given was not a correct statement of the law.

2. A conviction may be had upon a free and voluntary confession, corroborated only by proof of the corpus delicti. In charging on this subject, the trial judge should impress upon the jury the idea that, while this is the law, such proof does not necessarily demand a conviction, and that, at last, to authorize a verdict of guilty, the jury must be satisfied beyond a reasonable doubt of the guilt of the accused. *Wimberly v. State*, 81 S. E. 162, 105 Ga. 188, and citations.

3. Where the judge charges the jury, in effect that a verdict of guilty cannot be had upon a confession alone, but that the same must be corroborated, and that it is sufficient corroboration to authorize a conviction when, in addition to proof of a confession, the corpus delicti is shown, concluding his statement with the following language, "Where it is shown that the crime was committed, then you would be authorized to consider the confession"—no error is committed of which the accused can complain.

4. The evidence offered, while not so conclusive as to render mathematically certain the guilt of the accused, was legally sufficient to authorize a verdict of guilty. The jury appears to have been satisfied beyond a reasonable doubt that the accused was guilty. The trial judge necessarily approved the verdict, as is shown by his refusal to grant a new trial, and this court will therefore not interfere with his judgment.

(Syllabus by the Court.)

Error from Superior Court, Twiggs County; D. M. Roberts, Judge.

Sidney Owen was convicted of larceny, and brings error. Affirmed.

John R. Cooper, for plaintiff in error. J. F. De Lacy, Sol. Gen., for the State.

CANDLER, J. Judgment affirmed. All the Justices concurring.

(119 Ga. 351)

LAMBERT v. NORMAN.

(Supreme Court of Georgia. Jan. 12, 1904.)

CONSTITUTIONAL LAW—TOWN CHARTER—APPOINTMENT OF MAYOR AND ALDERMEN—RIGHT TO ELECT.

1. A legislative act incorporating a town, which provides that named persons shall act as mayor and aldermen until their successors are elected by the people of the town according to the scheme of the act, is not opposed to that provision of the Constitution which declares that "the people of this state have the inherent, sole and exclusive right of regulating their internal government, and the police thereof" (Oiv. Code, § 5734); nor to that provision which de-

clares that "in all elections by the people the electors shall vote by ballot" (Oiv. Code, § 5736). Nor is such act unconstitutional for the reason that the General Assembly "has no elective or appointive power of officers of towns to which they grant charters."

(Syllabus by the Court.)

Error from Superior Court, Colquitt County; R. G. Mitchell, Judge.

Action between H. Lambert and J. B. Norman, Jr. From the judgment, Lambert brings error. Affirmed.

Park & Payton, for plaintiff in error. Robt. L. Shipp and Alford R. Kline, for defendant in error.

COBB, J. This case involves the validity of that portion of the charter of the town of Norman Park (Acts 1902, p. 519, No. 56) which designates by name the mayor and aldermen of the town, who are to serve until their successors are elected according to the scheme of the act. All of the points insisted on are ruled in the headnote, and we do not deem any further elaboration necessary. The case of *Americus v. Perry*, 114 Ga. 871, 40 S. E. 1004, 57 L. R. A. 230, is closely in point, even if not directly controlling. See, also, *Dallis v. Griffin*, and citations, 117 Ga. 408, 43 S. E. 758; *Stapleton v. Perry*, 117 Ga. 564, 43 S. E. 996.

Judgment affirmed. All the Justices concurring.

(119 Ga. 379)

HARRIS v. ROAN, Judge.

(Supreme Court of Georgia. Jan. 13, 1904.)

CRIMINAL LAW—SECOND BILL OF EXCEPTIONS—EXTRAORDINARY MOTIONS—NEWLY DISCOVERED EVIDENCE—NEW TRIAL—MANDAMUS TO JUDGE.

1. The general rule is that, when the refusal of a new trial in a criminal case has been affirmed by this court, no second bill of exceptions can be allowed. The only exception to this general rule is such "an extraordinary motion or case" as is specified in section 5487 of the Civil Code of 1895.

2. The extraordinary motions or cases contemplated by the statute are such as do not ordinarily occur in the transaction of human affairs, as when a man has been convicted of murder, and it afterwards appears that the supposed deceased is still alive, or where one is convicted on the testimony of a witness who is subsequently found guilty of perjury in giving that testimony, or where there has been some providential cause, and cases of like character. *Cox v. Hillyer*, 65 Ga. 57.

3. Alleged newly discovered evidence which is cumulative of that presented on the trial, or which merely tends to impeach a witness examined at the trial, or which establishes a nervous disease or bodily eccentricity which was in existence at the time the crime was committed, and must have been known to the accused at the time of the trial, furnishes no sufficient reason for granting an extraordinary motion for a new trial.

4. The existence of excitement in the public mind, resulting from the commission of the crime, producing fear in the mind of the accused, so as to deter him from furnishing his counsel with information necessary to prepare his defense, even if in any case a sufficient reason to grant a new trial on extraordinary motion, will not be when the time elapsing be-

tween the verdict and the final order on the ordinary motion is such that the apprehensions in the mind of the accused must have abated.

5. When an alleged extraordinary motion for a new trial is entirely without merit, it is proper for the judge to decline to entertain the same, and to refuse to grant a rule nisi thereon.

6. This court will not by mandamus compel a judge to certify a bill of exceptions assigning error upon the refusal of the judge to entertain an extraordinary motion for a new trial and grant a rule nisi thereon, when it appears that such motion is without merit. *Malone v. Hopkins*, 49 Ga. 221; *Cox v. Hillyer*, 65 Ga. 57; *Hanye v. Candler*, 25 S. E. 606, 99 Ga. 214; *White v. Butt*, 27 S. E. 680, 102 Ga. 552; *Perry v. State*, 30 S. E. 903, 102 Ga. 368.

7. The case of *Taylor v. Reese*, 33 S. E. 917, 108 Ga. 379, was where the judge refused to certify the first bill of exceptions in the case, which complained of errors at the trial and was sued out in due time thereafter.

The case of *Sears v. Candler*, 37 S. E. 442, 112 Ga. 381, did not involve any question relating to an extraordinary motion for a new trial, and therefore the present ruling is not in conflict therewith.

(Syllabus by the Court.)

Application by John Harris for writ of mandamus to L. S. Roan, judge. Writ denied.

S. C. Crane, for applicant.

PER CURIAM. Mandamus nisi denied.

(119 Ga. 338)

MUTUAL LIFE INS. CO. OF NEW YORK v. HAMILTON.

(Supreme Court of Georgia. Jan. 12, 1904.)

NEW TRIAL—HEARING OF MOTION—CONTINUANCE—BRIEF OF EVIDENCE.

1. Where a term order, duly granted, to hear a motion for a new trial in vacation, recites "that it is impossible to make out and complete a brief of the testimony in such case before adjournment of court," and provides "that the movant have until the hearing, whenever it may be, to prepare and present for approval a brief of the evidence in said case, and the presiding judge may enter his approval thereon at any time, either in term or vacation, and if the hearing of the motion shall be in vacation, and the brief of evidence has not been filed in the clerk's office before the date of the hearing, said brief of evidence may be filed in the clerk's office at any time within ten days after the motion is heard and determined," and the hearing is regularly continued several times, by consent, during vacation, each order of continuance preserving all the rights of the movant under the original term order, and upon the last day set for a hearing in vacation no hearing is had, and no further order granted, by reason of the absence of the presiding judge, the motion goes over to the next term, at which it stands for a hearing, upon which the movant may present the brief of evidence for approval, and, after it has been approved, have the same filed.

Applying the rule above announced to the facts of this case, the court erred in dismissing the motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; W. B. Butt, Judge.

Action by Perry Hamilton against the Mutual Life Insurance Company of New York. Judgment for plaintiff, and defendant brings error. Reversed.

Jas. H. Gilbert and H. V. Hargett, for plaintiff in error. Hatcher & Carson, for defendant in error.

FISH, P. J. On May 15th, during the May term, 1902, of the superior court of Muscogee county, the case of Perry Hamilton, administratrix of W. T. Hamilton, against the Mutual Life Insurance Company of New York was tried, and resulted in a verdict for the plaintiff. On May 16th, during the term, the defendant filed its motion for a new trial; and on the same day the court granted an order rectifying and providing that, as it was "impossible to make out and complete a brief of the testimony in said case before adjournment of court, it is ordered by the court that said motion be heard and determined on the 17th day of June, in vacation, in judge's chambers at Columbus, Ga., * * * and that movant may amend said motion at any time before final hearing." The order further provided "that movant have until the hearing, whenever it may be, to prepare and present for approval a brief of the evidence in said case, and the presiding judge may enter his approval thereon at any time, either in term or vacation, and if the hearing of the motion shall be in vacation, and the brief of evidence has not been filed in the clerk's office before the date of hearing, said brief of evidence may be filed in the clerk's office at any time within ten days after the motion is heard and determined." On June 17th the motion was continued to be heard on June 28th, by an order to that effect, which contained the following provision: "* * * ordered that the plaintiff be allowed until the 28th day of June, 1902, to file his brief of the testimony and amended grounds for a new trial, and, if not filed at that time, then movant is entitled to all the privileges heretofore granted in the original motion to file any time before the hearing of the motion." On June 28th the motion was continued, by consent, to be heard on August 2d, the order providing "that the movant have until that day, inclusive, to make out and file a brief of the evidence had at the trial of said case, and have all other and further rights, etc., as though said motion were heard and determined at the regular May term of said court." On August 2d the motion was continued by consent, to be heard on August 12th, the order for the continuance providing "that the movant have until that day, inclusive, to make out and file an amended motion for new trial, and a brief of the evidence had at the trial of said case, and have all other and further rights, etc., as though said motion were heard and determined at the regular May term of said court, without any injury to movant, and with all rights first accorded movant in his motion for new trial." On August 12th the movant appeared at the time and place set for the hearing by the last-mentioned order, with a prepared brief of the evidence; but neither the presiding judge,

nor the respondent or her counsel, was present. Nothing more was done in reference to the motion until the following November term of the court. When, during this term, the motion for a new trial was called in its order, respondent moved to dismiss it "for failure of movant in preparing and filing and having approved the brief of evidence in said case on or before 12th August, 1902, it not having on said day obtained an order extending said time within which a brief of the evidence could be approved and filed in said motion"; alleging "that the May term, 1902, was adjourned after the expiration of the 12th August, 1902, as to said motion, and that movant cannot now file its brief of the evidence in said case." Upon the motion to dismiss the court passed the following order: "Upon call of the above case, the respondent moved to dismiss the motion for new trial upon the ground that no brief of evidence had been filed in the clerk's office or approved by the court in said case. It appeared by orders regularly granted that said case was tried at May term, 1902, and a motion for a new trial filed and an order granted extending the time for hearing until 17th June, when an order was granted extending time for hearing until 28th June, when another order was granted to August 2d, when another order was granted extending time until 12th August, 1902. Each order giving the right to prepare and file his brief of evidence, it appearing that the time of filing and preparing a brief of evidence had expired, and that no brief of evidence was filed, it is ordered and adjudged that the motion be, and is hereby, dismissed," etc. To this order of dismissal the movant excepted.

It is clear, we think, that the original term order of May 16th gave the movant in the motion for a new trial until the final hearing thereof to prepare, have approved, and to file a brief of evidence. The reason recited in that order for hearing the motion in vacation was that it was "impossible to make out and complete a brief of the testimony in said case before adjournment of court." After expressly giving the movant until the hearing, whenever it might be, to prepare and present for approval a brief of the evidence, and providing that the judge might enter his approval thereon at any time, either in term or vacation, the order provided that if the hearing should be in vacation, and the brief of evidence had not been filed before the hearing, then it might be filed within 10 days after the motion had been heard and determined; thus showing that it was not contemplated that the brief of evidence should be filed until it had been approved. It appears from each of the orders continuing the motion for a new trial, from the motion of the respondent to dismiss it, and from the order of the court dismissing the same, that the court and counsel for both sides recognized that, under the original term order and the orders of continuance, the movant in the mo-

tion for a new trial had until August 12, 1902, to prepare, present for approval, and to file a brief of the evidence in the case. The movant did not, in any of the orders for continuance of the motion for a new trial, consent to a limitation of its right, under the original term order, to have a brief of the evidence approved and filed upon the final hearing, but such right was expressly reserved in each of such orders of continuance. As the motion was not heard on August 12th—the last day, in vacation, set for the hearing—and, through no fault of the movant, no order was then passed in reference to the motion, it went over, by operation of law, to the succeeding November term. Civ. Code 1895, § 5485. When called in its order, the movant was ready with a brief of evidence, which its counsel presented to the judge for approval, and asked leave to file the same. The court declined to approve it or to permit it to be filed, but dismissed the motion for a new trial, because, as the court held, the time for preparing and filing the brief had expired on the 12th of August. For the reasons above stated, we think the court erred in this ruling, and the judgment below must therefore be reversed.

Judgment reversed. All the Justices concurring.

(119 Ga. 299)

GLASS v. STATE.

(Supreme Court of Georgia. Jan. 12, 1904.)

CRIMINAL LAW—ACCUSATION—AFFIDAVIT—GAMING.

1. In prosecutions in a city court the accusation may be more restricted, but cannot be broader, than the affidavit on which it is based.

2. Where an affidavit charges the commission of a specific act, the accusation must conform thereto.

3. As the greater includes the less, if the affidavit is general, the accusation may charge a specific criminal act included within the offense named in the affidavit.

(Syllabus by the Court.)

Error from City Court of Fayetteville; W. B. Hollingsworth, Judge.

Walt Glass was convicted of a misdemeanor, and brings error. Affirmed.

J. W. Wise, for plaintiff in error. A. O. Blalock, Sol., for the State.

LAMAR, J. Glass was prosecuted in the city court of Fayetteville for a misdemeanor. The affidavit charged him with the offense of "gaming." The accusation based thereon charged that he "played and bet for money and other things of value at a game of seven-up, and other games played with cards." The defendant demurred on the ground that the accusation did not follow the affidavit, in that it covered matters other than those contained therein. On the authority of *Dickson v. State*, 62 Ga. 588, *Brown v. State*, 109 Ga. 572, 34 S. E. 1031, and *Williams v. State*, 107 Ga. 693, 33 S. E. 641, the judge properly overruled the demurrer. If the af-

affidavit had charged the defendant with playing "seven-up," the defendant could not have been put on trial for playing at any other game or for gaming generally. *Blake v. State*, 112 Ga. 537, 37 S. E. 870. But where the affidavit sets out that the defendant was guilty of the general offense of gaming, the accusation can allege that he was guilty of any specific act included within the definition. The accusation cannot be broader than the affidavit, but, as the greater includes the less, if the affidavit is general, the accusation can be specific.

Judgment affirmed. All the Justices concur.

(119 Ga. 304)

TIPTON v. STATE.

(Supreme Court of Georgia. Jan. 12, 1904.)

CRIMINAL LAW—INDICTMENT—EVIDENCE—VENUE—ALIBI—ASSAULT WITH INTENT TO KILL—APPEAL—NEW TRIAL.

1. An indictment must allege a certain time within the statute of limitations, but on the trial the date may be established by circumstantial evidence.

2. Ordinarily, when a month is referred to, it will be understood to be of the current year, unless from the connection it appears that another is intended.

3. The indictment charged that the offense was committed on August 25, 1903, and on the trial thereafter during the same year the prosecutor testified that the offense was committed on August 25th, without stating the year. The defendant sought to prove an alibi, and offered evidence as to where he was on August 25, 1903. It being evident that both the state and the accused understood that the proof went to establish the commission of the act on the day charged in the indictment, a new trial will not be granted on the ground that the evidence left uncertain the time when the offense was committed.

4. Proof that the prosecutor lived in Walker county, and that he was assaulted while in his residence, sufficiently established the venue.

5. It was for the jury to determine whether the positive identification of the defendant as the perpetrator of the crime was met by the proof offered to establish an alibi.

6. Where one was charged with an assault with intent to murder A., and it appeared that the defendant had fired into a house in which A., B., C., and D. were living; that one shot came near B. and another within 18 inches of A.—there was evidence to support a conviction of an assault with intent to murder A.

7. This court cannot grant a new trial on the ground that the punishment was excessive, even though the defendant was found guilty with a recommendation to mercy.

8. The newly discovered evidence was merely cumulative of that previously offered in support of the defense of alibi. Besides, there was no showing as to the character and credibility of the new witnesses. Civ. Code 1895, § 5481.

9. There being no error of law assigned other than that the verdict was contrary to law and the evidence, and the evidence being sufficient to support the verdict, this court will not interfere with the discretion of the judge in refusing a new trial.

(Syllabus by the Court.)

Error from Superior Court, Walker County; W. M. Henry, Judge.

Fayette Tipton was convicted of assault with intent to kill, and brings error. Affirmed.

Lumpkin & Rosser and John W. Bale, for plaintiff in error. Moses Wright, Sol. Gen., for the State.

LAMAR, J. An indictment must allege a certain time within the statute of limitations when the offense was committed. *Bailey v. State*, 65 Ga. 410. If the day and month are given and the year is omitted, it is insufficient. Hence a charge that an offense was committed on "the 3d of June instant" was held to be defective in *Com. v. Hutton*, 5 Gray, 89, 66 Am. Dec. 352; *People v. Gregory*, 30 Mich. 371; *White v. State*, 93 Ga. 48, 19 S. E. 49 (4). While the allegations in the indictment must be specific, the time may be established by circumstantial evidence, and the present case is within the rule laid down in *Tillson v. Bowley*, 8 Greenl. (Me.) 163, followed in *Marston v. Jenness*, 12 N. H. 144, that "when a month is referred to, it will be understood to be of the current year, unless from the connection it appears that another is intended." *Contra*, *Lehritter v. State*, 42 Ind. 383. The indictment was found on August 26, 1903, and alleged that the assault with intent to murder was committed on August 25, 1903. The trial took place in September, but during the same term at which the indictment was found. The witnesses for the state testified that the "shooting occurred at 9:15 p. m. on August 25th." The defendant endeavored to establish an alibi, and offered much evidence to show that on August 25, 1903, at 9:15 p. m., he was at a church, about four miles distant. The state offered other evidence in rebuttal. From this it appears that both sides understood that August 25, 1903, was the time referred to by the witnesses for the state; and, there being no request to charge on this subject, or as to the statute of limitations, and the only complaint being that the verdict is contrary to law and evidence, we do not feel authorized to grant a new trial upon the ground that the year was not established with sufficient certainty.

It is now well settled that the failure to establish the venue can be taken advantage of on the general ground that the verdict is contrary to law, even though no question on that subject was raised in the lower court, and no specific assignment of error to call the state's counsel's attention to the fact that a reversal will be asked on that ground. But these rulings will not be extended. The record will be searched, and if it appears, even by circumstantial evidence, that the crime was committed within the jurisdiction of the court, a new trial will not be granted, even though no witness specifically stated that the offense was committed within the county. Here there was enough to establish the venue. It appeared that the prosecutor lived in

¶ 1. See Indictment and Information, vol. 27, Cent. Dig. § 247.

Walker county, and that he and his family were fired on while in his residence.

The defendant sought to establish an alibi, and also claimed that the offense, if any, was not assault with intent to murder T. B. Arnold, but his wife. It appeared that 10 or 12 shots were fired into the house in which the prosecutor, his wife, and family were living. The prosecutor positively and explicitly identified the defendant, and it was for the jury to pass upon the conflict occasioned by this evidence and that of a witness who swore that at the time of the shooting he saw the defendant at a church four miles distant. It was also for the jury to say whether the assault was with intent to murder the wife or the husband. There was evidence that one ball came within 3 inches of the wife, and another within 18 inches of the husband. While the case is close under the evidence, there was sufficient to sustain the verdict, and, there being no error of law complained of, and no assignment of error on the charge of the court, we must decline to interfere with the refusal of the judge to grant a new trial.

The newly discovered evidence of other persons who were at the church was cumulative, and, besides, there was no showing by the defendant that he did not know, and by the exercise of ordinary care could not have discovered, the existence of such evidence.

Judgment affirmed. All the Justices concur.

(119 Ga. 337)

EQUITABLE MORTG. CO. v. McWATERS.

(Supreme Court of Georgia. Jan. 12, 1904.)

NEW TRIAL—DISMISSAL OF MOTION—HARMLESS ERROR—INSTRUCTIONS—EXECUTION—CLAIM BY ADMINISTRATOR.

1. The motion to dismiss the motion for a new trial brought in question only matters which rested in the sound discretion of the trial judge, and it was not shown that that discretion was abused.

2. The evidence objected to by the plaintiff, even if inadmissible, related to a matter which was not in issue on the trial, and the failure to rule it out was not cause for the grant of a new trial.

3. The charges complained of in the motion embodied correct principles of law, and were applicable to the facts of the case on trial.

4. It appeared that some of the heirs for whose benefit the claim by the administrator was filed were concluded by a judgment rendered adversely to them on a claim which they had previously filed to the same land, and on the trial of which they could have set up the contentions they now seek to establish. *McWaters v. Equitable Mortgage Co.*, 42 S. E. 52, 115 Ga. 723. The share of these heirs in the land was one undivided half. The other heirs, not having been parties to that or any like suit for the land in controversy, were not estopped. As to them, the evidence fully warranted, if it did not demand, a finding that the possession of the defendant in *fi. fa.* was permissive only, and that the property was not subject. After a verdict finding the entire property not subject, it was therefore not error for the trial court to grant a new trial as to the undivided half interest claimed by the heirs first mentioned, and refuse it as to the others. Direction is

given that upon the next trial of the controversy between the plaintiff in execution and the administrator as to the share of the heirs who are concluded by the former judgment, the jury be instructed, upon proof of the facts before mentioned, to return a verdict finding that share subject.

(Syllabus by the Court.)

Error from Superior Court, Heard County; S. W. Harris, Judge.

Claim case between R. H. McWaters, administrator, and the Equitable Mortgage Company. From the judgment both parties bring error. Affirmed.

Payne & Tye, W. H. Daniel, Whitaker & Mooty, S. Holderness, and J. A. Noyes, for plaintiff in error. W. C. Wright and Frank S. Loftin, for defendant in error.

CANDLER, J. Judgment on both bills of exceptions affirmed. All the Justices concurring.

(119 Ga. 352)

MACK v. STATE.

(Supreme Court of Georgia. Jan. 13, 1904.)

STEALING RIDE ON TRAIN—WHAT CONSTITUTES—ACCUSATION.

1. If one should openly enter and remain in a car with no intent to pay his fare, he would not be guilty under the provisions of the act of December 21, 1897 (Van Epps' Code Supp. § 6662).

2. If he should conceal himself in a car for some purpose other than that of avoiding the payment of his fare, he would not be guilty under this act.

3. But if he should conceal himself on a train or in a car for the purpose of avoiding the payment of fare, he would be guilty of attempting to steal a ride, if removed before the journey began; or of actually stealing a ride, if he remained in the car until after the journey had commenced.

4. An accusation charging M. with the offense of a misdemeanor, in that he "fraudulently concealed himself in a car of a railroad company for the purpose of avoiding the payment of fare and stealing a ride," was sufficient to withstand a general demurrer.

(Syllabus by the Court.)

Error from City Court of Vienna; D. L. Henderson, Judge.

Bart Mack was convicted of stealing a ride on a train, and brings error. Affirmed.

Crum & Jones, for plaintiff in error. E. F. Strozier, Sol., and Whipple & McKenzie, for the State.

LAMAR, J. If one should openly enter and remain in a car with no intent to pay his fare, he would not be guilty under the provisions of the act of December 21, 1897 (Van Epps' Code Supp. § 6662). Or if he should conceal himself in a car for some purpose other than that of avoiding the payment of his fare, he would not be guilty thereunder. But if he should conceal himself on a train, or in a car, for the purpose of avoiding the payment of fare, he would be guilty of "attempting to steal" a ride, if removed before the journey began; or of "steal-

ing a ride," if not discovered until after the journey had actually begun. The accusation charged the defendant with a "misdemeanor," in that he did "falsely and fraudulently conceal himself from the conductor and train authorities, by hiding in a box car * * * upon a train of the Georgia Southern & Florida Railroad Company, for the purpose of avoiding the payment of fare and stealing a ride thereon." The judge properly overruled a general demurrer to this accusation. The defendant was not charged with the offense of merely concealing himself, but with the offense of a misdemeanor, manifested by concealing himself in a car for the purpose of avoiding the payment of fare. The act and the intent were those prohibited by the statute, and the accusation was sufficient.

Judgment affirmed. All the Justices concur.

(119 Ga. 358)

HENDRICK et al. v. DANIEL.

(Supreme Court of Georgia. Jan. 13, 1904.)

WITNESSES — COMPETENCY — TRANSACTIONS WITH DECEDENT—EVIDENCE—NEW TRIAL.

1. Under Civ. Code, § 5269, par. 1, in an action of ejectment, the opposite party to the grantee of a deed from a deceased person is not competent to testify in his own behalf to conversations and transactions with such deceased person affecting adversely the title conveyed by the deed; and under paragraph 5 the agent of such a party is likewise incompetent.

2. It is not error to exclude evidence as to matters about which there is no dispute.

3. This court will not consider a ground of a motion for a new trial, complaining of the refusal of the court to allow counsel to ask a witness a stated question, where it does not appear what answer to the question was expected.

4. The evidence amply sustained the verdict. (Syllabus by the Court.)

Error from Superior Court, Heard County; S. W. Harris, Judge.

Action by John W. Daniel against Hugh L. Hendrick and others. Judgment for plaintiff. Defendants bring error. Affirmed.

D. B. Whitaker, R. W. Freeman, and W. C. Wright, for plaintiffs in error. S. Holderness and Frank S. Loftin, for defendant in error.

CANDLER, J. Suit was brought by John W. Daniel against Hugh L. Hendrick to recover certain lands described in the petition. Daniel claimed under two deeds from Jephtha H. Daniel, Sr., dated, respectively, January 1, 1898, and April 23, 1898, conveying the land in dispute. At the return term the defendant answered that he was in possession of the land only as agent for his wife, Helen Hendrick, and at that term she was made a party defendant. In their plea they admitted Mrs. Hendrick's possession, and denied the plaintiff's title, or that he had any right to the possession or the rents and profits of the land. They further averred that in the fall of 1889 Jephtha H. Daniel,

the grantor in the deeds to the plaintiff, who was the father of both the plaintiff and Mrs. Hendrick, put Mrs. Hendrick in possession of the land, and expressed the desire that she should have it as a gift or advancement from him; that after this declaration, with the express understanding that the lands were a gift from Jephtha H. Daniel to his daughter Mrs. Hendrick, she, by and through her husband, Hugh L. Hendrick, went into possession, and has so remained ever since; and that her possession has been continuous and exclusive for a space of more than seven years in the lifetime of Jephtha H. Daniel, without the payment of any rent for the land, the seven years having elapsed before the making of the alleged deeds from Jephtha H. Daniel to the plaintiff. It was therefore claimed that Mrs. Hendrick was seised of the land in fee before the making of the deeds set out in the plaintiff's abstract of title. The plea also set up that, after going into possession of the land under this parol gift, Mrs. Hendrick, acting through her husband as her agent, made substantial and valuable improvements on the property, which were enumerated. At the trial, evidence was introduced on both sides. The jury returned a verdict for the plaintiff for the premises sued for, and mesne profits. The defendants made a motion for a new trial, which was overruled, and they excepted.

1. While the motion for a new trial, as amended, contains numerous grounds, the case is really controlled by a single question, viz., whether the court below erred in excluding testimony as to transactions and communications between Mrs. Hendrick and her husband and agent, on the one side, and Jephtha H. Daniel, under whom both the plaintiff and Mrs. Hendrick claimed, and who had died prior to the bringing of the suit, on the other. This evidence was excluded as coming within the prohibitions, respectively, of Civ. Code, § 5269, pars. 1, 5, the court holding, in effect, that John W. Daniel, the plaintiff, was an assignee or transferee of his deceased father, and therefore Mrs. Hendrick could not testify in her own favor against his title, and that her husband, who was admitted to have been her agent in all the transactions relating to the land, was likewise, by reason of his agency, incompetent to testify as to such transactions. The question squarely presented, therefore, is, where suit is instituted to recover possession of land by a grantee in a warranty deed, can the opposite party or his agent testify to conversations or transactions with the deceased grantor, the nature of which is to show an adverse title? This, in turn, renders necessary a discussion as to whether a grantee of land is included in the words "assignee" or "transferee," as used in the Code section to which reference has been made. This court is thoroughly committed to the proposition that the act of 1889, and the subsequent acts amendatory thereof, the

provisions of which have been embodied in Civ. Code, § 5269, are to be literally construed, and that nothing will be added to or taken from them by judicial construction. The original act (Acts 1889, p. 85, No. 496) provided only for cases "where any suit is instituted or defended by a person insane at the time of trial, or by the personal representative of a deceased person." In the case of *Woodson v. Jones*, 92 Ga. 662, 19 S. E. 60, which was decided November 6, 1893, this court held that under the act of 1889 "the maker of a negotiable promissory note is a competent witness in his own favor to prove payment thereof to the payee before the note was transferred, although the payee has since died; the action being by the indorsee of the note, and the personal representative of the payee not being a party thereto on either side." In the opinion the present Chief Justice, referring to former decisions to the effect that the terms of the act of 1889 would not be extended by construction, but would be construed to the letter, quoted from the act to the effect that "there shall be no other exceptions allowed under this paragraph, by any court, than those herein set forth." The General Assembly, which was then in session, seeing the deficiency in the act of 1889 as illustrated by the case cited, immediately thereafter, on December 9, 1893, amended it by providing that it should extend to cases where "any suit is instituted or defended, * * * by the endorsee, assignee, transferee or by the personal representative of a deceased person." Acts 1893, p. 53, No. 211.

The literal meaning of the word "endorsee" is easily ascertained by reference to its etymology. "Endorsement" applies to such written entries as may be made on the back of notes, checks, etc., and may transfer title to the paper on which it is made. The literal meaning of the word "assignment" is much broader. In its most general sense it applies to the transfer of interest in all classes of property, real, personal, or mixed. Bouvier gives as the definition of the verb "assign," to make or set over to another, and of "assignment," a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein; a transfer by writing, as distinguished from one by delivery. Black's Law Dictionary (page 97) defines the word as "the act by which one person transfers to another, or causes to vest in that other, the whole of the right, interest, or property which he has in any realty or personalty, in possession or in action, or any share, interest, or subsidiary estate therein. * * * In a narrower sense, the transfer or making over of the estate, right, or title which one has in lands and tenements." The same authority defines the verb "assign," as used in conveyancing, as follows: "To make or set over to another; to transfer, as to assign property, or some interest therein." It seems

clear that, technically speaking, the word "assignment" refers to a transfer of interest in land alone, and that to apply it to a transfer of a note or similar paper is to give it a broad, rather than a technical, meaning. Literally, it most assuredly covers a conveyance of land by deed. The word "transfer," in its literal meaning, is broader than "assignment," and all the authorities agree in a definition which, in effect, covers any act by which the owner of anything delivers or conveys it to another with the intent to pass his rights therein. In like general terms, a transferee is one to whom a transfer is made. Following the former decisions of this court, therefore, and giving to the words "assignee" and "transferee," as used in the Code, a literal construction, we are forced to the conclusion that they cover the grantee in a conveyance of land. These words are the broadest that could possibly have been used. A literal construction of either necessarily includes a vendee, grantee, or donee. That such was the meaning intended to be given them by the lawmaking power we think can easily be established by an application of any or all of the well-known rules for the construction of statutes. The act of 1889 and the amending act of 1893 are both remedial statutes. The evil sought to be cured was that the living took advantage of the dead, the sane of the insane, by giving testimony, the power to contradict which was buried in the tomb or obscured by dethroned reason. By the decision of this court in the case of *Woodson v. Jones*, supra, it was brought to the attention of the General Assembly that the act of 1889 failed of its full purpose, and it was accordingly amended by the act of 1893. To use a homely metaphor, by inserting in the law as it stood the word "endorsee" the Legislature healed the particular malady pointed out by the decision in the case cited, and then, to guard against a relapse, or the possibility of a similar attack in the future, it inoculated the patient with the words "assignee" and "transferee." The mischief as it existed prior to the passage of the act of 1889 was plain. That act did not accomplish its full purpose, and so in 1893 the General Assembly amended it so as to cover all possible cases where the same mischief threatened, and where estates, real, personal, or mixed, of deceased or insane persons, might otherwise be obtained or damaged by allowing parties to suits affecting such estates to testify to communications and transactions with such deceased or insane persons. With the full nature and extent of the evil clearly apparent, we cannot believe that the General Assembly intended to protect the estate of a deceased indorsee of a note against the testimony of the living maker, at the same time allowing it to be wronged by nullifying his warranty deed to a tract of land. On what theory it can be supposed that the General Assembly sought to protect the purchaser of a note, and leave unprotected the grantee of

a piece of real estate, we are at a loss to conceive.

The case of *Elliott v. Shaw*, 32 Ohio St. 431, cited by counsel for the plaintiff in error, we do not think is at all in point. That case held simply that, under an Ohio statute rendering incompetent as a witness the adverse party in interest to the grantee of a deceased person, the maker of a note would not be incompetent to testify in his own behalf against the assignee of the deceased payee; and the main reason given for the decision was that the lawmaking power clearly intended to restrict the statute being construed to the adverse party in a suit by or against the grantee in a conveyance of realty. Applying to our own law the well-defined rules of construction, and having in view the purpose of the act of 1889, and the evil sought to be remedied, we are clear that it was the intention of the act of 1893 to include and protect all indorsees, all assignees, and all transferees, of all kinds of property, real, personal, and mixed. It follows that the court below did not err in excluding the testimony under discussion, set out in the motion for a new trial.

2, 3. The other grounds of the motion disclose no error requiring the grant of a new trial. One of these grounds complains of the refusal to allow counsel to ask a named witness a specified question, but does not state what answer to the question was expected, and hence it cannot be considered. *Griffin v. Henderson*, 117 Ga. 382, 43 S. E. 712. Others complain of the rejection of evidence as to matters about which there was no dispute between the parties. A careful examination of the brief of the evidence shows that there is no merit in the contention that the verdict was contrary to law and the evidence. There was abundant evidence to sustain the verdict, and for no reason set out in the motion did the court below err in refusing to grant a new trial.

Judgment affirmed. All the Justices concurring.

(119 Ga. 373)

COURIER-JOURNAL v. HOWARD.

(Supreme Court of Georgia. Jan. 13, 1904.)

ACTION ON CONTRACT — PLEADING — AMENDMENT — INSTRUCTIONS — NEW TRIAL.

1. The original plea set up the defense of failure of consideration; and, whether or not this defense was at first pleaded with sufficient particularity, the subsequent amendments, which were allowed without objection, cured any defect of this nature in the original, and rendered it good as against the demurrers which were filed.

2. The request to charge was properly refused, because the effect of such an instruction would have been to authorize the jury to disregard the plain terms of the contract sued on, and to base their verdict on an understanding between the defendant and the plaintiff's agent which was not expressed in the written agreement.

3. The ground of the motion for a new trial complaining of the refusal of the court to al-

low counsel to ask a named witness a question therein set out cannot be considered, because it does not appear from the motion what the witness would have answered. *Hendrick v. Daniel*, 46 S. E. 438, and citations. The evidence of the defendant made out a complete defense to the action against him. The jury believed it, and rendered a verdict in his favor, which was approved by the trial judge, and we will not disturb it.

(Syllabus by the Court.)

Error from Superior Court, Early County; H. C. Sheffield, Judge.

Action by the Courier-Journal against T. M. Howard. Judgment for defendant, and plaintiff brings error. Affirmed.

R. H. Sheffield and W. O. Worrill, for plaintiff in error. O. Wilson, G. D. Oliver, and J. D. Kilpatrick, for defendant in error.

CANDLER, J. Judgment affirmed. All the Justices concur.

(119 Ga. 280)

EQUITABLE MORTG. CO. v. WATSON.

(Supreme Court of Georgia. Dec. 14, 1903.)

USURY—EVIDENCE.

1. The evidence being insufficient to support the verdict, the court erred in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Monroe County; E. J. Reagan, Judge.

Action by the Equitable Mortgage Company against M. M. Watson. Judgment for defendant, and plaintiff brings error. Reversed.

For former opinion, see 43 S. E. 49.

Payne & Tye, J. A. Noyes, and Cabaniss & Willingham, for plaintiff in error. Robt. L. Berner, for defendant in error.

FISH, P. J. The Equitable Mortgage Company sued Mrs. Watson on a promissory note for the sum of \$2,472.50 principal, besides interest and attorney's fees, and prayed for a general judgment, and for a special lien upon a certain tract of land which it alleged had been conveyed to it as security for the debt. The defendant filed several pleas, in two of which she alleged that the debt was infected with usury, and therefore the security deed was void, and the plaintiff was not entitled to the special lien prayed for. Upon a former trial the defendant abandoned all her alleged defenses except that of usury, admitted a prima facie case for the plaintiff, and assumed the burden of showing that the debt which the deed was given to secure was infected with usury. Upon that trial the jury found a general verdict in favor of the plaintiff for the principal and interest of its debt, but found in favor of the defendant upon the plea of usury, and against the special lien claimed by the plaintiff. There was a motion for a new trial, which was overruled, and the case was brought to this court, where the judgment overruling the motion for a new

trial was reversed; this court holding that "there was no evidence to authorize the finding against the special lien prayed for by the plaintiff." *Equitable Mortgage Co. v. Watson*, 116 Ga. 679, 43 S. E. 49. In rendering the judgment of reversal, this court gave direction that such judgment should not have the effect of setting aside the verdict in so far as it found in favor of the plaintiff for the principal and interest of its debt, and that the new trial should be had upon two issues only, viz., whether or not the plaintiff was entitled to the special lien prayed for; and, if so, should the judgment include attorney's fees? Page 685, 116 Ga., 43 S. E. 49. When the case again came on for trial in the lower court, counsel representing the parties agreed in open court to submit to the jury only the issue as to whether or not the plaintiff was entitled to the special lien prayed for, and to leave to the court the determination of the question in reference to attorney's fees. The jury found against the special lien. The plaintiff moved for a new trial, which was overruled, and it excepted.

The defendant admitted a *prima facie* case in favor of the plaintiff, and assumed the burden of showing that the deed under which the plaintiff claimed the special lien was void because of the existence of usury therein. In our opinion, she failed to establish her plea of usury, and therefore the verdict finding against the special lien is without evidence to support it. When the case was here before, this court held that "while, to support a plea of usury filed for the purpose of invalidating a deed given to secure a debt, the evidence need not establish the usury with the particularity required when it is sought to recover back or set off the usury, still the evidence must show with certainty that the transaction was tainted with usury." It also held: "In a given case, where the lender might reserve a portion of the loan without infecting the transaction with usury, it is incumbent on one who alleges usury to show the exact amount reserved." See first and second headnotes to the case. Three things were then established: First, that this was a case in which the lender might have reserved a portion of the loan without infecting the transaction with usury; second, that it was incumbent upon the defendant to establish with certainty that the transaction was tainted with usury; and, third, that it was incumbent on her to show the exact amount of the loan reserved, as under the facts of the case it was legally possible for the lender to reserve a portion of the loan without making the transaction usurious, which takes the case out of the well-settled general rule that, in order to successfully attack a deed as usurious, it is only necessary to show the bare fact that it is tainted with usury, without showing the exact amount thereof. Mr. Justice Cobb, who then delivered the opinion of the court, stated the documentary evidence introduced by the plaintiff, and

the testimony of Alonzo Richardson, who testified in behalf of the plaintiff, and concluded that this evidence authorized a finding in favor of the plaintiff, and that, if there was nothing to contradict this evidence, such a finding was demanded. The evidence which supports the plaintiff's case in the present record is substantially the same as that with which Mr. Justice Cobb, speaking for the court, was then dealing. The same documentary evidence was introduced upon this trial, and Richardson again testified substantially as he did before, except that upon this last trial he testified that, of the \$2,300 received from the mortgage company upon the note, the Atlanta Trust & Banking Company received \$172.50, and L. L. Ray \$115, as commissions for procuring the loan for the defendant.

In what respect, then, does the case as now made differ from the case as then made? Then the defendant relied mainly upon the testimony of her husband to show usury in the deed, which testimony this court held to be insufficient for such purpose. Now, her husband's testimony does not appear in the case, and she relies mainly upon her own depositions. The most cursory examination of the brief of her testimony contained in the record shows that she did not and could not know the facts which she undertook to prove by her testimony. It is true that when asked, upon direct examination, to "state whether or not any money was reserved by the Equitable Mortgage Company," she answered: "It was all kept back, except \$29, and what was paid in settlement of first loan. It was all reserved, except the amount used to pay off the first loan, and \$29 in cash delivered to me by my husband." But if she, as contended by her counsel, meant by this to say that the Equitable Mortgage Company kept back all the sum represented by the principal of the note, except the amount used to pay off the old loan and the \$29 delivered to her by her husband, her answers to the cross-interrogatories, irrespective of other circumstances in the case to which we shall presently allude, show clearly and conclusively that she did not and could not know this. She answered the cross-interrogatories as follows: "The money was borrowed for the purpose of paying off an existing loan on the land, in order to get the benefit of a lower rate of interest and to improve the farm. I suppose the old loan was paid out of the money, as this was the purpose of the loan. My husband received the money for the purpose stated. He attended to all my business. I was sick in bed at the time. I did not handle the money. My husband attended to it for me at my direction. I only handled \$29 which my husband brought me: I looked to the loan company to send me the remainder of the money, over and above what it took to pay off the existing loan. The other loan was satisfied. I don't know

of any other amount but the \$29 that was received by me or my husband on said loan. The other was kept back, and I looked to the lender for it. I don't know what was done with it, other than I have stated. I know it was kept back, because it was never sent to us. They kept back the difference between what was due on the old loan and the new. It was my understanding that I was to get, to the best of my recollection, \$475 in money, after paying off the first loan, when I signed the notes. My husband looked after the borrowing and paying out of the money for me. I received \$29 through my husband. I did not see any money paid my husband. He gave me only \$29. I only know he paid off the old loan, and gave me \$29 in cash. I know this from what my husband told me, and from the fact we never received any further notice from first loan. It is true I was examined before by interrogations, and the question was asked me, 'How much money was turned over to you, if any at all?' and I answered it: 'I don't remember. I don't think I got a cent. If I got any at all, it was a very small amount.' I think I added I received \$29. My recollection is that I testified as I do now. I don't remember whether I stated in my former interrogatories how much money was kept back. I know how much was kept back, because I only received \$29. I knew these facts when the other interrogatories were executed as well as I do now. I have talked to no one about interrogatories. No explanation has been given me as to why it is necessary to take my interrogatories again." We do not think it needs any argument to demonstrate that these answers of the witness show that she did not, of her own knowledge, know the fact which she undertook to establish by her testimony. And this character of hearsay evidence, though admitted, has no probative value. *Clafin v. Ballance*, 91 Ga. 412, 18 S. E. 309; *Eastlick v. Southern R. Co.*, 116 Ga. 48, 42 S. E. 499; *Suttles v. Sewell*, 117 Ga. 216, 43 S. E. 486.

But there is other and undisputed evidence in the case which shows that she could not personally know what amount of money the Equitable Mortgage Company actually loaned her. From this evidence it appears that she did not deal directly with the mortgage company, but in obtaining the money she dealt through a chain of agents. The documentary evidence shows that she constituted the Atlanta Trust & Banking Company her agent to procure a loan for her of \$2,300 for five years, at 6 per cent. interest, payable annually, to be secured by a mortgage on or a deed to her farm, to be made to such person or corporation as the trust company might procure to advance the money; that L. L. Ray was her agent in dealing with the trust company, and was duly authorized by her to receive the money procured by the trust company from the mortgage company. Here were two agents of hers interposed between

her and the mortgage company. Her third agent is shown by her testimony to have been her husband. So it appears from the evidence that her husband represented her in her dealings with Ray, Ray represented her in her dealings with the trust company, and the trust company represented her in her dealings with the mortgage company. Dealing through this string of agents, and, so far as the evidence discloses, having direct communication with only one of them—her husband—how was she to know how much money was received from the mortgage company? She knew how much money was received by herself from her husband. But her testimony shows that she did not know, of her own knowledge, how much he received from Ray, nor how much Ray received from the trust company, nor how much the trust company received from the mortgage company. What she actually received from her husband was not the question; but the vital question was, what did her agent the trust company receive from the mortgage company? Even if she had shown how much money her husband received from Ray, and also how much Ray received from the trust company, she would have failed to carry the burden which she assumed, unless she went further, and showed how much the trust company received from the mortgage company. If the amount received from the mortgage company by the trust company, shown by the evidence and admitted to have been the duly authorized agent of the defendant, was not such as to render the loan usurious, then the security deed was not tainted with usury. The evidence offered by the plaintiff shows what this amount was, and that it was not such as to render the loan usurious, and so this court decided when the case was here before. The evidence for the defendant wholly fails to overcome this, for the reason that it fails to show what amount she received from the lender in exchange for the note and the mortgage given to secure it.

We might well end this opinion here, but the able and ingenious counsel for the defendant in error has earnestly insisted that there is a circumstance, deducible from the evidence in the case, which shows that the \$29 in cash which the defendant testified she received from her husband was in fact all of the amount loaned to her by the mortgage company, except the sum used in settling the old loan upon the property. We will state the circumstances upon which the counsel relies. The defendant introduced a certificate of deposit issued by the trust company, reciting that the mortgage company had deposited with the trust company the sum of \$2,012.50, payable only after a certificate on the back thereof should be signed by Mrs. Watson, to the order of L. L. Ray, agent of Mrs. Watson, and upon a return of the certificate of deposit, properly indorsed. She also introduced the old note, with interest coupons attached thereto, which was taken up with proceeds

of the new loan. Richardson, the plaintiff's witness, as we have said, testified that, from the \$2,300 which the mortgage company turned over to the trust company for Mrs. Watson, the trust company received \$172.50 as commissions, and Ray received \$115 as commissions. The counsel contends that when the sum of \$287.50, the aggregate amount of these commissions, is added to the amount of the principal and interest that was due upon the old loan at the time it was paid off, and the total is subtracted from the amount of the certificate of deposit, there is left exactly \$29, the amount which Mrs. Watson testified she received from her husband in cash, and that this coincidence between her testimony as to the amount which her husband turned over to her, and the amount which would have been left if the commissions were paid out of the \$2,012.50 deposited to Mrs. Watson's credit with the trust company, shows that the mortgage company only loaned to her \$2,012.50. When the note representing the old loan was taken up, one of the coupons attached thereto was past due; and as both the note and the coupon, from its maturity, bore interest at 8 per cent. per annum, in making his calculation the counsel added together the principal of the note and the principal of the coupon, and then calculated the interest upon the aggregate sum from February 1, 1890, the date of the maturity of the coupon, to May 5, 1890, the date when the old note was paid off. But in making the calculation he computed the interest for a period of three months and five days, and, so computed, the mathematical result at which he arrived is correct. But as we understand it, the period of time for which the interest should have been calculated is three months and four days; and, if the calculation is made for this period, the difference between the amount of the certificate of deposit and the sum of the commissions and the amount due on the old loan will be \$29.36, instead of the exact amount which Mrs. Watson testified her husband paid her, viz., \$29. As, during the course of her examination, Mrs. Watson testified eight different times that the amount of cash which she received was \$29, never once intimating that that was not the precise amount which she received from her husband, and in three of these instances stated that it was "only" \$29, the force of the argument drawn from the alleged coincidence to which the counsel calls our attention is considerably weakened, if the interest is calculated for the correct period. But even admitting that the period for which the counsel calculated the interest was the correct one, we do not think much importance is to be attached to the result of his figures. At best, it raises a mere suspicion that the defendant's contention may be true, but does not prove that it is true. Let us consider for a moment the process of reasoning which must be pursued in order to reach the conclusion that the evidence shows "with

certainty that the transaction was tainted with usury," and shows "the exact amount reserved" by the lender, for this is what this court held the evidence must show in order to sustain the defendant's plea in this case. Mrs. Watson, without knowing the amount received from the mortgage company by her agent the trust company, without knowing the amount turned over by the trust company to her other agent, Ray, and without even knowing what amount her husband received for her from Ray, testifies that her husband turned over to her only \$29. Inasmuch as this happens to be the exact amount in cash which she ought to have received, if the mortgage company had only turned over to her agent the trust company the \$2,012.50 represented by the certificate of deposit, and from this the trust company and Ray had, respectively, deducted the commissions which Richardson testified they received, and the attorneys representing the holder of the old loan had received in settlement of the same neither more nor less than the exact amount due when the settlement was made, therefore Mrs. Watson has successfully carried the burden which she assumed, by proving "with certainty" that the transaction between the mortgage company and herself "was tainted with usury," and by showing "the exact amount reserved" from the loan by the lender. In our opinion, this reasoning is fallacious. The argument here indicated proceeds upon the theory that, because certain proved facts will harmonize perfectly with certain assumed facts, therefore the assumed facts must have occurred. It assumes that the \$287.50 of commissions received by the trust company and Ray were taken from the \$2,012.50 represented by the certificate of deposit, in the face of Richardson's uncontradicted testimony that they were taken from \$2,300 loaned by the mortgage company to Mrs. Watson, leaving the exact amount of the certificate of deposit, and in face of the fact that the trust company issued a certificate of deposit in favor of Mrs. Watson for \$2,012.50. It assumes that the amount paid in settlement of the old loan was neither more nor less than the sum due thereon when the settlement was effected. It assumes that the \$29 received by Mrs. Watson from her husband was all the cash which he received from Ray; that Ray received only \$2,012.50 from the trust company, and the trust company only received this sum from the mortgage company; and because these assumed facts will harmonize perfectly with the proved facts, viz., that the trust company and Ray received in commissions \$287.50, that Mrs. Watson got only \$29 from her husband, that the certificate of deposit was for \$2,012.50, and the amount due on the old loan was a certain sum, therefore Mrs. Watson has shown with certainty that the transaction was tainted with usury. When the case was here before, Mr. Justice Cobb said: "It is said, though, that under the documentary

evidence it appears that the trust company received from the plaintiff only \$2,012.50. It is true that the documentary evidence shows that this amount was received by the trust company, but that evidence does not show that this was all that was received, and Richardson swears positively that \$2,300 was received. If \$2,300 was received by the trust company, the transaction is not usurious. It therefore becomes necessary to determine whether there is any evidence on this point, contradicting Richardson, which would authorize a finding for the defendant." He concluded that there was nothing in the evidence offered by the defendant which contradicted Richardson's testimony. Then the strongest evidence for the defendant was that of her husband, who testified that he thought the lender reserved about \$475 at the time the loan was negotiated. Now the case in favor of the plaintiff is practically the same as it was then, and the only material change in the case for the defendant is the substitution of her testimony for that of her husband; and her testimony shows that, of her own knowledge, she knew nothing about the amount reserved by the lender. So, as much as we dislike to set aside verdicts upon mere questions of fact, we are constrained to again do so in this case. While it is very desirable that there should be an end of litigation, a court should never hesitate to set aside a verdict which is unsupported by evidence merely because such verdict is but a repetition of previous verdicts in the same case which have been set aside for a like reason.

Judgment reversed. All the Justices concur.

(119 Ga. 316)

FIDELITY & DEPOSIT CO. OF MARYLAND v. NISBET, Clerk of Superior Court, et al.

(Supreme Court of Georgia. Jan. 12, 1904.)

HARMLESS ERROR—PLEADING—AMENDMENT—STARE DECISIS—RECEIVER—ACTION ON BOND—EVIDENCE—ASSIGNMENTS OF ERROR—DIRECTING VERDICT.

1. Where a plaintiff, in whom the legal right of action existed, brought suit for the use of others, who were not named in the petition, but merely indicated therein by reference to a designated decree of the court, and the defendant demurred to the petition upon the ground that the names of the usees did not appear therein, and no copy of the decree referred to was attached thereto, the overruling of the demurrer, if erroneous, was rendered harmless, when the plaintiff during the trial amended the petition by inserting therein the names of the usees.

2. As the petition stated a cause of action in the plaintiff against the defendants, an objection to such an amendment upon the ground that there was not enough in the petition to amend by was without merit.

3. The unanimous decision of this court upon a question of law arising upon a given state of facts is, until reviewed and overruled, a precedent which must be followed in any subsequent case in which the same question is raised upon the same state of facts.

(a) The present case being a suit upon a receiver's bond, by the obligee therein against the

principal and surety, and the surety having set up the same defense as that made by the receiver in the case of *Tindall v. Nisbet*, 39 S. E. 450, 113 Ga. 1114, 55 L. R. A. 225, and the facts depended upon to support it being the same as those upon which the receiver relied in that case, it follows that the decision then rendered by this court in the contempt proceeding against the receiver controls the main question presented in the case now in hand.

4. Where evidence is offered and objected to, if it is competent for any purpose it is not erroneous to admit it.

5. There was no error in striking, upon demurrer, so much of an amendment to an answer as was based upon a wholly untenable theory, even though the demurrer did not attack the amendment upon this precise ground.

6. As there was nothing in the defense set up which could prevent any of the usees from entering a retraxit and withdrawing from the case, it was not erroneous to allow one of them to do so.

7. Assignments of error alleging that, for specified reasons, the court erred in directing a verdict in favor of the plaintiff, so far as a named usee was concerned, are without merit when there was nothing in the defense set up which could have prevented a recovery by the plaintiff for the benefit of this usee.

If any of these assignments of error was intended to raise the question whether this particular usee was estopped from recovering against the surety upon the receiver's bond, it is sufficient to say that the surety did not plead estoppel against such usee.

8. There was no error in directing a verdict for the plaintiff for the full amount sued for, and, if there was error in directing that the verdict should provide that such amount should be credited with the portion thereof to which the usee who had entered the retraxit would otherwise have been entitled, it was error of which the surety upon the receiver's bond could not complain.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; B. D. Evans, Judge.

Action by R. A. Nisbet, clerk of the Bibb superior court, and others, against the Fidelity & Deposit Company of Maryland. Judgment for plaintiffs, and defendant brings error. Affirmed.

Guerry & Hall, for plaintiff in error. Bacon, Miller & Brunson, C. P. Steed, Harde-man, Davis, Turner & Jones, John P. Ross, John I. Hall, Anderson & Grace, and Dessau, Harris & Harris, for defendants in error.

FISH, P. J. In the view which we take of this case, it is not necessary to determine all the questions raised in the court below, and presented here by the bill of exceptions, nor to state all the facts which are contained in the voluminous record. A full statement of the facts leading up to the present litigation will be found in the report which precedes the opinion in the case of *Tindall v. Nisbet*, 113 Ga. 1114, 39 S. E. 450, 55 L. R. A. 225. The main and controlling question in the case can be reached and decided without passing upon some of the minor questions made in the trial court, and by leaving unconsidered a considerable portion of the evidence for the plaintiff which was admitted over objections of the defendant, who appears as the plaintiff in error here; the consideration thereof

being rendered unnecessary by an agreed statement of facts which was introduced in evidence. The facts shown by the record which we deem necessary to an understanding of the decision we now make are as follows: On January 9, 1894, H. C. Tindall was duly appointed permanent receiver for the Macon Hardware Company. In the order of appointment, he was required to make and file in the office of the clerk of the superior court of Bibb county a good and sufficient bond, in the sum of \$25,000, conditioned for the faithful performance of his duties as receiver under the order, and such other orders as might be passed in the case; the bond to be approved by such clerk. The order of appointment further provided that the receiver should deposit all moneys coming into his hands in four banks located in the city of Macon, viz., the Exchange Bank, the American National Bank, the Central Georgia Bank, and the Macon Savings Bank; the deposits to be divided among these banks, as near as might be, in the proportion that the amount due by the Macon Hardware Company to each bank bore to the whole sum done by it to all of them, provided that the banks would pay interest upon such deposits, if left for the space of six months, at the rate of five per cent. per annum, and that no checks should be drawn against such deposits, except in the name of the receiver, and countersigned by the judge presiding of the court, except that checks drawn for expenses might be drawn without being so countersigned, but all such checks should specify for what expenses they were drawn. The terms of this order as to the manner in which checks should be drawn against the deposits were reiterated by orders subsequently passed by different judges presiding in the case. Tindall executed this bond, the Fidelity & Deposit Company of Maryland (hereinafter called the Fidelity Company) becoming the surety thereon. On the 25th of March, 1901, Nisbet, as clerk of the superior court of Bibb county, and the obligee in this bond, brought suit thereon against the obligors therein, alleging that Tindall, as receiver, had in his hands, in the administration of his trust, the sum of \$26,596.23, and that of this amount he had failed to account for the sum of \$6,021.17, which had been adjudged and decreed by the superior court of Bibb county to be in his hands, and that he had failed and refused to account for or to pay this latter sum, although required so to do by the orders and decrees of the court. No answer appears to have been filed by Tindall. In its answer the Fidelity Company denied the right and authority of the plaintiff to bring the suit, denied that the court had lawfully decreed that the plaintiff was entitled to recover any funds in the hands of the receiver, and denied that there were any such funds in the hands of the receiver at the date of the alleged decree of the court, and at the time of the filing of the suit against the receiver.

The answer further averred that there had been no accounting properly required of the receiver for the alleged fund, and that there had been no adjudication upon any proper proceedings of any amount or balance as against the receiver, and for such reason no suit could be legally brought against the Fidelity Company upon the bond on account of any alleged default of the receiver. It also denied that there had been any breach of the bond. It further averred that the receiver deposited the funds which came into the hands of the Exchange Bank, the American National Bank, the Central Georgia Bank, and the Macon Savings Bank, all of the city of Macon, dividing his deposits amongst said banks, as near as might be, in the proportions which the amount due by the Macon Hardware Company bore to the whole sum due by it to all of such banks, at interest at 5 per cent. per annum, etc.; that the order of the court expressly provided and commanded that no check should be drawn against such deposits, except in the name of Tindall as receiver, and countersigned by the presiding judge of the court; that the sum of money sued for was composed of portions of the money deposited in such banks, and loaned to them under these provisions of the order of the court, and that none of said sum was ever drawn out or collected of these banks by the court, or by the receiver upon checks signed by him and countersigned by the presiding judge of the court; and that the entire sum sued for was still in the hands of these banks, and still owing to the court, and to the receiver as such, and to the parties at interest in said cause, subject to be checked out or collected under order of the court, as provided in the order of the court. It alleged that the sum sued for, after being deposited in these banks under the order of the court, went into their custody for the court, and for the benefit of the parties at interest, and at the same time went out of the custody of the receiver, and that neither said sum, nor any part thereof, had since then come into the custody of the receiver, as such, and that while said sum was in the custody of these banks the defendant, Fidelity Company, owed the court or the parties at interest no duty concerning the same upon its bond or otherwise; that the banks had never had the legal power to dispose of the same, or any part thereof, or to pay up the loans made to them, or any part thereof, except under order of the court, or upon checks of the receiver countersigned by the presiding judge of the court, and that, so far as the sum sued for was concerned, these banks had not paid out the same, or any part thereof, under any order of the court, or upon any check of the receiver countersigned by the judge; that each of the banks was a party to the cause in which the receiver was appointed, as well as a depository of the court as to said sum, and, as such party and depository, had both constructive and actual notice of the orders of

the court relative to such fund, and was bound thereby and liable to pay over the sum sued for as might be required by the court.

By an amendment to its original answer, the Fidelity Company alleged that the money for which the suit was brought was deposited with and loaned to the Exchange Bank, the American National Bank, and the Central Georgia Bank, pursuant to the orders of Bibb superior court, and upon the terms of such orders; that this money had never been withdrawn or collected from said banks pursuant to the orders of said court, but these banks still had and were liable for it, and were bound to refund it as the court might direct, the amount thereof for which each bank was alleged to be liable being named; that, under the orders of the court, these banks became depositaries of the court, and became liable to pay to the court, or the receiver, or the creditors of the Macon Hardware Company, or to the clerk of the court, or to any person or persons the court might designate, the balance of the money deposited with them by the receiver, which they had never paid over to the court, or to any person authorized to receive such money; and that each of these banks should be required to pay the amount due by it, with interest, into court or to the parties entitled thereto, viz., the usees of the plaintiff. There was a prayer that, to this end, each of these banks should be made a party to this particular case, should be served with a copy of the proceedings, and be required to pay over said sum to the court or its order. This amendment was allowed, subject to demurrer, and each of these banks required to show cause why the prayers of the amendment should not be granted. Subsequently each of these banks demurred to this amendment, and the demurrers were sustained to so much of the amendment as sought to make these banks parties defendant to the case, and the Fidelity Company excepted.

At the trial the Fidelity Company demurred orally to the plaintiff's petition, and moved to dismiss it, upon the ground that no usee was named therein, and because no copy of the decree referred to in the petition was attached, and because it did not appear in the petition, or in any exhibit attached thereto, who the usees were. The court overruled this demurrer, and the Fidelity Company excepted. Subsequently the court allowed the plaintiff to amend the petition by inserting the names of various parties as usees, among them being the American National Bank and the Central Georgia Bank, and to this ruling the Fidelity Company excepted. After this amendment was allowed, the Central Georgia Bank filed a disclaimer of any interest in any recovery that might be had in the case, and asked to be dismissed as a usee plaintiff from the case, and entered "a retraxit on so being dismissed from said case." The court granted the application, over the objection of the

Fidelity Company, which thereupon excepted to this ruling.

At the close of the evidence "the plaintiff moved the court to direct a verdict for the plaintiff for all of the usees whose names had been inserted by amendment, including the American National Bank, but not including the Central Georgia Bank." The Fidelity Company resisted this motion, and moved the court to direct a verdict in its favor "in so far as the American National Bank was concerned." "The court granted the motion of the plaintiff, and overruled the motion of the Fidelity Company and directed a verdict for the plaintiff for the principal and interest against the Fidelity Company, less the amount the Central Georgia Bank would be entitled to." The case is here on writ of error sued out by the Fidelity Company.

1. The right of action for a breach of the bond was in the plaintiff, Nisbet, as clerk of the superior court of Bibb county; and he could have brought the suit without naming any usee at all, or, so far as the defendants were concerned, he could have sued for the use of any person or persons whom he might designate to take the proceeds of the action, provided, in so doing, he did not cut the defendants off from any defense which they would otherwise have. *Burke v. Steel*, 40 Ga. 217; *Buffington v. Blackwell*, 52 Ga. 129; *Gilmore v. Bangs*, 55 Ga. 403; *Cross v. Johnson*, 65 Ga. 717; *Davis v. Baker*, 71 Ga. 33; *Richmond & Danville R. Co. v. Bedell*, 88 Ga. 591, 15 S. E. 676; *Terrell v. Stevenson*, 97 Ga. 570, 25 S. E. 352; *Joiner v. Singletary*, 106 Ga. 257, 32 S. E. 90; *Norcross Manufacturing Co. v. Summerour*, 114 Ga. 156, 39 S. E. 870. But as the plaintiff brought his suit for the use of certain judgment creditors of the Macon Hardware Company, who were not identified in the petition otherwise than by reference to a designated decree of the court, we are inclined to think it would have been proper to have sustained the demurrer, unless the plaintiff either amended his petition by setting forth the names of the usees, or by striking therefrom all reference to them. A defendant might have a defense which he could set up against a usee, but could not urge against the person in whom the legal right to sue existed; and, where the plaintiff sues for the use of another, it would seem the defendant is entitled to know who the usee is, and good pleading requires that he should not be compelled to look beyond the petition in order to ascertain this. But if there were any errors in overruling the demurrer, it was cured when the plaintiff subsequently amended his petition by setting forth the names of the usees. The contention that he could not do this over the objection of the defendant Fidelity Company is without merit. The error assigned in the bill of exceptions is that there was not enough in the petition to amend by. There were a plaintiff, defendants, and a cause of action. No more was needed to enable the plaintiff

to amend his petition by naming the parties whom he chose to designate as usees. As a matter of fact, however, the amendment merely made perfectly plain, on the face of the petition, the names of the usees, who were already indicated therein by reference to a designated decree of the court.

2. During the progress of the trial the parties to the case entered into the following agreement: "It is agreed that the sum of \$6,021.27, the principal amount in dispute in this case, is represented by checks to that amount drawn and signed by H. C. Tindall as receiver of the Macon Hardware Company upon the Exchange Bank, the Central Georgia Bank, and the American National Bank, without being countersigned by the presiding judge of the court, and without any special order being granted allowing the drawing of said checks, and that all of said checks were paid by said banks (the Exchange Bank to the sum of \$2,901.53; the Central Georgia Bank, \$2,644.30; and the American National Bank, the sum of —) and that none of these checks had upon them any statement in reference to expenses; that said checks were paid by the several banks, and charged to the account of the receiver in said bank; that said checks were drawn by the said Tindall, and that he appropriated the money so drawn to his own use, and has never accounted for the same; and that the contention of the plaintiff was that the money so drawn was funds deposited in said banks by Tindall as receiver, while the contention of the Fidelity Company was that the money so drawn was not such fund, because, under the law and orders of the court, the money so drawn was not such fund, but was the moneys of the banks." This was agreed to unqualifiedly by all of the parties except the American National Bank, which did not object to any agreement made as to the other banks, but required proof as to itself, on the ground that it denied that it was a depository. The Fidelity Company thereupon introduced evidence for the purpose of showing that Tindall, as receiver, had drawn certain checks, which were not for expenses, and were not countersigned by the presiding judge, nor specially allowed by order of the court, upon said bank, which were paid by the bank, and the amount so drawn from such bank by him. The consideration and determination of this case are greatly simplified by this agreement made in open court. In view of the admissions made by the Fidelity Company in this agreement, some of the questions raised in the court below and brought to this court for decision become immaterial. Here is an agreement which, in the light of the decision rendered by this court in *Tindall v. Nisbet*, 113 Ga. 1114, 39 S. E. 450, 55 L. R. A. 225, absolutely settles the main and controlling question made in the case. That question was whether the money which Tindall, as receiver, drew from the Exchange Bank,

the Central Georgia Bank, and the American National Bank—three of the banks in which he had been required, by order of the court, to deposit the receivership funds—upon checks signed by him as receiver, but not countersigned by the judge of the court, nor allowed by any special order of the court, and not for expenses, was part of the trust fund committed to his keeping, or merely funds of these banks paid out by them to Tindall, not as receiver, but as a private individual. This was the great subject of dispute in the case, the Fidelity Company having set up the defense that as the orders of the court provided that no money, except for expenses, should be drawn by the receiver from the funds deposited in bank, without the check for such money being countersigned by the judge, and as the banks had either actual or constructive notice of these orders, the money which Tindall obtained from them upon checks drawn by him as receiver, not for expenses, and not countersigned by the judge, was no part of the receivership funds, and therefore, although Tindall appropriated it to his own use, and failed to account for it, he committed no breach of his bond as receiver in so doing, and hence his surety on such bond was not liable. This very question, except as to the effect of its decision upon the liability of the surety on the receiver's bond, was made by Tindall in the above-cited case, and was there decided adversely to him and to the contention of the Fidelity Company in the present case. It was there expressly decided: "If a receiver has been directed by the court to deposit a fund arising from the sale of property of the debtor in banks, subject to be withdrawn only on his check when the same has been countersigned by the judge presiding in the court which appointed him, and, in violation of his duty and in disregard of the order of the court, the receiver obtains such funds from the bank, on checks not countersigned, and appropriates the same to his own use, then, regardless of the question whether or not the bank is liable for such wrongful payment, such receiver is in direct contempt of the court, whose officer he is, and he may be attached and punished for contempt in disregarding the orders of the court, and also for a failure or refusal, when so ordered, to pay into court the fund so misappropriated."

3. It will be seen at once that the decision was by no means confined to the question whether or not Tindall could be attached and punished for contempt in disobeying the orders of the court in reference to the manner in which the money should be withdrawn by him from the banks, but it expressly determined that he could also be attached and punished for contempt for his failure or refusal, when so ordered, to pay into court the funds which he had withdrawn from the banks, upon checks not countersigned

by the judge, and appropriated to his own use. This latter question was the main one in the case, for the trial judge had "made the rule absolute, requiring [Tindall] to pay at once to the clerk the sum [of \$6,021.17], and ordered that he be committed to jail for contempt of court, and remain in custody until he can show that he has purged himself of the contempt by repaying the fund adjudged to have been misappropriated by him, and that he has been sufficiently punished, or by showing that he has been sufficiently punished, and is unable, by reason of his poverty, to repay said amount." 113 Ga. 1126. So it is perfectly clear that in that case it was decided, both by the trial court and by this court, that the money which Tindall withdrew from the banks upon checks signed by himself as receiver, and not countersigned by the judge, and not for expenses, was a portion of the receivership funds. He could not have been punished for contempt of the court because he failed to pay into court money which he had obtained from these banks, unless such money, when received by him from the banks, was received in his capacity as receiver of the Macon Hardware Company, and was receivership funds. It matters not whether the surety on the receiver's bond is or is not bound by the judgment rendered in that case. We may grant the contention of the Fidelity Company, so ably and forcibly presented here by its learned counsel, that it is not bound by that judgment, and has the right now to make the same question which the receiver then made, and to invoke a ruling by this court, upon identically the same facts, directly opposed to the one which was then rendered. Still the fact remains that this court then unanimously decided, on the very facts established by the agreement of the parties in this case, as a matter of law, that the funds which Tindall withdrew from these banks, upon checks signed by him as receiver, but not countersigned by the judge, were receivership funds, which he could be required to pay into court, and that, upon his failure to do so when so ordered by the court, he could be attached and imprisoned for contempt. It seems almost superfluous to say that when this court has, by a unanimous decision, decided the legal result of a given state of facts, it has established a precedent which, until the decision is reviewed and overruled, is bound to control any subsequent case in which the same question is presented on the same state of facts. If the legal effect of the facts established in Tindall's case was that he had misappropriated trust funds committed by the court to his keeping as receiver, the legal effect of these same facts, admitted by the surety, in the present case, is that Tindall misappropriated such funds.

4. The bill of exceptions recites that "the decree of February 22, 1901, was offered in evidence, and the Fidelity Company objected

to the same, and offered then and there to show that the same was void because rendered by consent, as contended by it; that the said decree was not accompanied by the record in the case, or any part thereof. And the court * * * overruled said objection, and denied the Fidelity Company said privilege." "The Fidelity Company at the same time objected further, specifically to that part of the decree that fixed the amount of the liability of Tindall on the ground that there were no pleadings to justify any findings, and because he had not been called upon to show cause or to make any account, the Fidelity Company claiming that for such reasons that part of the decree was not binding upon it; and the court overruled this objection also." Each of these rulings of the court is assigned for error. The plaintiff also offered in evidence the petition, the rule nisi, and the rule absolute in the contempt proceedings against Tindall. "The Fidelity Company objected on the ground that neither the petition, the rule nisi, nor the rule absolute was pleaded or referred to as fixing the liability of Mr. Tindall or the Fidelity Company, and the court overruled the objection, and allowed them all in evidence." This ruling is also assigned for error. We judge, from the record, that all of this documentary evidence was introduced before the introduction of the agreed statement of facts. It was certainly admissible in evidence for one purpose, if for no other, and the facts agreed upon render it unnecessary for us to decide whether or not it was admissible, as offered, for any other. It was admissible to prove the demand by the court upon its receiver for the principal sum for which the plaintiff sued. The decree, after finding that the receiver was chargeable with a stated amount, and distributing a certain sum therefrom, adjudged that there was left in his hands \$6,106.26, which he was required to pay over at once to the clerk of the court. The rule absolute in the contempt proceedings adjudged that the receiver was in contempt of court, and that, from the evidence, he was properly chargeable with the sum of \$6,021.17, for which he had failed and refused to account, and required him to at once pay said sum to the clerk of the court. Whatever may have been the scope of the purpose of the plaintiff in offering these documents in evidence, and whatever merit, if any, there may have been in the objections urged by the Fidelity Company to them at the time they were offered, it is quite evident to us that, in connection with the agreed statement of facts, they were admissible in evidence in so far as they established the fact that Tindall had been duly required by the court to pay over to the clerk of the court the amount of the receivership funds which he had wrongfully withdrawn from the banks and appropriated to his own use. They did, as we have just seen, establish this fact. If it were necessary for the plaintiff, in order to establish the breach of the bond, to prove any fact in addition to

those contained in the agreed statement, it was this, and this alone. After this agreed statement of facts was introduced, it mattered not under what pleadings or upon what evidence the court had found that Tindall had misappropriated funds committed to his keeping as receiver, and the amount of such funds for which he was liable. Independently of the court's findings upon this subject, the admitted facts established the misappropriation of such funds by Tindall, the amount of such misappropriation, and the fact that he had never accounted for the same. The decree of February 22, 1901, was also admissible for another purpose. It was certainly admissible for the purpose of showing the respective amounts due by the Macon Hardware Company to the plaintiff's usees. Clearly, as to this matter, it made no difference whether the decree was rendered by consent or not, as both the hardware company and these usees, its judgment creditors, were bound by it.

5. The court committed no error of which the Fidelity Company can legally complain in striking so much of the amendment to its answer as sought to have the Exchange Bank, the Central Georgia Bank, and the American National Bank made parties defendant to the case. It is immaterial whether this portion of the amendment was or was not subject to the demurrers respectively filed by these banks, as the Fidelity Company was not hurt by the action of the court thereon. We may say, however, in passing, that it was clearly subject to the demurrer of the Exchange Bank, which was in no sense a party to the case, not being one of the plaintiff's usees. The theory of the amendment was wholly untenable. It was the same as that of the original answer, with which we have dealt in discussing the main and controlling question in the case. The theory upon which the surety company based its defense, both in the original answer and this amendment, was that there had been no misappropriation of the receivership funds by its principal, because the money which Tindall withdrew from these banks in violation of the orders of the court, and applied to his own use, was not drawn from the funds deposited in the banks by him as receiver, but was money belonging to these banks, which they had advanced to him, and for which he was responsible to them alone, and that the funds for the recovery of which this suit was brought by the obligee in the bond were still on deposit in these banks, and they could be compelled to pay them into court. The purpose of the amendment was to have these three banks made parties defendant, in order that they might be compelled to pay into court money which they still held on deposit for the receiver. Now, we have seen that this court, upon facts the same as those presented in the present case, has decided that the receivership funds involved in this case have been withdrawn from these banks by

the receiver, and misappropriated by him. We have seen, also, that it makes no difference whether the surety on the receiver's bond was or was not bound by this ruling, as the decision of this court upon a question of law arising upon a given state of facts declares the law applicable to the same state of facts in any subsequent case. It necessarily follows that these banks could not be held liable upon the theory that the funds alleged to have been misappropriated by the receiver are still in their hands.

6. From what we have said in reference to the theory of the defense set up by the Fidelity Company, it follows that the court committed no error in allowing the Central Georgia Bank to enter a retraxit as to any interest in the sum for which the plaintiff sued, and to be dismissed as a usee plaintiff from the case. The theory that this bank still had on deposit a portion of the funds for the recovery of which the suit was brought, or that the money which it had paid out on checks drawn by the receiver in violation of the orders of the court had not gone in extinguishment of the amount due to the receiver upon his deposit account, was, as we have seen, untenable. Counsel for the plaintiff in error, in their brief, contend that the court erred in this ruling, because the Fidelity Company had pleaded, "in effect, set-off, and prayed for relief." We do not think that it had pleaded set-off, or anything in the nature of set-off, against this bank, or against any other of the plaintiff's usees. But even granting that there was anything in its pleas which could be given such a construction, it is apparent from its own showing that there was nothing upon which it could base such a plea. It had no claim of its own upon which to found a plea of set-off, for it had expended no money whatever in settlement of its liability upon the receiver's bond, and, until it had done so, it certainly could have no claim against the bank. Whether the Fidelity Company, after making good the loss occasioned by the malfeasance of its principal, would have any lawful claim against the banks which honored the improperly drawn checks of the receiver, is a question which does not arise in this case. Nor did the Fidelity Company's principal, Tindall, have any claim against this bank upon which the surety upon his bond could base a plea of set-off, for, under the decision in *Tindall v. Nisbet*, supra, the payment of his checks by the bank went in extinguishment of the bank's liability to the receiver; otherwise it could not have been held that the money which the bank paid on these checks to Tindall was receivership funds, for the misappropriation of which he was in contempt of court.

7. There are several assignments of error in the bill of exceptions upon the rulings of the court on the motions in reference to the direction of a verdict. It is unnecessary to deal here with those which are predicated upon the erroneous theory set up in the de

defendant's pleas, which we have already fully discussed. One of the assignments is that the court erred in directing a verdict in favor of the plaintiff, so far as the American National Bank was concerned, because the payment by this bank of the sum deposited with it by the receiver, upon the checks drawn by him in violation of the orders of the court, "was illegal and wrongful on the part of said bank, and the said bank, having thus illegally and wrongfully parted with such sum, had no right to retain or not account for the same, and at the same time recover an amount of the Fidelity Company upon its bond, thus recovering from said company, in effect, an amount of money it had illegally and wrongfully disposed of in manner aforesaid, without the Fidelity Company's knowledge of the same; the said company being entirely without notice and without fault as to said transaction." If this exception is intended to raise the question whether or not this bank was, as a usee plaintiff, estopped from recovering against the Fidelity Company, it is sufficient to say that the latter did not plead estoppel against the bank. It was nowhere alleged in the answer, or any of the amendments thereto, that this bank, or any other usee, was estopped from recovering against the Fidelity Company. It would take a very strained construction of the answer, as amended, to find the doctrine of estoppel even hinted at therein. The Fidelity Company took the broad and untenable position that the plaintiff was not entitled to recover in behalf of any of the usees, because the money for which he sued was still on deposit in this and two other named banks, and was lawfully subject to the receiver's checks or to the orders of the court. It fought the usees en masse, and not in detail. None of its pleas was directed against the specific interest of any particular usee, but its whole defense was based upon the theory that it was not liable at all, but the three banks were. It did allege that the action of the banks in paying the checks in controversy was wrongful and illegal, but it pleaded this, not by way of estoppel against the banks named as usees, but for the declared purpose of compelling the banks which had paid these checks to pay the amount of the receiver's alleged misappropriation into court, or to the judgment creditors of the Macon Hardware Company, and for this purpose it vainly sought to have these banks made parties defendant to the cause.

8. Another assignment of error is: "Because the court erred in directing the verdict as follows: For the plaintiff for the full amount sued for, principal and interest, for all of said usees, notwithstanding the Central Georgia Bank had, under order of the court, entered a retransit in so far as its right of recovery was concerned, and for the credit of said unknown amount upon the verdict and judgment after the same should be ascertained." The court committed no error in direct-

ing a verdict for the full amount sued for, and if there was error in directing that the amount of the interest in such verdict which the Central Georgia Bank would have been entitled to, if it had not withdrawn from the case, should be credited on the verdict and judgment, it was error in favor of the Fidelity Company and against the plaintiff. In our opinion, the plaintiff had the right to recover the full amount for which he sued. He did not sue for specific amounts in favor of the respective usees, but for one entire sum for all of them; and, notwithstanding the retransit by this bank, he was entitled to recover the whole amount involved in the breach of the bond, if the same was not more than enough to settle the established claims of the remaining usees against the Macon Hardware Company. Had the plaintiff sued without making any usees, he clearly would have been entitled to recover the full amount misappropriated by the receiver, in order that he might bring it into court for distribution; and, if the established claims against the Macon Hardware Company were not sufficient to exhaust the sum recovered, the balance would go back to such company. As he did sue simply for certain named judgment creditors of the hardware company, the fact that one of such usees disclaimed any interest in a recovery by the plaintiff simply inured to the benefit of the remaining usees, if their claims were sufficient to absorb the sum recovered. In such an event, there would be simply more to divide among the remaining usees. As it is clear from the evidence that the amount for which the plaintiff sued was not sufficient to pay the usees remaining after the retransit by the Central Georgia Bank, the Fidelity Company was not injured, but benefited, by the verdict and judgment directed. If the amount to be credited upon the judgment cannot be legally ascertained, the Fidelity Company is not hurt, for, until it is ascertained and credited on the judgment, the judgment cannot be enforced. We apprehend, however, that it can be mathematically and accurately ascertained by a calculation based upon the decree of February 22, 1901, and the judgment in this case.

Judgment affirmed. All the Justices concurring.

(119 Ga. 300)

MURPHY v. STATE.

(Supreme Court of Georgia. Jan. 12, 1904.)

CRIMINAL LAW—ACCUSATION—NEW TRIAL.

1. Under the act establishing the city court of Fayetteville, which act provides (Laws 1902, p. 133, No. 189, § 81) that "the defendants in criminal cases in said city court shall be tried on a written accusation, setting forth plainly the offense charged, founded upon the affidavit of the prosecutor," etc., the affidavit on which the accusation against the plaintiff in error was founded was sufficient. See *Brown v. State*, 34 S. E. 1031, 109 Ga. 570, 572, and cases cited; *Glass v. State* (this day decided) 46 S. E. 435.

2. There being evidence before the jury upon which they could well have found the defendant

guilty, and the judge having on a motion for a new trial approved their finding, this court declines to order a new trial.

(Syllabus by the Court.)

Error from City Court of Fayetteville; W. B. Hollingsworth, Judge.

Gus Murphy was convicted of crime, and brings error. Affirmed.

J. W. Wise, for plaintiff in error. A. O. Blalock, Sol., for the State.

TURNER, J. Judgment affirmed. All the Justices concurring.

(119 Ga. 331)

GEORGIA R. & BANKING CO. v. FRAZIER.
(Supreme Court of Georgia. Jan. 12, 1904.)

RAILROADS—TRESPASSER ON TRAIN—
EVIDENCE.

1. When this case was here before (83 S. E. 996, 108 Ga. 807), it was decided that the evidence did not authorize a recovery by the plaintiff. After a careful reading of the record in that case and the one now before us, we find no substantial difference as to the main fact relied upon in the court below for a recovery. The impeachment of the defendant's conductor, relied upon in this case, was not as to the fact which it was necessary for the plaintiff to establish, but as to his habits. There was no evidence which would have authorized a finding that the conductor either kicked the boy off of the train, or so frightened him that he jumped off.

(Syllabus by the Court.)

Error from Superior Court, Taliaferro County; H. G. Lewis, Judge.

Action by Alex Frazier against the Georgia Railroad & Banking Company. Judgment for plaintiff, and defendant brings error. Reversed.

See 33 S. E. 996.

Jos. B. & Bryan Cumming and Jas. B. Park, for plaintiff in error. Saml. H. Sibley, for defendant in error.

SIMMONS, C. J. Judgment reversed. All the Justices concurring.

(119 Ga. 307)

COLEMAN v. NELMS, Sheriff.

(Supreme Court of Georgia. Jan. 12, 1904.)

HABEAS CORPUS—CONVICTION OF VAGRANCY—
BOND—RIGHT TO JURY.

1. The plaintiff in error having been tried and found guilty by a jury on an accusation charging her with being a vagrant, under the act of August 17, 1903 (Acts 1903, p. 46), it will be presumed, on a habeas corpus sued out by her, that, before the court passed sentence upon her, she was allowed an opportunity to give bond for her future industry and good conduct for one year, or would have been allowed such opportunity if she had asked for it.

2. The matter of giving a bond under the act mentioned, after verdict, is a proceeding entirely before the court, and requires no action by the jury. See Morton v. Nelms, 45 S. E. 616, 118 Ga. 786.

3. The verdict of a jury having been rendered, as above indicated, even if sentence was improperly passed upon the accused without

affording her an opportunity to give bond for future good behavior, she would not be entitled to be discharged upon habeas corpus, but should be held in the custody of the sheriff to await proper sentence in the event she failed to give such bond. Russell v. Tatum, 30 S. E. 812, 104 Ga. 332; Manor v. Donahoe, 43 S. E. 719, 117 Ga. 304.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Petition of Pinky Coleman for a writ of habeas corpus to J. W. Nelms, sheriff. From an order refusing the writ, petitioner brings error. Affirmed.

S. C. Crane, for plaintiff in error. A. J. Orme, Sol., for defendant in error.

TURNER, J. Judgment affirmed. All the Justices concurring.

(54 W. Va. 450)

MILLER v. GILLISPIE et al.

(Supreme Court of Appeals of West Virginia.
Nov. 22, 1902.)

FRAUDULENT CONVEYANCE—TITLE IN WIFE—
PRESCRIPTION—FRAUD—EVIDENCE—DEF-
POSITIONS—USE IN ANOTHER SUIT.

1. When a wife claims, in a contest against the creditors of her husband, to have purchased and improved real estate, there is a presumption against the bona fides of the transaction, which she cannot overcome except by clear and full proof that the property and improvements were paid for by her with money derived from some source other than her husband.

2. Fraud is to be legally inferred from the facts and circumstances of the case, when they are such as to lead a reasonable man to the conclusion that the property was purchased and improved by the husband with intent to hinder, delay, or defraud existing or future creditors.

3. When, in such case, the transaction is attacked by a subsequent creditor upon the ground of actual fraud, the fact that the transfer or conveyance is not upon a consideration deemed valuable in law may be treated as evidence of the fraud, and need not be alleged in the bill.

4. In the absence of an agreement to the contrary, depositions taken in one suit cannot be used in another, unless the parties are the same, or are in privity, and the subject-matter of the suits is also the same.

5. A deposition taken by the defendant in a suit brought by one creditor to set aside a fraudulent conveyance cannot be used by the defendant in another suit brought by another creditor to impeach the same conveyance, unless by agreement.

(Syllabus by the Court.)

Appeal from Circuit Court, Webster County; W. G. Bennett, Judge.

Bill by Rachel F. Miller against J. M. Gillispie and Mary Gillispie. Decree for defendants, and plaintiff appeals. Reversed.

C. C. Higginbotham, Edward A. Brannon, Robert C. Linn, and J. M. Hoover, for appellant. Mollohan, McClintic & Mathews, for appellees.

POFFENBARGER, J. Assuming that the court properly overruled the demurrer to the

bill in this cause, the sole question is whether the lower court properly held that certain real estate owned by Mary E. Gillispie, and situated in the town of Addison, Webster county, was purchased for her by her husband, who is insolvent, in fraud of his creditors, or by her with money so fraudulently furnished by him. Mrs. Gillispie seeks to overcome the presumption which legally arises against her by showing that the lot was bought by her with money of her own, money given to her by her father, money loaned to her by her father, money borrowed by her from her brother-in-law, and money made by her in keeping boarders, selling milk and butter, etc. The two adjoining lots cost \$425. The first was conveyed to her by Benjamin Hamrick and wife by deed dated August 18, 1894, in consideration of \$200, of which \$100 was paid in cash, and the balance, due in one year, secured by a lien reserved in the deed. The other lot was conveyed to her by the same parties by deed dated October 16, 1897, in consideration of \$225, the deed reciting the receipt of the purchase money. On the first lot so purchased there has been erected a dwelling house. The contract price for it was \$625, exclusive of the painting, which cost \$75, and the chimneys and flues, costing \$75. Other improvements were put upon the property, including a cellar, costing, as stated by Mrs. Gillispie, \$62; a barn, costing \$65; a well, costing \$40; a pump, \$15; and a fence, \$15. The total cost of the property and improvements was about \$1,397. Mrs. Gillispie says she obtained the money with which this property was bought and improved in the following amounts and from the following sources: Money she had when married, June, 1894, \$50; gift from her father, \$20; from David Morton note, \$20; from David Morton, borrowed money, \$10; loan made to her by Delbert Gillispie, \$150, for which note was given December 18, 1894; loan made to her by Benjamin Hamrick, \$200, for \$100 of which a note was given, dated February 4, 1895, and for the residue of which no note was taken; loan made to her by her father, I. W. Skidmore, \$400, for which she gave her note, dated June 24, 1895; keeping boarders in the year 1896, \$308.10; keeping boarders in the year 1897, \$106.10; boarding Delbert Gillispie for three years and eight months at \$10 per month, \$440; boarding Cherry Woodsell, \$80; boarding Rosa Gillispie, \$50; milk and butter sold, \$50; gift from her father, \$100—making a total of \$1,984.20. In support of her contentions and testimony, I. W. Skidmore says he furnished her the money which she claims he furnished. Delbert Gillispie testifies that he loaned her said sum of \$150, and Benjamin Hamrick testifies that he loaned her the \$200 which she says she borrowed from him. She repaid him \$100 with the last \$100 she received from her father, Skidmore. It is not denied that she kept boarders, although it is not admitted

that she received from that source the amount she claims to have made thereby, nor that the profit realized was so large as she claims it was. Moreover, it is contended that her table was largely supplied from the store of her husband, although she says she had a good garden and kept cows. An effort is made to show that her father's circumstances were not such as to have warranted such liberality on his part toward his daughter. While he owns real estate assessed as containing 358 acres, valued at \$1,306, it appears that the principal part of it is wild land, and only about 75 acres of it are cultivated. In the year 1890 he was assessed with personal property amounting to \$574, including 2 horses valued at \$90, 12 head of cattle valued at \$163, and 31 head of sheep valued at \$39. For the years 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, and 1899 his personal property valuations for the purpose of taxation were, respectively, \$456, \$636, \$389, \$238, \$223, \$232, \$279, \$229, and \$191. While some of the assessors say he mentioned the fact that he had loaned his daughter \$400, he was never assessed with it, for the reason that he explained that it was not to be repaid unless he should need it. Other witnesses testify to his having borrowed, or attempted to borrow, small amounts of money at various times; while others testify to his having loaned money at various times in small amounts, to his having paid his bills promptly, and to his always having had money about him. It appears that he has been a thrifty and economical man, and he swears he considers himself worth seven or eight thousand dollars. The improbability of Delbert Gillispie's having loaned the defendant any money is insisted upon for the reason that he was clerk in a store at a salary of about \$15 per month, with an allowance of \$10 per month for board, and had no money, or very little, at the beginning of his services in January, 1893. In 1895 he was assessed with only \$20 worth of personal property; in 1896 with \$100, of which \$55 was listed under the head of "Money, credits, and investments"; in 1897 with \$90, of which \$50 was listed under said head; in 1898 with \$200, of which \$150 was listed under said heading. He says he had about \$50 when he came there, besides \$15 or \$20 due him from another person, which he collected; that he sold a watch for \$10 or \$12; that he taught a school of penmanship, from which he realized \$25 or \$30; and that he made as much as \$50 from the sale of books, rings, and other articles not kept in the store by his employers. But on March 7, 1894, he had a settlement with his employers, which showed a balance due him of \$42.34, as shown by the books, and on the 18th day of December, 1894, he claims to have made this loan, and to have had in money at that time about \$277, from which to make it. The ability of Hamrick to make his loan of \$200 seems to be conceded.

Other facts bearing upon the question of the bona fides of the transaction between Mrs. Gillispie and her husband necessitate the traversing of a good deal of ground. In 1892 the firm of D. M. Miller & Co., engaged in timber and mercantile business, was composed of D. M. Miller and J. M. Gillispie. Afterwards, and before the dissolution of the copartnership, J. M. Gillispie and his codefendant, Mary E. Gillispie, intermarried. The business of the firm was conducted by Miller and Gillispie. They had a store at Cowen, Webster county, under the personal supervision of Miller, and another at Addison, under the personal control of Gillispie. Delbert Gillispie was a clerk in the store at Addison. He was a brother of J. M. Gillispie, and after the marriage of the latter boarded with him, as did also the wife of Delbert Gillispie part of the time. On the 27th day of January, 1896, the firm was dissolved by the death of Miller. After that event the plaintiff herein, Rachel F. Miller, the widow of D. M. Miller, and J. M. Gillispie, formed another copartnership under the firm name of J. M. Gillispie & Co., and continued the business until in March, 1897, when the new firm was dissolved. The dissolution agreement provided that Gillispie should take the stock of goods and store accounts of the firm, pay all debts of the firm due or to become due, and secure to the plaintiff the payment of one-half of the surplus. An invoice showed the assets at that time to be about \$7,600 of which the stock amounted to \$4,200 and the accounts to \$3,400. Gillispie continued the business at Addison until in January, 1898, when he made an assignment for the benefit of his creditors, whose claims amounted to several thousand dollars in excess to the amount realized from his assets. He admits that the business of the firm as first composed was profitable, and that the new firm made a little money during the first year, but nothing the second year; and he claims the business after the retirement of Mrs. Miller was crippled by reason of G. A. Lynch, administrator of D. M. Miller, deceased, and agent of Mrs. Miller, having taken from him accounts amounting to about \$2,500, in addition to some money paid him. Lynch admits having received \$689.73 from Gillispie, and says he thinks he received accounts and evidences of debt in addition thereto, but does not remember the amount. His settlement as administrator shows heavy liabilities against D. M. Miller, nearly all of which appear to have been for merchandise, but how much of it grew out of his partnership with Gillispie does not appear.

The debt which is sought to be collected by this suit was originally contracted by the firm of D. M. Miller & Co. One note was for \$200 dated October 28, 1895, and payable to the order of C. C. Miller. The other was for \$100 dated December 14, 1895, and payable to the same person. On the 25th day of

April, 1896, the firm of J. M. Gillispie & Co. took up the two notes and gave in lieu thereof their own note for \$300 payable to C. C. Miller. This note was part of the firm indebtedness assumed by Gillispie in the dissolution agreement. In May, 1898, F. J. Hively, to whom the note had been assigned, recovered a judgment against Gillispie and Mrs. Miller as partners, and afterwards enforced payment thereof in a chancery suit by the sale of a lot belonging to Mrs. Miller, the plaintiff in this suit.

During the time covered by the purchase of the lots by Mrs. Gillispie and the making of the improvements thereon, as hereinbefore set out, she had dealings in the store of Miller & Co., Gillispie & Co., and J. M. Gillispie, relating directly to her transactions in reference to the purchase and improvement of this property. Part of the purchase money of the lots was paid by J. M. Gillispie to Hamrick, but Mrs. Gillispie and he say she furnished the money, and he acted as her agent. She claims to have had an account at the store, carried on a separate book, which has not been produced, and that she paid her grocery account at the store, but says it amounted to but very little—\$50 or \$60 in 1896, and \$35 or \$40 in 1897. She admits that the \$625, the contract price for building the house, was paid to Brooks Watson, the contractor, partly in merchandise from the store of D. M. Miller & Co. and partly in money. Watson's store account, including part of the lumber, as having been received from "Harris Boys," and charged as \$216.17 amounts to \$398.52. At the end of it, under date of June 30, 1895, appears the entry, "Cr. By Mary Gillispie, \$398.52," closing the account of Watson. She says she paid that amount in cash to her husband in settlement of Watson's account at the store out of the \$400 received from her father about June 24, 1895, but she took no receipt for anything she claims to have paid him. In another place she says of the Watson account: "I paid it to Mr. Gillispie. Part of it was paid in cash and part of it was paid in Delbert Gillispie's board." At another place she says \$200 was paid in cash to the Harris boys, and that Watson "got part of the rest of it out of D. M. Miller & Co.'s store in goods, and the balance of it I paid in money." Again, she says, in reference to the \$200 paid for the lumber, "I can't answer as to the exact amount, but I paid all that they got out of the store, and, if they were paid any money, Mr. Gillispie paid it, and I paid it back to him." While Mrs. Gillispie says her husband had nothing to do with her business of keeping boarders, she admits that he collected a part of the money from her boarders, but says he paid it over to her. Mr. Little, who did the painting, took part of his pay out of the store, and Mrs. Gillispie says she settled his store account. The same explanation is made as to the payment of Mr. Dilley, who dug the well. Mrs. Gil-

lispie admits that the first \$100 paid on the lots was handed to Mr. Hamrick by her husband, but says it was her money.

There is some evidence bearing directly upon the question of good faith toward creditors on the part of the defendants. Minnie Gillispie lived with the defendants while they were building the house and for a short time before. She testifies that she heard J. M. Gillispie say to his wife they were going to buy the lot, and that he asked his wife to pay \$50 on it, and said, if she would do so, he would pay the balance. She further says Mr. Gillispie wanted the deed made to her, fearing something might happen, as it was while they were in the store, and there was a possibility of their breaking up, and leaving them without a home. Mrs. O. E. Lynch says she resided at Addison at the time the Gillispies were married, and that they boarded with her for a short time after they were married, and that at the time Mrs. Gillispie had \$60. She says Mrs. Gillispie told her she had paid \$50 on the lot first purchased, and that Mr. Gillispie had told witness he would pay the remainder on the lot. She further says: "He said he was going to buy and build them a home, and he intended to put it in her name, and that they was in business, and she didn't know what might happen, and that, if anything happened him, it would leave a home for her and her family." Mrs. Lynch also says that in December, 1896, she was at the dwelling house of the Gillispies, and "went to dress their baby, and their articles of clothing were in the trunk. His wife requested me to get them out. I went to get the clothing, and saw something tied up in a piece of zephyr cloth, and, being very heavy, to the looks of it, I opened it, and saw what it contained, and it was gold." She says there was very nearly a quart of it, and she had heard Gillispie say he intended to keep what gold he got. She also says she heard him say that, if Watson were not always in his debt, he would dismiss him from building the house.

The foregoing statement shows that the first lot was purchased, and the transaction sought to be impeached here was begun, before the debt here sought to be collected was originally contracted. Nearly \$400 had been paid on the contract for the construction of the house prior to the giving of the notes representing the original debt. This payment was made June 30, 1895, and the first note given to C. C. Miller bears date October 28, 1895, and the other one December 14, 1895. The testimony shows that the improvements, or at least the house, were completed early in the year 1896, not long after the debt was contracted. The note for one-half of the purchase money of the first lot became due August 18, 1895, but just when it was paid does not appear. The deed for the second lot was dated October 16, 1897, and Benjamin Hamrick's receipt for the entire purchase-money of the two lots is dated October 22,

1897. It seems to be established by the evidence that the improvements were not completed until after the debt was contracted. If Gillispie furnished any of the money, it was a gift to his wife, and stands upon the footing of a voluntary conveyance to her, for it is not pretended that she purchased anything from him. As to part of the gift or voluntary settlement, the plaintiff must be treated as a subsequent creditor and as to the balance as an existing creditor. But, if it be established that the gift was made with intent to defraud the creditors of Gillispie, either existing or subsequent, then it is wholly unimportant whether the plaintiff was a creditor at the time of the perpetration of the fraud or became a creditor afterwards. This is well settled in *Lockhard v. Beckely*, 10 W. Va. 87, where it is held that: "If it be shown that there was mala fides or fraud in fact in the transaction, whether the actual fraudulent intent relates to existing creditors or is directed exclusively against subsequent creditors, the effect is precisely the same, and subsequent creditors may, upon the strength of such fraud, successfully impeach the conveyance." Nor is the distinction laid down in the books between fraudulent conveyances and voluntary conveyances very important here, for in the same case it is held that a conveyance or transfer may be fraudulent and voluntary at the same time. "A voluntary conveyance, as to subsequent creditors, is not void merely on the ground that it was voluntary, and the party indebted at the time it was made; yet upon the question whether it is fraudulent in fact it is proper to consider the circumstances of its being voluntary, and the party indebted at the time; and, if additional circumstances connected with these two be sufficient to show fraud in fact, it is void as to subsequent creditors." So the only inquiry here is whether, upon all the evidence and the circumstances disclosed, there was fraud in fact within the meaning of the principles of law relating to fraudulent conveyances.

During the period covered by the purchase and improvement of these two lots, J. M. Gillispie undoubtedly handled considerable amounts of money, and had the opportunity to secrete in his trunk, in fraud of his creditors and of his copartner, a considerable sum of money in gold, as stated by Mrs. Lynch; probably not so much as she testifies to, but she says she did not measure or count it. From his own testimony it appears that the firm of D. M. Miller & Co. carried on a considerable business, having assets at the time of the death of Miller amounting to about \$12,000 and owing debts amounting to \$8,900. Gillispie had been in the firm then for about four years. At that time he claims to have been worth about \$800. It is not probable that he had been worth more than that at any other time of his connection with the firm. He said the firm had only six or seven hundred dollars over and above its indebted-

ness in the latter part of the year 1893, when the store was burned out. This may be urged as a reason why it devolved upon his wife to borrow money and provide a home, but it does not eliminate the fact that her husband was handling considerable amounts of money, and could easily have diverted enough of it to make that provision. The crucial question is whether he did it. It would be difficult to hold, in the face of the evidence, that the father of Mrs. Gillispie did not give and loan her the money which he says he did. The same is true as to what she claims to have borrowed from Hamrick. As to the loan made from Delbert Gillispie, there is less certainty as to his ability to make it, but he swears he did so, and produces the note. But in this connection it must be remembered that Mr. Skidmore did not apply this money himself to the purchase and improvement of the property, nor did Mr. Hamrick or Delbert Gillispie. Nor in the case of Mr. Hamrick is it clear that his transactions were had with Mrs. Gillispie personally, for she says that the \$100 paid Hamrick on the purchase money was handed to him by Mr. Gillispie, although it was her money. Hamrick himself speaks in general terms. Little, the man who did the painting, only mentions \$5 as having been paid to him in cash by Mrs. Gillispie. As to how much she paid in person to any of the contractors, she is silent, although she says she paid part of it in cash. Granting that she borrowed all the money she says she borrowed, it does not follow necessarily that she put that money into the property, nor does it exclude the inference that it was paid for by her husband. It only shows she had some money which she could have paid on the property. But her husband had in his hands money with which he could have paid all on the property. She did very little of the actual paying. He did practically all of it. As to the money derived from keeping boarders, and sale of milk and butter, the evidence is uncertain and inconclusive both as to the amount thus made and as to whether the profits belonged to the wife. Somebody had to cultivate the garden, the family had to be clothed as well as fed, and the groceries came from the store, and only the defendants testify that Mrs. Gillispie paid for them. There is not even a book to corroborate them. Feed had to be furnished for the cows, and that, no doubt, came from the store.

That the firm of D. M. Miller & Co., was carrying a considerable indebtedness during the period covering these transactions is certain. Two witnesses testify directly to the declaration of an intention on the part of both Mr. and Mrs. Gillispie to purchase the first lot with the money of J. M. Gillispie, except as to \$50 of it, and have it conveyed to Mrs. Gillispie for the express purpose of providing a home for themselves against a possible reverse in business. In the absence

of any showing to the contrary, the law would make this actual fraud against the creditors of the husband. These statements are denied by the defendants, but the circumstance of practically all of this business having been transacted by J. M. Gillispie, much of the work and materials having been paid for out of the store, and the absence of the account which Mrs. Gillispie claims to have had with the store, all tend to establish the execution of the purpose which these two witnesses say the defendants declared in their presence. There must be added to this the fact that a business admittedly solvent in January, 1896, passed under the management of J. M. Gillispie, and made money for another year, and became wholly insolvent and indebted to the extent of thousands of dollars in excess of its assets in January, 1898, unattended by any great sudden loss, as by fire, flood, or other inevitable circumstance.

To overcome the presumption of fraud arising from the evidence and the facts shown, the wife must establish her purchase of the property with means derived from sources other than her husband by full and clear proof. *Stockdale v. Harris*, 23 W. Va. 499; *McMasters v. Edgar*, 22 W. Va. 673; *Rose v. Brown*, 11 W. Va. 122; *Core v. Cunningham*, 27 W. Va. 206; *Herzog v. Weller*, 24 W. Va. 203; *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664; *Spence v. Smith*, 34 W. Va. 697, 12 S. E. 828; *Martin v. Warner*, 34 W. Va. 182, 12 S. E. 477. "In a contest between the creditors of the husband and his wife, owing to the great facility which the married relation affords for the commission of fraud, there is, as there should be, a presumption against the bona fides of the transaction, which the wife must overcome by clear and satisfactory evidence." *Crowder v. Garber* (Va.) 34 S. E. 470. This court has declared the same rule in different language in *Walker's Adm'x v. Peck*, 39 W. Va. 325, 19 S. E. 411; *Wood v. Harmison*, 41 W. Va. 376, 23 S. E. 560.

Enough has been said to indicate clearly that the evidence adduced by Mrs. Gillispie in support of her contentions does not measure up to this requirement. Another familiar principle peculiarly applicable to this case is that "fraud is to be legally inferred from the facts and circumstances of the case when those facts and circumstances are of such a character as to lead a reasonable man to the conclusion that the conveyance was made with the intent to hinder, delay, or defraud existing or future creditors." *Lockhard v. Beckley*, 10 W. Va. 87; *Livesay v. Beard*, 22 W. Va. 585; *Sturm v. Chalfant*, 88 W. Va. 249, 18 S. E. 451. The evidence of actual payment by Mrs. Gillispie is narrowed down, as has been shown, to the testimony of herself and her husband, and numerous cases are found in the Reports in which such evidence is held insufficient as against facts and circumstances giving rise

to the inference of fraud. The rule was devised to cover just such cases. But for it creditors would not often be able to impeach a fraudulent conveyance.

The defendants, by cross-assignment of error, say the court erred in overruling the demurrer to the bill; but it is sufficient. It sets forth clearly and fully the indebtedness of the defendant J. M. Gillispie, shows the recovery of the judgment against Gillispie and Mrs. Miller, and the enforcement of the payment of it out of the real estate of Mrs. Miller in the chancery suit; and with it are filed as exhibits a transcript from the justice's docket showing the issuance and return of an execution unsatisfied, a copy of the decree ordering a sale of the real estate of Mrs. Miller, and reciting the assignment of J. M. Gillispie, and a copy of the decree confirming the sale thereof. It further alleges that J. M. Gillispie paid the purchase money of the lots, and had them conveyed to his wife with intent to hinder, delay, and defraud his creditors; and that he procured the improvements to be put upon the property, and paid for them with his own money, with the like intent. The prayer is that the lots may be held liable for the plaintiff's debt, and sold, and the proceeds applied to the payment of it. There is no allegation of the insolvency of J. M. Gillispie, but the fact appears from the exhibits. That is sufficient. The exhibits are parts of the bill. *Sadler v. Taylor*, 49 W. Va. 104, 38 S. E. 583.

It is also contended that the bill should have marked the distinction between a fraudulent conveyance contemplated by section 1 of chapter 74 of the Code of 1899 and a voluntary conveyance as contemplated by the second clause of section 2 of said chapter. As has been shown, the bill sufficiently charges fraud, and the fact that the transfer is not upon a consideration deemed valuable in law may be treated merely as a fact tending to establish fraud. The bill may properly treat it as matter of evidence, and omit any mention of it.

Prior to this suit another had been brought against the defendants by the Horner-Gaylord Company to impeach the same transaction on the ground of fraud, and in that suit the depositions of Mary E. Gillispie, J. M. Gillispie, and Delbert Gillispie were taken and filed. These depositions seem to have been filed by the defendants in this suit as exhibits with their depositions taken herein. "The rule is that depositions taken in one suit cannot be used in another suit unless the parties are the same or are in privity and the subject involved in the suit is also the same." 6 Ency. Pl. & Pr. 579. It excludes the depositions in the former suit, for neither the parties nor the subject-matter are wholly the same. Another principle having the like effect, asserted in *Brown v. Johnson*, 13 Grat. 644, is that "a man who cannot be prejudiced by a deposition or proceeding in a suit shall never receive any ad-

vantage from it." In *Brown v. Johnson*—an action against one obligor on a joint bond—an attempt was made by the defendant to use a deposition taken in another action by the plaintiff on the same bond against another obligor, and the court held that under no circumstances could it be competent evidence. See, also, *Payne v. Coles*, 1 Munf. 373, and *Chapman v. Chapman*, Id. 398. The plaintiff could not have used these depositions against the defendants except by agreement, or, in a limited sense, for purposes of contradiction. But the exception must be treated as waived by failure to insist upon it in the court below. This rule of waiver extends to all exceptions save those going to the competency of the witness, as to which, indeed, no exception is necessary. *Hill v. Proctor*, 10 W. Va. 78; *Vanscoy v. Stinchcomb*, 29 W. Va. 271, 11 S. E. 927; *Fant v. Miller*, 17 Grat. 187.

For the reasons given, the decree complained of must be reversed, the appellant must be decreed her debt and costs as a charge upon the property in question, and the cause remanded for further proceedings in accordance with the principles herein stated and the rules and principles of equity.

On Rehearing.

(Dec. 16, 1903.)

This case was decided and the foregoing opinion filed November 22, 1902, and afterwards a rehearing was allowed. The briefs for appellees filed upon the reargument as well as upon the first hearing are unusually long, but their contents may be reduced to a few propositions. One is that the rule which casts upon the wife who claims, in a contest against the creditors of her husband, to have purchased and improved real estate, the burden of proving that the property and improvements were paid for by her with money derived from some source other than her husband, ought to be abolished, because the statute now authorizes a married woman to carry on business in her own name, and to acquire and hold property free from her husband's control and from liability for his debts. In this connection it is urged that this rule has been abolished in Virginia by the decision in *Catlett v. Alsop*, 40 S. E. 34, or that the principles there declared, if followed out, will produce such result. That case seems to liberalize the rules of law to some extent in such contests, but it does not hold that this particular rule, which has been so long the well-settled law in all jurisdictions, is to be overturned. It holds that an insolvent husband may be employed by his wife in the management and conduct of her business, and that his earnings in her employment may be devoted to the support of his family as far as may be necessary for that purpose, and his creditors are only entitled to subject to the payment of their

debts the excess. This court long ago enunciated and applied substantially the same proposition in *Boguess v. Richards*, 39 W. Va. 567, 20 S. E. 599, 28 L. R. A. 537, 45 Am. St. Rep. 938. That is a matter entirely foreign to any question arising in this case. In establishing the presumption of fraud as to transactions between husband and wife working prejudice to the rights of the creditors of the former, the courts do not assign as reason therefor the common-law disabilities of the wife. They base it upon the close relationship of the parties, and the facilities which that relationship affords for the perpetration of fraud. That relationship is in no manner altered by the married woman's statute. If that statute has any effect in this connection, it is to increase, rather than to diminish, the facility for the perpetration of such fraud. There is greater latitude under it for the wife to set up claims to property and to hold property than there was at common law. It is urged, however, that this rule has the effect of trenching upon the rights of married women under this statute, and of partially thwarting the purpose of the Legislature in passing the statute. Married women had property rights before the passage of this law, which were as sacred as their new rights. Had the courts deemed this rule prejudicial and injurious to their rights in the sense of depriving them of anything which belongs to them, it never would have had any existence in the jurisprudence of this country. The same principle is applied by the courts everywhere to persons standing in a close confidential relation, such as father and son, brother and brother, brother and sister, and all others closely related by blood or affinity. Why? Because of the relationship; and, the relationship of husband and wife, being closer than that of any others, the principle is more rigidly applied as between them. See *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664; *Spence v. Smith*, 34 W. Va. 697, 12 S. E. 828; *Knight v. Capito*, 23 W. Va. 639; *Douglass v. Douglass*, 41 W. Va. 13, 23 S. E. 671; *Himan v. Thorn*, 32 W. Va. 507, 9 S. E. 980; *Reilly v. Barr*, 34 W. Va. 95, 11 S. E. 750; *Hutchinson v. Bolts*, 35 W. Va. 754, 14 S. E. 267; *Butler v. Thompson*, 45 W. Va. 660, 31 S. E. 960, 72 Am. St. Rep. 838; *Bierne v. Ray*, 37 W. Va. 571, 16 S. E. 804; *Ballard v. Chewning*, 49 W. Va. 508, 39 S. E. 170. The rule exists *ex necessitate*. But for it the statute against fraudulent conveyances could not be made effective.

That part of the opinion which recites that somebody had to cultivate the garden, and the family had to be clothed as well as fed, and feed furnished for the cows, has been adverted to in the later briefs as evidence of the application of a false principle. It was not apprehended that this would be construed to mean anything other

than an indication of the weakness of the claim that Mrs. Gillispie had realized a large amount of money from keeping boarders with which to pay for the property and improvements. How could she have paid her share of all the expenses of keeping the boarding house, and turned in on the purchase of the property and its improvements all the money taken in from her boarding house business? Are we to accept the absurd proposition that every dollar of the income was profit, allowing nothing for expenses? Can a married woman's business be carried on without expense any more than that of any other person? In her statement of the amount of money derived from her business of keeping boarders she allows practically nothing for the expenses, and the statements of the former opinion referred to were intended merely to direct attention to this fact.

The statement in the former opinion that certain depositions taken in another suit, and made exhibits with depositions taken in this suit, do not appear in the printed record, is erroneous. They are in that record, and were read and considered under the impression that they were depositions taken in this case. This error is the result of the unusual and peculiar manner in which they are inserted in the printed record. But it signifies nothing. In going back over the record, they are found to have been marked and considered as carefully as any of the others. Further examination of this record serves to strengthen, rather than to weaken, the conclusion announced in the former opinion. That conclusion was that the evidence offered to show that Mrs. Gillispie paid for the property with her own money was insufficient to overcome the presumption against the good faith of the transaction, as it appeared that practically all the money was actually handled and delivered, by way of payment, by J. M. Gillispie, and not Mary E. Gillispie, and, further, that J. M. Gillispie was at that time handling other money than that which Mrs. Gillispie claims to have paid into his hands. The truth of this inference is established to a moral certainty by certain facts found in the record and marked on the former examination of it, but, as the result of inadvertence, not stated in the opinion. It appears from Ledger No. 1 of the books of D. M. Miller & Co., as testified to by G. A. Lynch from the book itself, that J. M. Gillispie was allowed as expenses, from the firm, on the 23d day of August, 1894, \$274.92; on January 15 or 17, 1895, \$480.08; on August 29th (year not given), \$207.18; on January 13, 1896, \$141.71—making a total of \$1,103.89. This amount, which seems to have been withdrawn from the firm by him without anything upon the books to show for what purpose the money was expended, or upon what accounts it was taken out, was used for some purpose by J. M. Gillispie, from time to time, while the purchases of property and

payments of the costs of improvements thereon were in progress. Hence the record shows more than mere opportunity on the part of J. M. Gillispie to obtain the money with which to buy this property for his wife. It shows that he did actually withdraw, from the firm assets, a considerable amount of money at that time, which is wholly unaccounted for by him, and cannot be accounted for upon any theory except that of his having paid it, instead of Mrs. Gillispie's money, for the property and the improvements thereon. This circumstance strongly supports the conclusion that the property was paid for with the husband's money, and greatly weakens the contention of Mrs. Gillispie that it was paid for with her money.

Another contention is that, as the house in question was completed late in the year 1895, or early in the year 1896, and the assignment of the husband did not occur until in the year 1898, he was solvent at the time of the purchase and improvement of the property, and might have made a valid gift to his wife. This is not the theory of the defense. Both husband and wife testified that the purchase was made by her with her own money. However, it affirmatively appears that the husband's financial condition was such as to render his inability to make such a gift to his wife without prejudice to the right of his creditors perfectly apparent. It is not a case of a wealthy man, or a well-to-do man, having good reason to believe himself able to make a substantial gift to his wife without injuring his creditors, and therefore to act in good faith in doing so. Such gift, to be valid, cannot be made under any other conditions. *Hume v. Condon*, 44 W. Va. 553, 30 S. E. 56.

Finally, it is urged that the court should find that Mrs. Gillispie had invested a considerable amount of her own money in the property and its improvements, and become vested with the legal title, whereby the property has become her separate estate, and that the amount of her interest in it should be fixed, and then the amount expended in the purchase and improvements by her should be protected and secured to her by the decree; in other words, that an apportionment of the value of the property be made between the wife and the husband's creditors, as in the cases of *Humphrey v. Spencer*, 36 W. Va. 11, 14 S. E. 410, and *Bogges v. Richards*, 39 W. Va. 576, 20 S. E. 599, 26 L. R. A. 537, 45 Am. St. Rep. 938. As this is a case of actual fraud on the part of the husband, participated in by the wife, the principle invoked does not apply. *Humphrey v. Spencer* expressly decides that such apportionment can be made only in cases in which there is no actual fraud. The law applicable here is that declared in *Lockhart v. Beckley*, 10 W. Va. 87; *Rose v. Brown*, 11 W. Va. 137; *Bank v. Wilson*, 25 W. Va. 242; and *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664—all of which hold that the wife's

property is to be charged with the amount of the husband's money which went into the improvements, although that may amount to the entire proceeds of the sale of the property.

As it clearly appears that money of the husband in excess of the amount of this debt and the costs of this suit was used in the purchase and improvement of the property, the order directed in the former opinion should be entered.

(54 W. Va. 272)

FAIRMONT PLUMBING CO. v. CARR.

(Supreme Court of Appeals of West Virginia.
Nov. 28, 1903.)

PLUMBING CONTRACT—CONSTRUCTION— REJECTION.

1. A contract for putting in the plumbing and heating works of a house provides for partial payments for the work, and provides that "the final payment shall be made when the work is completed satisfactory to owner and architect." This gives the owner or architect absolute right of rejection of the work for defect or incompleteness, and his reasons for rejection cannot be ignored, if in good faith and not fraudulent.

(Syllabus by the Court.)

Appeal from Circuit Court, Marion County; John W. Mason, Judge.

Action by the Fairmont Plumbing Company against Lydia E. Carr. Decree for plaintiff for less than the amount claimed, and it appeals. Affirmed.

C. H. Leeds, for appellant. W. S. Haymond, for appellee.

BRANNON, J. The Fairmont Plumbing Company and L. E. Carr entered into a written contract by which said company contracted to construct and complete a plumbing system and hot-water heating plant in a certain house belonging to said Carr, in Fairmont, for a certain price. Said Carr paid part of the sums agreed, but refused to pay the balance claimed by the company because of alleged failure of the company to complete the work according to the contract; and the company filed a mechanic's lien, and brought a chancery suit to enforce it, for the balance claimed under the contract and for some extra work. A decree allowed the company \$32.87 for some "extra," but denied relief for the balance of extras, and denied any relief for the balance claimed for work under the contract, without prejudice to another suit, and the company appeals.

I will not argue the case upon the volume of depositions of conflicting evidence. As in other cases several times stated, the design in requiring of this court written opinions is not to detail evidence going to establish facts, but to state ultimate facts, so far as necessary to make intelligible the principles of law ruling the case. The judge of the circuit court found that the execution of the contract was delayed, to the damage of the defendant, and also that the work was

never completed as demanded by the contract, and its execution defective. We cannot, upon conflicting evidence, reverse this finding. I regard the finding correct. But if this were not so, there is a legal principle which would affirm the decree. The contract provides for partial payments during the execution of the work, and then says, "The final payment shall be made when the work is completed satisfactory to owner and architect." The owner and architect condemned the work as incomplete and defective, and complained of delay. They both expressed dissatisfaction with it repeatedly. The architect refused to give an order for final payment; and both owner and architect, under oath as witnesses, continue to express dissatisfaction, and say that the work was delayed, to the loss of the defendant, ill-executed, and incomplete. It does not appear that this dissatisfaction of owner and architect was fraudulent or collusive, but, I think, well grounded. Under the clause of the contract just stated, upon authorities given in *Barrett v. Coal Company*, 51 W. Va. 416, 41 S. E. 220, 90 Am. St. Rep. 802, the decision of the circuit must stand.

Decree affirmed.

On Rehearing.

(Feb. 2, 1904.)

A petition for rehearing calls for an extension of the above opinion. That the principle, stated in it is sound, as regards sale or manufacture of chattel articles, as machines, clothing, portraits, and the like, is not contested; but it is said the clause of the contract, "The final payment shall be made when the work is completed satisfactory to owner and architect," cannot apply to construction of a building or fixtures therein. It is said that mere chattels can be kept by the seller or manufacturer, or returned, whereas in the other case the owner of the house gets the work without pay. It is a sufficient answer to say: There is the contract. The parties have made it themselves applicable to the construction of these fixtures. The court cannot disapply it to this subject when the parties have by their own act applied it. Those words are in this very contract. Can a court strike them out? Can a court take from Mrs. Carr a sedate clause made for the purpose of protecting her from an imposition very common—bad construction? Is it a hard case? It may be, but the builder, to get the contract, took the risk of saying, "Give me the contract, and I will execute it to the satisfaction of yourself and the architect." This clause means something. It means more than the law would say if it were not in the contract. Then whether the work was completed according to the contract would be a question for the decision of the law, but this contract leaves it to the owner and architect.

Now to the authorities: Whilst somewhat variant, the weight of them supports this

view. In 6 Cyc. 88, we find it stated that it has been held by eminent courts that in special building contracts the builder cannot recover anything unless he has performed the work according to the contract, but that the later rule is not to allow the owner to keep the work and not pay anything, but recovery of the real worth of the work done may be had by showing substantial performance; but this is added: "The doctrine, however, of 'substantial performance,' does not apply when the omissions or departures from the contract are intentional, or so substantial as not to be capable of remedy, so that an allowance out of the price would not give the owner what he contracted for, or where the contract must be performed to the satisfaction of the owner or architect." Note that the last clause makes such a contract as we have in hand an exception from the rule of "substantial performance." Why? Because so the parties wrote their contract, and courts cannot make a new or different one. This contract is in this respect not different from those where payment is to be made upon the certificate of an architect, engineer, or other person, that the work has been done according to contract, unless this contract is stronger in favor of the owner of the building, as perhaps it is, since it leaves it to the mere satisfaction of the owner and architect. In *Wharton on Contracts*, § 594, we find this: "Building contracts often contain the provision that the owner shall not be liable to the builder until the work has been approved by the architect employed; and this provision, when the builder takes the work subject to it, and when the architect acts as an independent arbiter between the parties, will be strictly enforced. The owner has no right to complain, since the architect was selected by him, and charged by him with this very power. The builder has no right to complain, since he took the work on this very condition. No matter how arbitrary may be the action of the architect in refusing to give the certificate required by the contract, yet, if he persist in his refusal, the builder cannot recover on the contract price. It is otherwise when the architect, in collusion with the owner, refuses to give the certificate, in which case the owner and the architect may together be liable in an action for conspiracy, or the owner may be made liable on the contract, being estopped by his own fraud from setting up the refusal of the architect to certify." In *Clark on Contracts*, 66, we find: "Again, a promise may depend upon the act of the promisor or of some third person. For instance, it may be made a condition precedent to one party's liability under the contract that he shall approve of, or be satisfied with, the other party's performance; and in such a case, by the weight of authority, he cannot be compelled to accept the other party's performance, and perform his part, unless he is satisfied. Examples of such a condition occur in contracts for the

manufacture and sale of goods, or for services, where the buyer's or master's liability to pay is made to depend on his being satisfied with the goods or the services. Other examples are in the case of promises to pay for the construction of a building or of a railroad, or for any other construction work, conditional upon the approval and certificate of the architect, engineer, or other third person. In such cases payment cannot be enforced without such approval unless there is fraud, or such gross mistake as to necessarily imply bad faith." *Hammon on Contracts*, § 466, says: "Conditions precedent may be regarded as vital or suspensory. A vital condition precedent is one whose nonperformance discharges the contract. A suspensory condition precedent is illustrated where a promise is made to depend upon the act of a third person, as in the case of a promise in a building contract to pay for the work upon receiving a certificate of approval from the architect. * * * 'In all these cases,' says Sir William Anson, 'it would appear that an action brought before the fulfillment of the condition would be brought prematurely; and though neither the nonfulfillment of the condition, nor the action brought before it was fulfilled, would discharge the contract, the condition suspends, according to its terms, the right to the performance of the promise.'" *Chitty on Contracts*, 833, says: "If a railway company agree to pay a certain price for work, which is to be done to the satisfaction of their engineer, or if a building agreement contain the usual clause that the party will pay upon receiving the architect's certificate that the work has been done to his satisfaction, the fact of the work having been done to his satisfaction in the one case, and the obtaining a proper certificate in the other, is a condition precedent to the right to receive payment." *Addison on Contracts*, 576, and *Beach on Contracts*, § 105, are to same effect. Such is the law as the text-writers construe the cases. Turn to some authoritative cases. *Sweeney v. United States*, 109 U. S. 618, 3 Sup. Ct. 844, 27 L. Ed. 1053: A man contracted with the government to build a wall around a cemetery; the contract saying that, when inspected by an engineer, and he "shall have certified that it is in all respects as contracted for, it shall be received and become the property of the United States." Held, that if there is no fraud, nor such gross mistake as would necessarily imply bad faith, nor failure to exercise honest judgment, the engineer's certificate is a condition precedent to payment." The same doctrine held in *Martinsburg & Potomac R. Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255. See *Chicago, etc., v. Price*, 138 U. S. 185, 11 Sup. Ct. 290, 34 L. Ed. 917. A man agreed to put in a building an elevator "warranted satisfactory in every respect." The lower court instructed that if it was reasonably fit, and if the defendant ought to have been satisfied with it, the

plaintiff could recover; but the Supreme Court held that the contract meant that the elevator was to be satisfactory to the defendant, "and, while it could not be rejected for mere caprice, yet a bona fide objection by him to its working was a sufficient defense." *Singerly v. Thayer*, 108 Pa. 291, 2 Atl. 230, 56 Am. Rep. 207. Same in *Kennedy v. Poor*, 151 Pa. 472, 25 Atl. 119. So *Gladius v. Black*, 50 N. Y. 145, 10 Am. Rep. 449. In *Hennessy v. Metzger*, 152 Ill. 505, 38 N. E. 1058, 43 Am. St. Rep. 267, we find it held that where a building contract provides that the architect shall pass upon the work, and certify upon the payment to be made, his decision is a precedent condition to require payment, and action does not lie in its absence. In *Kane v. Stone Co.*, 39 Ohio St. 1, upon a contract to build a house "subject to the approval of an architect," it was held that "if such architect, acting in good faith, fails and refuses to approve the work in any form, the general rule is that the contractor cannot recover." In *Pormann v. Walsh*, 97 Wis. 356, 72 N. W. 881, 65 Am. St. Rep. 125, was a building contract, by which the contractor agreed to perform the work to the "satisfaction of the architect and to the satisfaction of the owner"—just this case. It was held to be "binding on the contractor, and that the owner might withhold his approval or satisfaction with the work so as to defeat a recovery of payment, provided he does not do so unfairly or capriciously." In *Bradner v. Roffsell*, 57 N. J. Law, 412, 31 Atl. 387, was a building contract requiring payment upon a certificate of an architect that "the work is done in strict accordance with drawings and specifications, and that he considers the payment properly due." The trial court charged the jury that the architect's certificate could be dispensed with only by proof that it was withheld by fraud on his part, and that "it would be prima facie evidence of fraud if the architect withheld his certificate without any substantial reason." The Supreme Court held this charge erroneous, because the use of the word "substantial" tended to substitute the judgment of the jury for the decision of the architect. The court also said: "In *Chism v. Schipper* [51 N. J. Law, 1, 16 Atl. 816, 2 L. R. A. 544, 14 Am. St. Rep. 668] the chief justice carefully pointed out the need of the watchful supervision over the determination of juries on this question, and declared that the architect's conduct could not be impeached for want of knowledge, or because his judgments do not agree with those of others. To instruct a jury that they may find fraud from the withholding of such a certificate without a substantial reason is to permit them to determine what are substantial reasons, and if, in their judgment, there are none, then, though the architect's judgment may be honestly otherwise, to convict him of fraud." See where the adverse proposition leads. A man is going to build a house, or put in heating and plumbing ap-

paratus. He is incapable of judging the work, and the contractor agrees to submit the work to the judgment of an architect, and that the final payment shall only be called for when that architect approves it. The architect does not approve it. Then a jury, or the judges on the circuit and supreme benches, who cannot fitly judge the work when they hear the evidence or read the record, are to say that there was in fact substantial compliance with the contract; that the architect ought to have given his certificate. What becomes of the usual, necessary provision that the architect shall judge the work—a provision carefully inserted to protect the owner against the imposition, so often practiced, of bad construction? What becomes of the utility of the contract? What the use of a solemn contract? In *Butler v. Tucker*, 24 Wend. 447, a man agreed to get stone for a building "to the entire satisfaction of the other party and third persons." The court held that he must "allege and prove that the work was done to the satisfaction of the arbiters." The opinion said: "The plaintiff not only agreed to furnish and deliver granite of a particular description, and execute the work in a specified manner, but he also stipulated that the whole should be done and completed to the entire satisfaction of the building committee. It is not enough for him to say that he has performed the agreement in other respects, without also alleging that he has done it to the satisfaction of the arbiters agreed on between the parties. *Worsley v. Wood*, 6 T. R. 710; *Delaware & H. Canal v. Dubois*, 15 Wend. 89; *Morgan v. Birnie*, 9 Bing. 672; *U. States v. Robeson*, 9 Pet. 319 [9 L. Ed. 142]; 1 Chit. Pl. 812." *Chism v. Schipper* (N. J. Law) 16 Atl. 316, 2 L. R. A. 544, 14 Am. St. Rep. 668, 674, recognizes the doctrine that, when such certificate is required by the contract, it must be furnished, in the absence of fraud.

There being no difference in this respect between contracts touching chattels and building contracts, I feel authorized to repeat the statement in the original opinion—that, in the application of the clause that the work should be satisfactory to the architect, the cases of *Barrett v. Coal Co.*, 51 W. Va. 416, 41 S. E. 220, 90 Am. St. Rep. 802, and *Osborne v. Francis*, 38 W. Va. 312, 18 S. E. 591, 45 Am. St. Rep. 859, are binding authority. I will add that I cannot see any logical difference, in principle, between the case before us and the case where the certificate or decision of an engineer is made by the contract final and conclusive as to the completion of the work, or its character, or even its quantity. He is made the arbiter in both cases. In *Condon v. Railroad Co.*, 14 Grat. 302, the contract provided that an engineer should inspect the work, and "determine when the contract is complied with according to its fair interpretation, * * * and his decision shall be conclusive between the parties." It was held that such a con-

tract was valid, and the decision of the engineer conclusive, and that his final estimate was a condition precedent to recovery. I think that case especially is authority in this case, as it covered the character of the work. A number of cases lay down this principle. *Kidwell v. Railroad Co.*, 11 Grat. 676; *B. & O. R. Co. v. Polly*, 14 Grat. 447; *Chicago R. Co. v. Price*, 138 U. S. 185, 11 Sup. Ct. 290, 34 L. Ed. 917; *Kilberg v. U. S.*, 97 U. S. 398, 24 L. Ed. 1106.

There are some cases adverse to the position taken in this opinion, but not many or sound. Some seeming to be such on first blush are not when scrutinized. I now refer to some cases cited for the plumbing company. In *Pope Iron Co. v. Best*, 14 Mo. App. 502, the contract guaranteed "the furnace to work satisfactorily." The court said that did not mean that it would work to satisfaction of the defendant, but to work reasonably well. A great difference. The contract was satisfied if the furnace worked well in the opinion of the jury. That is only the usual contract. This contract says the satisfaction of the defendant and architect must be attained, not that of a jury. *Shupe v. Collender* (Conn.) 15 Atl. 405, 1 L. R. A. 389, has no application. It only holds that, where a purchaser of an article is not satisfied, this does not disable him from keeping it and recouping the price for defect under the warrant. *Hawkins v. Graham* (Mass.) 21 N. E. 812, 14 Am. St. Rep. 422, does not fit this case. The contract said that the heating apparatus should be of first-class workmanship, and in "the event of the system proving satisfactory," to be paid for, not saying proving satisfactory to the plaintiff; and, further, it added the words "or the work demonstrated." The court said this offered an alternative; that is, it let in proof of the sufficiency, and did not limit to the defendant's approval. *Carroll v. Welch*, 26 Tex. 147, involved no clause such as does this case; nor did *Nelson Co. v. Mitchell*, 38 Mo. App. 321, nor *Fleischmann v. Miller*, Id. 177. *Chism v. Schipper*, 51 N. J. Law, 1, 16 Atl. 316, 2 L. R. A. 544, 14 Am. St. Rep. 668, fully recognizes the force of the clause in question as above stated, but holds that a fraudulent withholding of approval defeats it, which we do not deny. *Bannister v. Patty's Ex'rs*, 35 Wis. 215, holds that a contract for cut-stone work in a house, providing that no payment should be made until the superintendent should give a certificate that it was to his satisfaction, was valid, and required the certificate to be refused by fraud or collusion. True, it is said that if the certificate is withheld by mistake there may be recovery. The mistake meant is not defined. This is obiter, and it is not so actually decided. This dictum is based on *Hudson v. McCartney*, 33 Wis. 331. Turning to this case, it is found to strongly support the view taken in this opinion. The contract for erection of a house provided for payment as the work went on,

to the full satisfaction of the superintendent. Held, that there could be no recovery without such certificate, unless withheld by "fraud or bad faith or clear evidence of mistake." "If fraud in the superintendent or other arbiter can ever be established by proof that the work was in fact properly performed, it can only be in cases where his refusal to certify is shown to have been grossly and palpably perverse, oppressive, and unjust—so much so that the inference of bad faith would at once arise when the facts are known. Having stipulated to submit to a skilled arbiter, when the question whether his work conforms to the contract arises, the party cannot, in general, substitute the judgment of a jury upon that question." The court said: "Neither do we think the case was one where the jury should have been permitted to go into evidence of the manner in which the work was executed, for the purpose of impeaching the decision of the superintendent," and that such evidence could not establish fraud in the superintendent. That is, his mere error of judgment would not do. The court intimated that fraud in the superintendent could only be shown by collusion with the owner, or by procurement by the owner. "It is not upon every claim made by the mechanical workman that he has complied with his contract, or upon every controversy between him and the arbiter, that the power of deciding is to be taken away from the latter, and the question carried into a court, to be determined by a jury of inexperienced men, or by the judge alone. If this were otherwise, and if, upon every difference between the superintendent and the party contracting to do the work, the former is deprived of all authority to decide, then such stipulations entered into between parties become utterly useless. But such is not the view which has uniformly been taken by the courts, by which such stipulations have been held valid to secure to the party in whose favor they are made the advantage of having the work inspected, and its character determined with reference to the requirements, by a person of skill and ability to form a correct judgment in such matters. 'Every man is the master of a contract he may choose to make, and it is of the highest importance that every contract should be construed according to the intention of the contracting parties. And it is important in a case of this description that the person for whom the work has been done should not be called upon to pay for it until some competent person shall have certified that the work has been properly done according to the contract and specifications.' Per Erie, C. J., in *Clarke v. Watson*, supra [18 O. B. (N. S.) 278]. It is manifest that this important object will be defeated, and the protection of a skilled superintendent lost, if, in every case of disagreement or dissent on the part of the contractor, the opinion of a jury is to be substituted. Having deliberated

ly and of his own free will made choice of a person as fit and competent to decide, and by whose determination he has agreed to abide, it is but reasonable and proper that the contractor should be held to the performance of his agreement." *Wyckoff v. Meyers*, 44 N. Y. 143, holds that, when the certificate is given, it binds the owner of the building, in the absence of fraud. It is authority for the contention of this opinion. *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442, also cited for the appellant, according to the syllabus in 72 Am. Dec. 442, says that, when a contract requires "complete performance or the production of an architect's certificate of performance," there can be no recovery, "unless such performance is proved or such certificate produced." Of course, because by the contract either answers. But the case in the state report (17 N. Y. 173) shows that the syllabus is not at all as given in 72 Am. Dec.; the contract was not as there given. It is a strong case for the position I have taken. Buildings were to be built "to the entire satisfaction of architects," and balance of payment "when all the work shall be completed and certified by the architects." The opinion says: "Assuming that the contracts had been so far performed as to justify the plaintiff in treating them as substantially executed, as I incline to think they were, yet the final payment for the work was to be made when it was completed, and a certificate of the architects to that effect obtained. The parties have seen fit to make the production of such a certificate a condition precedent to the payments. The plaintiff is as much bound by this part of his contract as any other. It is not enough for him to bring his action, and say that he has completed the work. He has agreed that the architects should decide whether the work is completed or not. He cannot now withdraw the decision of this question from them, and refer it to a legal tribunal." The court held that occupation of the buildings was not a waiver of strict performance, and that "a party is entitled to retain, without compensation, the benefit of partial performance, where, from the nature of the contract, he must receive such benefits in advance of full performance, and is by the contract under no obligation to pay until performance is complete." I would add that the contractor annexes his work to the reality of his own wrongful act, as judged by his chosen arbiter. Likely the balance will not more than cover the defect. He is in default. *Plano Co. v. Ellis*, 68 Mich. 101, 35 N. W. 841, cited for appellant, is also against him. It holds that the clause to "satisfaction" gives absolute decision to the purchaser of the chattel. It says that *Wood Reaping Co. v. Smith*, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57, governs the case, and that holds that where, by a contract to buy a harvesting machine, it was to work to the satisfaction of the purchaser, it gave absolute right to him

to reject the machine, and "his reasons for doing so cannot be investigated." *U. S. v. Robeson*, 9 Pet. 319, 9 L. Ed. 142, is also against the appellant. *Wyckoff v. Meyers*, 44 N. Y. 143, was a case of refusal of a certificate in bad faith—that is, fraud—by the architect. *Carroll v. Welch*, 26 Tex. 147, has nothing on the subject. *Fleischmann v. Miller*, 38 Mo. App. 177, and *Nelson Co. v. Mitchell*, Id. 321, have no reference to such a clause as the one involved in this case.

Thus it appears that only fraud can excuse the plaintiff from meeting the satisfaction of Mrs. Carr and the architect. There is no proof of fraud. The evidence shows that the architect and Mrs. Carr's son acted bona fide. The contract demanded that the heating apparatus should give 70 degrees in zero weather. It was tested when the thermometer was 2 or 3 degrees above zero, and it furnished heat only up to 48 or 50 degrees. Complaint was made of insufficient heat by the tenants. The storerooms and barber shop and upper rooms were worthless without adequate heat. The fine, new house would be greatly damaged by this defect. The company would not test the heat, though requested to do so, but seem to admit this defect by their conduct. The architect and the son of the defendant swear to this defect. If it exists, as the circuit court has found, the balance claimed by the company, \$327.51, would not satisfy this defect alone, perhaps. There were other defects, not necessary to be stated, but going to show that dissatisfaction on the part of the architect was bona fide. The courts say that dissatisfaction in such case is a question of fact. If it exists, reasonable or not, if honest, that is enough. Its accuracy in judgment cannot be inquired into. This is because the contract makes the architect the judge, and so his decision does not come from fraud. It is good. That judge cannot be deposed and substituted by a jury of incompetent men. That the heating apparatus is defective I think pretty clearly appears. But on a mass of evidence pro and con the circuit judge has passed, and has found that the architect acted in good faith. The good faith we must treat as fixed, and that, under such a contract, is the solvent of the case.

(102 Va. 429)

VIRGINIA FIRE & MARINE INS. CO. v. RICHMOND MICA CO.

(Supreme Court of Appeals of Virginia. Feb. 10, 1904.)

INSURANCE—STIPULATIONS OF POLICY—WAIVER—REPRESENTATIONS OF AGENT—AGENT'S AUTHORITY—ESTOPPEL TO DENY.

1. Where the agent of an insurance company, who had always represented the company in its relations with assured, informed him when he made application for a renewal of the policy for the ensuing year that it was not necessary to make any change in the provisions of the policy on account of the execution of a contract to sell the premises to another, and the

fact that the other had been put in possession, and thereupon assured, who had requested a change in accordance with the facts, paid the premium, and accepted the policy in its previous form, the company was estopped from asserting a forfeiture under a clause of the policy providing that it should be void in case assured's interest in the premises was other than unconditional ownership, although the policy provided that no officer, agent, or other representative of the company should have power to waive any provision of the policy, except certain specified ones, which they could waive only in a specified manner.

2. In order that an insurance company may successfully assert that its agent has exceeded his powers in waiving conditions of a policy, the assured must have actual notice of the limitations placed on the agent's powers, either by having his attention called to the stipulation of the policy containing such limitation, or otherwise. The constructive notice afforded by the circumstance that the policy contains the limitation is insufficient.

Error to Circuit Court of City of Richmond.

Action by the Richmond Mica Company against the Virginia Fire & Marine Insurance Company. There was judgment for plaintiff, and defendant brings error. Affirmed.

Leake & Carter, for plaintiff in error. Munford, Hunton, Williams & Anderson and Lewis C. Williams, for defendant in error.

WHITTLE, J. This was a proceeding by motion in the circuit court of the city of Richmond by the defendant in error, the Richmond Mica Company, against the plaintiff in error, the Virginia Fire & Marine Insurance Company, upon a fire insurance policy, to recover the sum of \$1,500, loss occasioned the plaintiff from the destruction by fire of certain of the property covered by the policy.

The policy contains, among others, the following provisions:

(1) "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple."

(2) "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions, as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this company, shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions or conditions, no officer, agent or representative shall have such power, or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Plaintiff in error denies liability for the loss on the ground that at the date of the policy

the interest of the assured in the property was other than the unconditional and sole ownership, and that the building destroyed was not located on ground owned by the assured in fee simple, and that there had been no waiver of the forfeiture which accrued from the breach of the condition of the policy in the manner and upon the terms prescribed in the second provision, and the entire policy was therefore void and of no effect.

There was a demurrer to the evidence, which the trial court overruled, and rendered judgment for the plaintiff for the damages provisionally assessed by the jury, and the case is here on writ of error to that judgment.

It is conceded that, if the insurance company is liable at all, the amount of the recovery is correct; but, as remarked, the company denies liability in toto, for the reason stated.

It appeared in evidence that R. A. Lancaster, Jr., was the general agent of the insurance company for the city of Richmond; that during a series of years he had received the premiums and written insurance upon the property in question for the defendant in error in the company of his principal; that these policies were renewed from year to year, it being the practice of the agent before the expiration of a former policy to write insurance upon the property for the ensuing year, to deliver the policy to L. M. Williams, the secretary and treasurer of the assured, and collect the premiums from him. There was no written application for any of this insurance, and no information with respect to the property was demanded of the assured. Lancaster solicited the risk, wrote the insurance, received the premiums, and, in fine, was alone known to the assured throughout the transaction.

In accordance with custom, in the latter part of the year 1902 Lancaster approached Williams for the purpose of renewing the insurance for the year 1903, when he was informed by Williams that the Richmond Mica Company had contracted, in writing, to sell the property to one Mersereau, and had placed him in possession of it; that Mersereau had paid part of the purchase price, but owed a balance on the property of \$3,402.43, which, when paid, or secured to be paid, would entitle him to a conveyance. Having thus voluntarily made a full and fair disclosure of the state of the title of his principal, Williams requested Lancaster to write the insurance so as to meet the exigencies of the case. Whereupon Lancaster assured him that it was not necessary to alter the policy as it had been prepared by him; that, when the title to the property was transferred to Mersereau, it would be time enough to make the change. Acting upon that information and assurance, the premium was paid, and the policy accepted as filled up by Lancaster.

The status quo of all parties was main-

tained until May 30, 1903, when the property was destroyed by fire. In its proof of loss, the assured having again called attention to its contract with Mersereau, the insurance company denied liability, and tendered the amount of the premium to Williams, who promptly declined to receive it.

On a similar state of facts, this court has so often decided that the conduct of the agent estops the insurance company from asserting the forfeiture relied on that it may be stated as established law in this jurisdiction.

In the case of *The Georgia Home Insurance Co. v. Kinnier*, 23 Grat. 88, it was held that when a policy of insurance contained a condition that the policy should be vitiated if the premises became vacant by the removal of the owner or occupant for a period of more than 20 days without immediate notice to the company, and written consent, it was competent for the insurer or its lawful agent to waive this condition, and if, at the time the agent of the company received the premium of insurance and delivered the policy, he had knowledge of the vacation of the property, and did not then avoid the policy, but treated it as valid and subsisting, such conduct of the agent was a waiver of the condition, and a breach of it could not be relied on by the company to defeat a recovery upon the policy. In the case of *McLean v. Insurance Co.*, 29 Grat. 372, the above case is cited as authority for the proposition that conditions in a policy which are for the benefit of the insurer, the breach of which may operate a forfeiture, may be waived by the insurer or his lawful agent. The rules there laid down with respect to the doctrine of waiver and estoppel in such cases are followed and approved in *Insurance Co. v. Weill*, 28 Grat. 389, 26 Am. Rep. 364; *Insurance Co. v. West*, 76 Va. 578, 44 Am. Rep. 177; *Insurance Co. v. Telger*, 90 Va. 277, 18 S. E. 195; *Basley v. Insurance Co.*, 91 Va. 169, 21 S. E. 235; *Insurance Co. v. Pankey*, 91 Va. 259, 21 N. E. 487; *Insurance Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846; *Insurance Co. v. Ward*, 95 Va. 231, 28 S. E. 209; *Farmers' Ass'n v. Williams*, 95 Va. 248, 28 S. E. 214; *Insurance Co. v. Goode*, 95 Va. 751, 30 S. E. 366; *Insurance Co. v. Nalla*, 101 Va. —, 44 S. E. 896.

In many of those cases the policies were "standard policies," identical in form with the one under consideration.

In *Lynchburg Fire Insurance Co. v. West*, 76 Va. 578, 44 Am. Rep. 177, the court recognizes the general rule that parol testimony is inadmissible to vary or contradict written instruments, but holds that exceptions exist where the assured is misled by declarations of the insurer or his agent; where the insurer insists on forfeitures of his own creation; where the insurer or his agent, in preparing an application or policy, fails to follow correct descriptions given

by the assured; or where one uses his superior knowledge or influence to mislead the other as to the true import of the contract. Parol testimony is admissible in such instances, it is said, not to contradict the writing, but by way of equitable estoppel to prevent its use. It was also held in that case that the agent's knowledge of the real condition of the risk is imputable to the principal, and estops him from setting up any warranty inconsistent therewith.

Thus, in *Virginia Fire & Marine Insurance Co. v. Goode*, 95 Va. 751; 30 S. E. 366, the court held that what passed between an agent and the assured while filling out an insurance policy is admissible when offered, not to contradict the policy, but to show that a representation therein ought not to operate as an estoppel upon the assured.

In *Mutual Fire Insurance Co. v. Ward*, 95 Va. 231, 28 S. E. 200, the court says at page 237, 95 Va., page 211, 28 S. E.: "That knowledge of a general agent, who has power to receive and accept proposals for risks, subject to the approval and ratification of his principal, to issue and deliver policies, and renew and cancel the same, will bind the company, was decided by this court in the case of *Georgia Home Insurance Co. v. Kinnler*, 28 Grat. 96. * * * Facts communicated to the agent exercising powers thus enumerated, though uncommunicated to his principal, were held in the case of *Lynchburg Fire Insurance Co. v. West*, supra, to bind the company; there being no evidence to show that special limitations upon the power of the agent were known to the assured, or were plainly to be inferred by him from the nature of the agent's employment."

In *Farmers', etc., Association v. Williams*, 95 Va. 248, 28 S. E. 214, the following statement of the rule is quoted with approval from the opinion of Judge Cooley in the case of *Aetna Insurance Co. v. Olmstead*, 21 Mich. 253, 4 Am. Rep. 483: "Where an agent, who, at the time and place, is the sole representative of the principal, assumes to know what information the principal requires, and, after being furnished with all the facts, drafts a paper which he declares satisfactory, induces the other party to sign it, receives and retains the premium money, and then delivers a contract which the other party is led to believe, and has a right to believe, gives him the indemnity for which he paid his money, we do not think the insurer can be heard in repudiation of the indemnity on the ground of his agent's unskillfulness, carelessness, or fraud. If this can be done, it is easy to see that the community is at the mercy of these insurance agents, who will have little difficulty, in a large proportion of the cases, in giving a worthless policy for the money they receive."

The following language from the leading

case of *Lynchburg Fire Insurance Co. v. West*, supra, which was also quoted with approval by this court in the case last named, is so apposite to the case in judgment that it may with propriety be repeated:

"If the defendants were misled, it was by their own agent, and not by the plaintiff. The latter honestly gave the agent all the information that was required of him. He relied upon the agent to see that the business was correctly done, according to the requirements of the company. Called upon to make answers to certain interrogations, he had the right to presume that the agent was competent to understand their meaning and effect, as well as the meaning and effect of the provisions of the policy bearing upon the disclosures made. The defendants ought not now to be heard to say that the agent of their own selection had exceeded his powers, and that he had not communicated to them the facts made known to him by the plaintiff. This is manifestly so, unless it could be shown that special limitations upon the powers of the agent were known to the plaintiff, or plainly appeared from the nature of his employment.

"No such limitations upon the powers of the agent are brought home to the assured, either in the application or otherwise."

As has been seen, the assured gave full and explicit information with respect to its contract with Mersereau to Lancaster, the general agent of the insurance company, and invoked his superior knowledge, in the light of all the facts, to write a policy which would afford the indemnity sought, and to secure which the premium was paid. Under these circumstances, without the slightest suspicion of bad faith on the part of the assured, the policy in question was prepared and delivered by Lancaster, with the assurance that it met the necessities of the case; and upon that assurance the assured acted, and parted with the premium. Between the delivery of the policy and the fire, no change had taken place in the status of the property, and not a dollar more of the purchase price had been paid by Mersereau; and it is conceded that the assured had an insurable interest in the property far greater in value than the amount of the policy. In the face of this undisputed testimony, to permit the insurance company, after loss, to escape liability upon the pretext that one of the general provisions of a printed policy, intended to cover every conceivable case, had been violated, would be in contravention of the decisions of this court from the case of *West Rockingham Insurance v. Sheets*, 26 Grat. 854, decided in November, 1875, to the latest expression of the court on the subject, found in the case of *Union Assurance Society of London v. Nalls*, 101 Va. —, 44 S. E. 896, decided in June, 1903.

In the case of *The Wytheville Insurance & Banking Co. v. Teiger*, 90 Va. 277, 18 S. E. 195, the policy contained a provision "that

in any matter relating to this insurance, no person unless duly authorized in writing, shall be deemed the agent of this company," and the court held: "When an insurance company clothes a person with apparent authority to deliver policies and receive premiums, as was done in this case, it is estopped, after a policy is delivered as a valid contract to an innocent holder, to set up the defense that the agent acted without written authority from the company. Such a defense, if sustained, would operate as a gross fraud, and can receive no countenance in a court of justice. If in such case a waiver were not implied, the delivery of the policy would be not only an unmeaning, but a deceptive and fraudulent, ceremony." Citing *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233; *Georgia Home Ins. Co. v. Kinnier*, 28 Grat. 88; *Manhattan Fire Insurance Co. v. Weill*, 28 Grat. 389-395, 26 Am. Rep. 364; *Life Insurance Co. v. Miller*, 12 Wall. 285, 24 L. Ed. 410, 2 May on Insurance (3d Ed.) § 360, and other authorities.

It was insisted on behalf of the insurance company that the decision in *Sulphur Mines Co. v. Phoenix Insurance Co.*, 94 Va. 355, 27 S. E. 24, is opposed to the doctrine contended for on behalf of the defendant in error. An examination of that case, however, shows that the question raised here was not involved. There the policy contained a provision that it should be void if the property was or should become incumbered, unless consent thereto should be indorsed on the policy by an authorized agent of the insurance company. The court held that such an incumbrance, unknown to the company, avoids the policy, although it was not customary to make that inquiry when policies were issued to large corporations. It was not pretended in that case that the agent who effected the insurance knew of the incumbrance, or made any representation to the assured in regard to it. It was therefore a breach by the assured of an express condition of the policy, unaffected by extraneous circumstances, and the court properly held that the policy was avoided.

It is also argued that the established doctrine of this court, namely, that an insurance company will not be heard to say that an agent of their own selection has exceeded his powers, and has not communicated to them facts made known to him by the assured, is subject to the qualification, unless it can be shown that special limitations upon the powers of the agent are known to the assured, or plainly appear from the nature of the agent's employment. The contention is that a provision in a policy such as is contained in the policy in this case, *ipso facto*, carries notice of the restrictions on the powers of the agent home to the assured.

If that contention were true, it would practically abrogate the doctrine of this court in all cases, for the rule is predicated upon the

fact that the dealings of the agent have been such that a policy which, according to its letter, was violated in its inception, and void ab initio, must be upheld on the ground that the agent has so dealt with the assured as to estop his principal from setting up and taking advantage of what would otherwise have operated a forfeiture. The contention presents a striking illustration of arguing in a circle. The insurance company, it is said, is estopped from relying upon the forfeiture prescribed by the policy, by reason of the conduct of its agent, which constitutes a fraud upon the rights of the assured; but the assured cannot avail himself of the estoppel, because to do so would contravene the provisions of the policy.

The true interpretation of the qualification of the rule is that the assured must have actual notice of the limitations placed upon the agent's powers, either by having his attention called to the stipulation of the policy containing it, or otherwise, and not on the constructive notice afforded by the circumstance that the policy contains the limitation.

In May on Insurance (Parsons' Ed.) § 137, at page 244, Mr. Parsons, referring to decisions where it is held that, in case of restrictions in the policy upon an agent's power, he cannot bind the company by acts in excess of such limitation, says:

"It seems very doubtful if the doctrine of these cases is entirely correct. The assured has a right to suppose that a general agent has all the powers incident to his business, unless he has knowledge to the contrary, and usage may overcome the provisions of the policy. * * *

"Prudent men are accustomed to rely upon the acts and statements of the agents, and they should be protected in so doing. * * * As to waivers taking place after issue, it is very proper to require the assured to look at his policy and conform to it, and limitations of the agent's authority should be effective unless, by a course of business or otherwise, the company has waived the limitation on the agent's power of waiver."

While, it must be confessed, there is great divergence of opinion on the subject, the rule as stated by Mr. Parsons is believed to be more in consonance with justice and reason, and has been uniformly upheld by the decisions of this court for the past 30 years.

Mr. Joyce, in his admirable work on Insurance (volume 1, § 439), after an exhaustive discussion of the subject and review of the authorities, reaches the conclusion that an agent may waive conditions, notwithstanding the inhibition in the policy.

A strict adherence to the opposing theory would not only operate disastrously to the assured, but to the business of the insurer as well, for, in the practical conduct of such business, it would be impossible to submit every departure from the company's rules to the principal office or to the board of directors.

Much reliance has been placed by counsel for the plaintiff in error upon the opinion of Mr. Justice Shiras in the case of *Northern Assurance Co. v. Grand View Building Association*, 183 U. S. 308, 23 Sup. Ct. 183, 46 L. Ed. 214, reversing the judgment of the Circuit Court of Appeals of the Eighth Circuit. While the pronouncements of that great court must always command the highest respect, its judgment in the particular case is deprived of much value as a precedent by the circumstance that it is not in harmony with many former decisions of that court, and that the Chief Justice, Mr. Justice Harlan, and Mr. Justice Peckham did not concur in the opinion of the majority. Since that decision was rendered, Mr. Justice Shiras has retired from the bench, and been succeeded by Mr. Justice Day, who presided in the Circuit Court of Appeals in the case of *Queen Insurance Co. v. Union Bank & Trust Co.*, 111 Fed. 689, 49 O. C. A. 555, where a different conclusion was reached. So there are now on that bench at least four justices who entertain views opposed to those of the majority, as expressed in the case referred to. In this state of the law, this court can hardly be expected to abandon its own well-considered precedents to follow the questionable ruling of another tribunal.

It follows from these views that the judgment complained of is without error, and must be affirmed.

CARDWELL, J., absent.

(102 Va. 459)

PARLETT v. DUNN.

(Supreme Court of Appeals of Virginia. Feb. 10, 1904.)

MASTER—INJURIES TO SERVANT—DUTIES OF MASTER—SAFE PLACE TO WORK—SAFE APPLIANCES—REASONABLE CARE—ERROR IN JUDGMENT—ASSUMPTION OF RISK—ACTIONS FOR INJURIES—EVIDENCE—EXPERT TESTIMONY—INSTRUCTIONS—INAPPLICABILITY TO EVIDENCE.

1. In an action for a servant's injuries, expert evidence is admissible to show the usual method of putting up a hoisting apparatus, consisting of a derrick slightly inclined, and held in position by guy ropes, as the manner in which such an apparatus should be constructed, placed in position, and fastened, so as to make it reasonably safe, is not within the range or experience of men not skilled in the use of such appliances.

2. In an action for servant's injuries, expert testimony as to witness' own practice in guying up a derrick, rather than as to the usual or customary manner of doing such work, was improper.

3. It is the duty of a master to use ordinary care and diligence to provide a reasonably safe place in which his servant is to work, considering the character of the work to be done, and for a failure to do so he is liable for resulting injuries to the servant.

4. A servant who, when employed, knew what kind of work he was to do, and claimed to have had experience in such work, and knew that there was neither floor nor scaffolding on either side of the girders where he was to work, and, with full knowledge of the obvious danger, con-

tinued to work on the girders without complaint or objection, must be held to have assumed the risk.

5. In an action for servant's injuries, an instruction as to the master's duty not to expose the servant to risks beyond those incident to his employment, and such as were in contemplation at the time of the contract of service, was improper, where there is no evidence of such exposure.

6. It is the duty of the master to use ordinary care and diligence to provide for the use of his servants reasonably safe and suitable appliances for the work to be done.

7. The construction and setting up of a hoisting apparatus, which required skill and knowledge of mechanical forces in order to render it safe for the work to be done by servants, and which was put in position for the purpose of raising all the material for a building, is an appliance concerning which it is the master's duty to exercise ordinary care to see that it is reasonably safe; and it is not within the rule that the adjustment of implements to the work in hand, according to its varying needs, belongs to the duties of the servant, and not to those of the master.

8. The master's duty in furnishing safe appliances is to use that ordinary care which persons of ordinary prudence would exercise under the circumstances of the particular case, and he is not negligent for not adopting some method or instrumentality which some people believe to be less perilous than the method adopted.

Error to Law and Chancery Court of City of Norfolk.

Action by one Dunn against C. R. Parlett. There was judgment for plaintiff, and defendant brings error. Reversed.

Hughes & Little, for plaintiff in error. Wolcott, Wolcott & Gage, for defendant in error.

BUCHANAN, J. This is an action by an employé to recover damages from his employer for personal injuries resulting from the alleged negligence of the latter in failing to provide for the plaintiff a reasonably safe place in which, and reasonably safe and suitable appliances or machinery with which, to work.

The defendant, C. R. Parlett, as general contractor, was building a warehouse in the city of Norfolk, upon which the plaintiff was working at the time of the accident. Through the building, 15 or 16 feet apart, were upright pillars, upon which rested horizontal girders, 12 by 14 inches. On these girders the floor joists were placed. The joists were raised from the ground to the second and third stories by means of a hoisting apparatus known as an "A" or breast derrick. It was 8 feet wide at the bottom, 12 inches wide at the top, and 26 feet high. The bottom of it rested on second-story joists, or on timbers resting on, and at right angles to, the joists on the edge of a wellhole where the joists had not been placed, through which building material was to be raised. The derrick did not stand perpendicular, but inclined slightly toward the wellhole, and was held in position by two guy ropes, each fastened to the

¶ 6. See *Master and Servant*, vol. 24, Cent. Dig. §§ 173, 178.

center of the top piece—one extending to the rear and the other to the front of the derrick, at right angles to it, and made fast. To the top of the derrick was attached a pulley, through or over which a rope came down in front of the derrick and over the wellhole, to which the building material was to be attached. The other end of the rope ran down to a pulley or snatch block attached to a pillar by a rope. From this pulley the rope extended back through another pulley to a hoisting engine in the rear and to the left of the derrick. From the ground to the bottom or foot of the derrick was about 17 feet, and the pitch or height of the second story was 12 feet.

The derrick had been placed in position on Monday prior to the injury on the following Friday, and used without accident during that period to raise the second-story joists, all of which had been laid, except those over the wellhole. At the time of the accident the joists for the third story were being raised, and Dunn and three other employes were engaged in guiding, receiving, and piling the joists as they were hauled to the third story. Their place of work, as the joists came up through the wellhole, was on the girders upon which the third-story joists were to be placed. Dunn and another employe were on the girder to the right, and McDonald, the foreman on that floor, and the other employe, were on the girder to the left, of the derrick, awaiting or looking out for a load of joists which was being hoisted. While in that position the derrick swung around or fell over towards Dunn, and struck and knocked him off the girder, causing him to fall upon the joists on the second story, and inflicting the injuries described in the declaration.

The cause of the accident, the plaintiff claims, was the negligent and faulty construction of the hoisting apparatus, and the failure to provide him a safe place to work on the third story.

The evidence shows that there was no flooring or scaffolding on the third story around or along the girder where the plaintiff was working. It further shows that the plaintiff was employed, among other things, to work overhead in the building in raising joists, and that he held himself out, when employed, as having had experience in such work. The evidence further shows that the defendant furnished the material, including pulleys, guys, and ropes, for making the hoisting apparatus; that it was constructed at the building by McDonald, foreman, and that it was put in position by the employes of the defendant; that the defendant was engaged in other work, gave no personal attention to the construction of the building, but left it in charge of his head foreman, Johnson. The plaintiff introduced expert evidence to show that the hoisting apparatus was defective, in this: that it only had two guy ropes to hold it in

position, when there should have been at least three, and that the pulley or snatch block near the ground floor ought to have been under the center of the derrick, and not at one side, as it was. The defendant introduced expert evidence tending to show that the hoisting apparatus was constructed, placed in position, and fastened in the usual and customary way.

The first error assigned is the action of the court in permitting the plaintiff to introduce expert evidence tending to show that the hoisting apparatus used in raising the joists was not properly guyed.

Where the facts from which negligence is to be inferred are within the range of ordinary human experience, the opinions of the men on the jury, in the eye of the law, is better than those of experts; but, where the injury involves questions of science or skill, expert evidence is admissible. The manner in which such a hoisting apparatus should be constructed, placed in position, and fastened so as to make it reasonably safe and suitable for the work to be done, cannot be said to be within the range of the experience of men not skilled in the use of such an appliance. Expert evidence was therefore admissible to show the usual method of putting up such an appliance, but some of the answers of the witness seem to give his own practice in guying an "A" derrick, rather than the usual or customary manner of doing such work. Such evidence was not proper. *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509.

The action of the court in giving certain instructions asked for by the plaintiff, and the refusal to give certain others asked for by the defendant, is assigned as error.

One of the instructions given for the plaintiff to which objection was made is as follows:

"No. 2. The court further instructs the jury that it was the duty of the defendant to use all reasonable care to provide and maintain for the plaintiff a safe place to work while in the performance of his duties, and not to expose him to risks beyond those incident to his employment, and such as were not in contemplation at the time of the contract of service; and if the jury believe from the evidence that the said defendant did not use due and reasonable care to provide for the plaintiff a reasonably safe place to stand on the third floor of the said building, where he was required to be in order to help land materials elevated to that floor, and that such failure was the cause of the injury to the plaintiff, then, although they further believe from the evidence that the plaintiff had knowledge of the dangers of the place in which he was required to work on the said third floor of said building, and still continued to work there, they must find for the plaintiff, unless they believe that a person of ordinary prudence, acting with such prudence, would, under all the circumstances, have refused to incur the risk, and unless they believe from the evi-

dence that the plaintiff was himself guilty of any negligence which contributed to the injury."

It is the duty of the master to use ordinary care and diligence to provide a reasonably safe place in which his servant is to work, considering the character of the work to be done, and for a failure to do so he is liable in damages for resulting injuries to the servant. The servant, however, assumes all the ordinary risks of the service in which he is engaged. He also, as a general rule, assumes all risks from causes which are known to him, or which should have been readily discovered by a person of his age and capacity in the exercise of ordinary care. *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869; *McDonald v. N. & W. Ry. Co.*, 93 Va. 98, 27 S. E. 821; *Robinson v. Dinlenny*, 96 Va. 41, 42, 80 S. E. 442; *N. & W. Ry. Co. v. Cromer*, 99 Va. 763, 40 S. E. 54.

The plaintiff, when employed, knew what kind of work he was to do, and claimed to have had experience in such work. He knew that there was neither floor nor scaffolding on either side of the girders where he and the other employes on that story were working. The danger was open and obvious. Having sought and accepted employment to work on the building, with full knowledge of the danger, and continued to work on the girder without complaint or objection, when he knew there was neither floor nor scaffolding to protect him from falling, he assumed the risk.

"Where a business," says *Shearman & Redfield on Negligence* (volume 1 [5th Ed.] § 185), "is obviously dangerous, and is conducted in a manner which is fully known to the servant at the outset, he assumes the risk of its conduct in that manner, although a safer method could have been adopted."

The instruction is based upon the theory that the defendant had exposed the plaintiff to risks beyond those incident to his employment, and such as were not in contemplation at the time of the contract of service. There is no evidence to sustain this theory, and the instruction should not have been given.

The action of the court in giving the plaintiff's instructions Nos. 1 and 3, and in refusing to give the defendant's instructions 1 and 3, is assigned as error.

The question raised by these instructions is whether it was the duty of the master to exercise ordinary care and diligence in furnishing a reasonably safe and suitable hoisting apparatus for raising the building material to the second and third stories of the warehouse, or whether the master had performed his duty when he furnished his employes sound and suitable material out of which to make the derrick, and with which to rig or set it up.

The rule is settled in this state by repeated decisions that it is the duty of the master to use ordinary care and diligence to provide

for the use of his servants reasonably safe and suitable appliances for the work to be done. *N. & W. Ry. Co. v. Nuckolls*, 91 Va. 193, 21 S. E. 342; *Bertha Zinc Co. v. Martin's Adm'r*, 93 Va. 791, 22 S. E. 869; *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509; *McDonald v. N. & W. Ry. Co.*, 95 Va. 98, 27 S. E. 821; *Robinson v. Dinlenny*, 96 Va. 41, 30 S. E. 442; *Riverside Cotton Mills v. Green*, 98 Va. 58, 34 S. E. 963; *Va. & Car. Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. 976; *Southern Ry. Co. v. Mauzy*, 98 Va. 692, 37 S. E. 285; *N. & W. Ry. Co. v. Cromer*, 99 Va. 764, 40 S. E. 54.

The fact that the hoisting apparatus in this case was made up, when complete, of various parts, each of which was sound and suitable for the purpose for which it was intended, is relied on to bring it within the rule of law that the adjustment and adaptation of implements to the work in hand, according to its varying needs, belongs to the sphere of the servant, and not to the master. 1 *Shear. & Red. on Neg.* (5th Ed.) § 195.

Whatever be the scope of that rule, it cannot, under our decisions, apply where the construction and setting up of the apparatus or machine, ready for use, require skill, judgment, and knowledge of mechanical forces, in order to render it safe and suitable for the work to be done by the servants. The hoisting apparatus in question was not a simple appliance to be moved from place to place about the building and easily adjusted, but was an instrumentality constructed and put in position, according to the foreman's testimony, for the purpose of raising all the material for the building which required hoisting, and was operated by a steam engine, and, as appears from the evidence of the experts, requiring for its construction and setting up, ready for work, such skill, judgment, and knowledge of mechanical forces as the ordinary laborer or employe could not be expected to have.

The court below properly held, in giving and refusing the instructions under consideration, that, if the defendant failed to exercise ordinary care and caution in furnishing a hoisting apparatus reasonably safe, he was liable in damages for the injury done, if the plaintiff himself was free from fault. But while this rule of law is well settled, it is also true, as was said in the case of *N. & W. Ry. Co. v. Cromer*, *supra*, that even the skillful and experienced will frequently differ in their choice of instrumentalities and methods of doing work, and the master should not be adjudged negligent for not conforming to some other method, believed by some to be less perilous than the method adopted. Ordinary care depends upon the circumstances of the particular case, and is such care as persons of ordinary prudence, under all the circumstances, would and do exercise.

We are of opinion that the judgment should be reversed, the verdict set aside, and

a new trial awarded, to be had not in conflict with the views expressed in this opinion.

CARDWELL, J., absent.

(102 Va. 471)

CHESTERMAN v. BOLLING.

(Supreme Court of Appeals of Virginia. Feb. 10, 1904.)

EJECTMENT—COMMON SOURCE—TITLE—DISPUTE—ESTOPPEL—CONVEYANCES—ADVERSE POSSESSION—COLOR OF TITLE.

1. Neither plaintiff nor defendant in ejectment is entitled to dispute the title of the person through whom each claims as a common source.

2. Where plaintiff's remote grantor caused a survey of 50 acres to be taken from a tract described by name, and sold such survey to defendant's ancestor, and thereafter the balance of the tract was sold at public sale, at which the 50-acre tract was expressly reserved, and both the vendor and the vendee in the deed under which plaintiff claimed purchased with notice that the 50-acre tract was excluded, plaintiff had no title thereto as against defendant.

3. Where plaintiff's remote grantor in 1877 sold 50 acres from a larger tract to defendant's ancestor, who took possession under the contract of sale, and occupied the land openly as his own, claiming title thereto until his death in 1901, and in 1880 he paid the balance of the price and received a conveyance under a court decree, and none of plaintiff's grantors of the larger tract had ever claimed title to such 50 acres, defendant was entitled to the land as against plaintiff by adverse possession under color of title.

Error to Circuit Court, Goochland County.

Action by Evan R. Chesterman, as trustee, etc., against Martha Ann Bolling. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

C. W. Throckmorton and H. R. Miller, for plaintiff in error. A. K. & D. H. Leake, for defendant in error.

WHITTLE, J. This is an action of ejectment, which was instituted in September, 1901, in the circuit court of Goochland county, by the plaintiff in error, Evan R. Chesterman, trustee, against the defendant in error, Martha Ann Bolling, to recover a tract of land situated in that county, described in the declaration as "Red Hill," containing 375 acres, more or less.

At the trial neither party demanded a jury, whereupon all questions of law and fact were submitted to the court, and judgment rendered for the defendant.

Both plaintiff and defendant claim title to the land in controversy from a common source, so that it is unnecessary to trace their chain of title beyond W. B. Durfey, under whom both claim, and the validity of whose title neither can dispute. *Bolling v. Teel*, 76 Va. 493.

It appears from the certificate of evidence that in 1882 B. D. Peachy, as special com-

missioner, acting under a decree of the circuit court of James City county, in a suit to partition the real estate whereof W. A. Durfey died seised among his heirs conveyed part of the "Red Hill" tract, containing 375 acres, more or less, to the purchaser, W. B. W. Brooking. In 1895 Brooking and wife conveyed the land to C. T. Davis; and in 1898 Davis conveyed to M. L. Wood, who subsequently conveyed it in trust to Chesterman, to secure a debt due from Wood to Davis.

In 1900 there was a survey made of the Red Hill farm, according to metes and bounds established while the entire tract belonged to Durfey, which showed that the original boundary embraced about 380 acres, and included the 50 acres in the possession of the defendant.

It further appears that the defendant is the daughter and sole heir of Joseph Mayo, deceased; that in 1877 Durfey caused a survey of 50 acres, taken from the Red Hill tract, to be made by the county surveyor, and delivered possession thereof to Mayo under a contract of sale; that Mayo cleared the land, paid the taxes, and erected a dwelling house and other permanent improvements thereon, and remained in the peaceable, undisputed, and exclusive possession of the property, under color of title, from the date of his purchase until his death in the year 1901; that there was a small balance of purchase money due upon the land, which Mayo paid a short time before his death to Special Commissioner Peachy, who thereupon conveyed the land to him, as directed by a decree of the October term, 1880, of the circuit court of James City county; that at a judicial sale made in 1882 of part of the Red Hill tract to Brooking it was publicly announced by those conducting the sale that the 50 acres of land previously sold by Durfey to Mayo were excepted from the sale; that Brooking, the original purchaser of the larger tract, knew of Mayo's ownership and possession of the smaller tract, and that it was not included in his purchase; that Davis was also apprised of those facts, and that neither Brooking nor Davis ever asserted title to that property. Peachy, who, as special commissioner, made conveyances to Brooking and Mayo of their respective purchases, states unequivocally that he transacted all business pertaining to the Durfey estate, and knows that the Mayo tract was not included in the sale and conveyance to Brooking.

Thus both vendor and vendee agree that the deed under which plaintiff claims does not cover the land in dispute.

It will be remembered that the case is here as upon a demurrer to evidence by the plaintiff; but, without invoking that rule, it is manifest from the whole evidence that plaintiff has no title whatever to the 50-acre tract, and that no previous owner of the larger tract ever asserted any claim thereto. Even if Brooking had purchased the prop-

erty originally, plaintiff's right of action would long since have been barred by the adverse possession under color of title of the defendant and her ancestor for nearly a quarter of a century.

In no aspect of the case, therefore, could there have been a recovery by the plaintiff. His contention proceeds upon the false premise that he is invested with the legal title to the land in controversy. If he was not, as obviously appears, the exceptions taken to various subordinate rulings of the court on matters of procedure were immaterial, and need not be considered.

The judgment complained of is without error, and must be affirmed.

(102 Va. 453)

NORFOLK & W. RY. CO. v. HAWKES.
(Supreme Court of Appeals of Virginia. Feb. 10, 1904.)

MASTER AND SERVANT—RAILROADS—DANGEROUS PREMISES—DEPOT PLATFORMS—OVERLAPPING TRAINS—CONTRIBUTORY NEGLIGENCE.

1. Defendant's trains, while passing a station at which plaintiff was employed, by reason of a curve opposite the platform, extended over the edge of the platform, which was built on a straight line, for various distances along the same. Plaintiff, who was 19 years of age, and a person of intelligence, was employed by defendant to take the mail bag from the messenger on the express car. Plaintiff had been in defendant's service for 18 days prior to his injury, and had performed the same duty on 34 former occasions; and on the day in question, when he saw the train coming, he took his position at a point within 6½ inches of the edge of the platform, and was struck by the train by reason of its overlapping the platform for such distance. At the point where plaintiff stood, the platform was 12 feet wide; leaving 11 feet 5½ inches behind him, where he might have stood in safety. *Held*, that plaintiff was guilty of contributory negligence, as a matter of law.

Error to Circuit Court, Nottoway County.

Action by Samuel Hawkes against the Norfolk & Western Railway Company. From a judgment in favor of plaintiff, defendant brings error. Reversed.

William Hughes Mann and Jos. I. Doran, for plaintiff in error. James F. Epees, for defendant in error.

HARRISON, J. This action was brought by Samuel Hawkes, a minor, suing by his mother, as next friend, to recover from the Norfolk & Western Railway Company damages for injuries alleged to have been received in consequence of the negligence of the defendant company.

It appears that there is at Blackstone, Va., a station of the defendant company, which has in front of it a platform 95 feet long and 12 feet wide. This platform has a straight edge on the side next to the railroad track, while the track has a slight curve, that would not be observed unless attention was called to it. The result of this curve is to bring a train, when it reaches the station, closer to the platform at some points than others; the projection of the cars over

the platform varying from 1¼ inches, at the ends, to 10 inches at the nearest point of contact between the rail and the platform.

On the 18th day of May, 1902, about 11:55 p. m., the plaintiff, a youth 19 years of age, who was an employé of the railroad company, went upon the platform, in the discharge of his duty, to take the mail bag off the express car; and, as the train pulled in, he was struck by it and thrown down, with one leg under the wheels of the engine, resulting in injuries that made amputation of the leg necessary.

It is averred that it was negligence in the defendant company to employ a youth 19 years of age, without the consent of his mother, his father being dead, and without requiring him to file a written application setting forth his age, experience, and other necessary qualifications; that it was also negligence in the defendant not to furnish the plaintiff with a copy of its rules, and not to give the plaintiff particular instructions touching the dangers and perils of his employment. The averment of negligence, however, chiefly relied on, is that, in careless disregard of the ordinary rules of safety, the defendant company erected its station so near the track that the trains, in passing, projected tortuously over the platform thereof; that the railway track at the point where the station was located was curved, and the front edge of the platform, along beside which the trains passed, was in a straight line, in consequence whereof both the points and the extent of the projection of passing trains over the platform were irregular, unequal, uncertain, and misleading, so that, while a person occupying a position a given distance back from the front edge of the platform, at one point thereon, might be safe, yet, if the same person were to occupy a position the same distance back from the front edge of the platform at another point, it would be fatally dangerous.

The jury found a verdict for the plaintiff, and assessed his damages at \$1,500. A motion for a new trial on the ground that the verdict was contrary to the law and the evidence, and for other reasons, was overruled, and judgment was given for the plaintiff, to which ruling the defendant excepted.

In the view taken by this court, it is unnecessary to consider any other assignment of error than that which involves the refusal of the lower court to set aside the verdict as contrary to the law and the evidence; and, in dealing with that subject, it is wholly unnecessary to enter upon a consideration of the question whether or not any actionable negligence has been traced to the defendant company, for, if such negligence were conceded, the plaintiff, upon well-settled principles, would not be entitled to recover; the injury of which he complains being the result of his own reckless and inexcusable negligence.

The evidence shows that the plaintiff was

a person of intelligence, and that the only duty he had to perform on the night of the accident was, when the passenger train reached the station, to take from the messenger on the express car the United States mail bag. He had been in the service of the defendant for 18 days, and had performed this same duty on 34 former occasions. The platform was 12 feet wide at the point of the accident, and the overlap of the train at that point was 6½ inches. This left 11 feet 5½ inches of platform where the plaintiff could have stood in safety. He says that he saw the train coming, and knew that it was dangerous to stand too close to it; and yet he negligently put the 11 feet 5½ inches of safe platform behind him, and took his stand on the 6½ inches, where the danger apparent from an approaching locomotive was enough to frighten back the most foolhardy. The plaintiff says he thought he was safe. It makes no difference that the danger was not in the plaintiff's mind. Such thoughtlessness is negligence which cannot be charged to the defendant company. *Southern R. Co. v. Mauzy*, 98 Va. 699, 37 S. E. 285. The plaintiff had reached the age of discretion. Ordinary care would have required him to have kept far enough from the edge of the platform to be out of the way of the engine he knew to be approaching. His negligence in getting too near the track, when it was not necessary to do so, not only exposed him to, but brought upon him, the injury of which he complains.

In *B. & O. R. Co. v. Whittington's Adm'r*, 30 Grat. 805, an employé of the railroad company, who was engaged in mending the track, stood near enough to the track to be struck by a train if there should have been an increase of speed, or a wider car passing. He might have stood further off and been safe. This court declared him to be guilty of the greatest imprudence and negligence, and denied a recovery for his death. Judge Staples, delivering the opinion of the court, said: "But it is obvious to every mind that a man who stands near enough to a railroad track to be struck by a train, if perchance there should be an increase of speed, or a change of cars, is simply guilty of the greatest imprudence and negligence."

"No man is justified in placing himself near a passing train upon any such idea or presumption. It is inexcusable rashness and folly to do so. The instincts of self-preservation, the dictates of the most ordinary prudence, would suggest, and even require, that every person, upon the approach of a train, shall retire far enough to avoid injury, whatever may be the speed of the train or the width of the cars. He must, at his peril, place himself where he cannot be struck by the train so long as it continues upon its track. Of course, the result might be very different where the employé, in remaining or near the track, is acting under the instructions of the company.

"In the present case the deceased both saw and heard the train long before it reached him. It is not denied he had ample time to get out of the way."

In the case at bar it was not a question of having time to get out of the way. The plaintiff was in a place of safety, and put himself, unnecessarily and negligently, in the way. In the case of passengers upon the station platform of a railroad, it has been repeatedly held that they could not recover where they had been guilty of negligence in going near enough to the edge of the platform to be struck by a passing train. *Chicago, B. & Q. R. R. v. Mahara*, 47 Ill. App. 208; *Matthews v. Pennsylvania Ry. Co.*, 148 Pa. 491, 24 Atl. 67; *Dotson v. Erie R. Co.* (N. J. Err. & App.) 54 Atl. 827.

In the case last cited, a passenger was struck, while walking near the edge of a station platform, by the pilot beam of a passing engine, which projected over the platform. The court declared that there was no question of negligence by the company, and denied a recovery. In a well-considered opinion, the court said:

"It is undoubtedly a settled rule that a railroad company is under a duty to exercise ordinary and reasonable care to so construct and maintain station buildings, platforms, and approaches that they shall be safe for use by passengers. *Elliott on Railroads*, 1590. But this use is to be exercised in conformity to the manifest purpose for which the structure in question is adapted. And so a railroad company is only required to build platforms of sufficient dimensions to accommodate passengers getting on and off at their stations. *Harkey v. R. & P. Ry. Co.*, Fed. Cas. No. 6,065; *Taylor v. Pennsylvania Co.* (C. C.) 50 Fed. 755; *Moreland v. Boston & C. R. R.*, 141 Mass. 81, 6 N. E. 225; *Kelly v. Manhattan Ry.*, 112 N. Y. 440, 20 N. E. 383, 3 L. R. A. 74; *Laffin v. Buffalo R. Co.*, 108 N. Y. 136, 12 N. E. 599, 60 Am. Rep. 433. It is manifest that this duty requires the railroad company to construct its platform sufficiently near to the rails that it will afford to passengers, including the aged and infirm, a safe exit to and from the trains. And it is a matter of common knowledge that in performing this duty the platforms along the best-regulated railroads are built so near the rails that the projections from the engines and cars will overlap, to some extent, the edge of the platform. While the extreme edge of the platform is perfectly safe for passengers when occupying it for the purpose to which it is manifestly adapted, it is a matter of common knowledge that it is a place of danger when occupied while trains are passing or are likely to pass. It is the plain duty of the passenger, when not getting on or off a train, but while he may be waiting upon the platform, or engaged in walking upon it, to keep such a distance from the edge of it next to the rail that he would be beyond the reach of the projections of ordinary trains.

And the company is not liable for injury to a passenger who suffers himself to go beyond such a limit, and is injured by a passing train. It was held in *C. & Q. R. R. v. Mahara*, 47 Ill. App. 208, that, where a platform is wide enough to give room for safety, the fact that it is so built that the edge nearest the track cannot be safely occupied as a standing place while trains are passing is not negligence. In *Matthews v. Pa. R. Co.*, 148 Pa. 491, 24 Atl. 67, it was held that where a passenger waiting for a train at a station, the platform of which is properly constructed, stands so near the track as to be struck and killed by the bumper of a passing locomotive, the railroad company is not liable. See, also, *McGeehan v. Lehigh Valley R. Co.*, 149 Pa. 188, 24 Atl. 205; *Pa. R. R. v. Bell*, 122 Pa. 58, 15 Atl. 561."

The negligence of the plaintiff was the proximate cause of his injury, and in such a case there can be no recovery.

For these reasons, we are of opinion that the lower court erred in overruling the motion of the defendant company to set the verdict aside, and its judgment must therefore be reversed, and the case remanded for a new trial.

CARDWELL, J., absent.

(102 Va. 467)

DINNING v. DINNING.

(Supreme Court of Appeals of Virginia. Feb. 10, 1904.)

HOLOGRAPHIC WILLS—EXECUTION—SIGNATURE.

1. Under Code 1887, § 2514, providing that a will shall be signed by the testator in such manner as to make it manifest that the name is intended as a signature, a holograph will purporting to make an orderly and apparently complete disposition of all testator's property, ending with the words, "I, William Dinning, say this is my last will and testament," was sufficiently signed by the testator to entitle it to probate.

Error to Hastings Court of Portsmouth.

Application by Harry James Dinning for the probate of the will of William Dinning, deceased. From a judgment denying probate, proponent brings error. Reversed.

William H. Stewart, for plaintiff in error.

HARRISON, J. In the court of Hastings for the city of Portsmouth, on the 18th day of April, 1903, Harry James Dinning offered for probate the following paper, purporting to be the last will and testament of William Dinning, deceased:

"Portsmouth, Va., April 20th, 1902.

"In case of my death, I wish my brother Harry to take charge of my estate and pay off all of my just and honest debts, and I want my sister Mary's body brought from Berkley and buried alongside of me. After this is done and all paid for and my funeral and burying is paid for, I give to my brother, Harry Hunter Dinning, all of my furniture in

my house on Glasgow street, Scottsville, and all of my clothes, watch and chain, and give him my house and vacant lots on Glasgow street, known as the Walton property, Scottsville, and my store, 1332 County street. I do give to my brother's wife, Mary Elizabeth Dinning, my half interest in the property corner of Glasgow and Pearl streets, Park View; she is the owner of the other half of this property, and to my nephew, Harry James Dinning, the house and lot corner of Glasgow and First avenue, Scottsville; also my Lincoln Park lot; to my niece, Daisy Hunter Raby, I leave my place known as the Perry place, North street, Park View, and my lot in Buffalo, N. Y., to pay off the mortgage to Mr. Wise. I leave her this, she being my favorite niece, and for kindness in my life, I having raised her and loved her. I, William Dinning, say this is my last will and testament."

The court certifies that it was proved that William Dinning died on the 20th of March, 1903; that at the date mentioned in the writing he was upwards of 21 years of age, and of sound mind and memory; that the paper was wholly in his handwriting, and was found, a few days after his death, in a valise, with his other valuable papers.

Probate of this writing was refused upon the ground that it was not signed in such manner as to make it manifest that the name was intended as a signature. This judgment was excepted to, and a writ of error awarded by this court.

Section 2514 of the Code of 1887 requires that a will shall be signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature. This statute was first introduced into our law by the revisors of 1849, and has remained unchanged to the present day. It has several times been interpreted by this court. *Ramsey, etc., v. Ramsey's Ex'r*, 13 Grat. 664, 70 Am. Dec. 438; *Roy, etc., v. Roy's Ex'rs*, 16 Grat. 418, 84 Am. Dec. 696; *Warwick v. Warwick*, 86 Va. 602, 10 S. E. 843, 6 L. R. A. 775. The result of these decisions is that it must appear from the face of the paper that the testator designed by the use of his signature to authenticate the instrument; the manifest intention of the signature, wherever placed, being the rule of the statute.

In *Ramsey v. Ramsey's Ex'r*, supra, after reviewing the history of the law on the subject, Judge Daniel says: "When due weight is given to these considerations, there arises, I think, a fair inference that the Legislature, in requiring that the will shall be signed 'in such manner as to make it manifest that the name is intended as a signature,' designed not merely to enact what had been decided in *Waller v. Waller* [1 Grat. 454, 42 Am. Dec. 564], but to furnish a rule in respect to the signature, which, whilst it would have all the certainty of the British statute, would yet

let in wills, which, though not signed at the foot or end, might be signed in such manner as to afford internal evidence of authenticity equally convincing."

In the case at bar the instrument was undoubtedly intended as a will. It makes an orderly and apparently complete disposition of the testator's property. After naming an executor, the testator gives directions as to the payment of his debts and the removal of his sister's remains to be buried beside his own; and, subject to the payment of these debts and expenses, makes certain specific bequests and devises, leaving for the last the provision he desired to make for his niece, the special object of his affection and bounty. He then concludes, "I, William Dinning, say this is my last will and testament." If, under the construction placed, as seen, for nearly 50 years, upon it, the statute was designed to furnish a rule in respect to the signature, which would let in wills, though not signed at the foot or end, if signed in such manner as to afford internal evidence of authenticity equally convincing, then it would be difficult to conceive of a case coming more nearly within the contemplation of the statute than the will under consideration. The signature is at the end of an apparently completed instrument, and followed by only eight words, which do not indicate a purpose to add anything more, or to take anything from what had been written, but, understood according to their usual acceptance, constitute an emphatic declaration that the signature was intended to authenticate all that had preceded it, as the final consummation of the testator's purpose. If the testator had said, "I say this is my last will and testament. William Dinning," no question could have been raised. The sense is exactly the same when he says, "I, William Dinning, say this is my last will and testament." Neither form was essential. The will would have been complete without those words, either following or preceding the signature. The testator evidently used them as adding force to his signature, and it would be trifling with the right of a man to dispose of his property by will to hold that the addition of the words mentioned after the signature to an otherwise completed will had resulted in rendering invalid the entire instrument.

For these reasons the judgment complained of must be reversed, and the case remanded, with directions to the lower court to enter an order admitting the will in question to probate.

(102 Va. 441)

TEMPLEMAN'S ADM'R v. PUGH.

(Supreme Court of Appeals of Virginia. Feb. 10, 1904.)

LIMITATIONS—PROSECUTION OF SUIT—OBSTRUCTIONS.

1. Section 2933 of Code of 1887, as amended by Act Feb. 19, 1898 (Acts 1897-98, p. 441, c.

404), providing that the statute of limitations shall not run while the prosecution of a right is obstructed in any manner therein mentioned, applies only to persons who obstruct the prosecution of such right, and has no application to deceased persons or their estates.

Error to Circuit Court, Fauquier County.

Action by A. B. Pugh, receiver, against the administrator of James A. Templeman. Judgment for plaintiff, and defendant brings error. Reversed.

O. B. Roller, Mr. Martz, and T. J. Elliott, for plaintiff in error. Munford, Hunton, Williams & Anderson and Arthur B. Pugh, for defendant in error.

BUCHANAN, J. A. B. Pugh, receiver, on the 26th day of December, 1900, instituted his action of assumpsit against the personal representative of James A. Templeman, deceased, to recover the sum of \$1,250, alleged to be due from the said decedent's estate on account of subscriptions to the stock of the Salem Loan & Real Estate Investment Company, chartered under the laws of this state.

The defendant appeared, and filed the plea of non assumpsit, the plea of res judicata, and two pleas of the statute of limitations—one of three years and the other of five years.

The plaintiff replied generally to the first two pleas, and filed two special replications to each of the pleas of the statute of limitations. To each of these special replications the defendant demurred. The court overruled the demurrers, and issues were joined. A jury was waived, and, all matters of law and fact having been submitted to the court for its determination, it rendered judgment in favor of the plaintiff. To that judgment this writ of error was awarded.

The facts relied on in the pleadings by the plaintiff to defeat the bar of the statute of limitations are the following: The contract sued on, which was to be performed in this state, was entered into in the year 1890 by James A. Templeman, who was then a citizen and resident of the state of Maryland, and continued to reside without the state of Virginia until his death on the 27th day of October, 1894. His will was probated and his executors qualified in the orphans' court of the city of Baltimore, in the state of Maryland. Afterwards, on the — day of —, 1900, ancillary letters of administration were granted to the sheriff of Fauquier county. The cause of action accrued on the 1st day of January, 1895.

Section 2920 of the Code of 1887, after fixing the period of limitation upon any action to recover money upon an award or any contract other than a judgment or recognizance, provides "that the right of action against the estate of any person hereafter dying [May 1, 1888] on any such award or contract, which shall have accrued at the time of his death, or the right to prove any such claim against his estate in any suit or proceeding, shall

not in any case continue longer than five years from the qualification of his personal representative, or if the right of action shall not have accrued at the time of the decedent's death, it shall not continue longer than five years after the same shall have so accrued."

By section 2919 of the Code, as amended by an act approved February 12, 1896 (Acts 1895-96, p. 331, c. 292), it is provided, among other things, that the period of one year from the death of any party shall be excluded from the computation of time within which by the operation of any statute or rule of law it may be necessary to commence any proceeding to preserve or prevent the loss of any right or remedy.

The decedent, James A. Templeman, having died October 27, 1894, and this action not having been brought until December 26, 1900, the demand sued on, whether controlled by the three-years or the five-years statute of limitations, is barred, even if the period of one year from the death of the debtor should be excluded in computing the time between his death and the institution of this action, unless the decedent or his estate is exempted from the operation of the statute by section 2933 of the Code, as amended by act approved February 19, 1898 (Acts 1897-98, p. 441, c. 404). This section, as amended, so far as material to this case, is as follows:

"Where any such right as is mentioned in this chapter shall accrue against a person who, by departing without this state or by absconding or concealing himself, or by continuing to reside without the state, or by any other indirect way or means, shall obstruct the prosecution of such right, the time that such obstruction may have continued shall not be computed as any part of the time in which the said right might or ought to have been prosecuted. But this section shall not avail against any other person than him so obstructing, notwithstanding another might have been jointly sued with him if there had been no such obstruction."

The object of the Legislature in enacting that section was to stop the running of the statute of limitations as to the classes of persons therein mentioned as long as they obstructed the prosecution of any such right of action as is mentioned in chapter 140 of the Code. Since dead men cannot obstruct the prosecution of any such right, it is clear that the section can only apply to persons living at the time the right of action accrued, and then only to such time as they shall have obstructed the prosecution of such right in the manner therein indicated.

In this case, the debtor having died before the plaintiff's right of action accrued, he did not and could not obstruct its prosecution. He is neither within the letter nor the spirit of section 2933; neither is his estate. As soon as two months had elapsed after the

debtor died, the plaintiff could have had his estate in Virginia committed to the sheriff of Fauquier county for administration (Code 1887, § 2845), and, as soon as his right of action accrued, have instituted this action, just as he could have done if the debtor had been a resident of this state when he died.

Statutes of limitations are statutes of repose, and especially is this true as to the estates of the dead. They are founded on a sound public policy, and should be so construed as to advance the policy they were designed to promote.

We are of opinion that the facts relied on are not sufficient to defeat the bar of the statute of limitations, and that the judgment of the circuit court must be reversed for so holding.

(102 Va. 446)

NORTHINGTON v. NORFOLK RY. & LIGHT CO.

(Supreme Court of Appeals of Virginia. Feb. 10, 1904.)

CARRIERS—INJURIES TO PASSENGERS—CONTRADICTION—EVIDENCE—VERDICT—VACATION—NEW TRIAL—APPEAL—REVIEW OF EVIDENCE.

1. Under the express provisions of Acts 1891-92, p. 962, where there have been two trials of an action at law, and the verdict on the first is set aside by the trial court, and a new trial granted, and proper exceptions taken, and on the second trial a jury is waived, and no testimony introduced, whereupon a judgment is rendered, and the evidence certified, the appellate court will examine the evidence on the first trial, and, if the court erred in setting aside the verdict, the subsequent proceedings will be annulled, and a judgment rendered thereon.

2. In an action for injuries received while boarding a street car, *held* that, plaintiff's evidence being contradictory, a verdict in her favor was properly set aside as unsupported by the evidence.

Error to Law and Chancery Court of City of Norfolk.

Action by Anna Northington against the Norfolk Railway & Light Company. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

Miller & Coleman, for plaintiff in error.
Richard B. Tunstall, for defendant in error.

WHITTLE, J. The plaintiff in error, Anna Northington, brings this case here to review a judgment of the court of law and chancery of the city of Norfolk setting aside the verdict of a jury awarding damages in her behalf against the defendant in error, the Norfolk Railway & Light Company, in an action for personal injuries.

The status of the case is as follows: There were two trials in the court below. At the first trial the jury returned a verdict in fa-

vor of the plaintiff, which, upon motion of the defendant, was set aside as contrary to the law and evidence, and a new trial granted. At the second trial the plaintiff declined to introduce any testimony, and, a jury having been waived, the court rendered judgment for the defendant.

In such case, by statute, the rule of decision is that this court must "look first to the evidence and proceedings on the first trial, and if it discovers that the trial court erred in setting aside the verdict on that trial, it shall set aside and annul all proceedings subsequent to said verdict and enter judgment thereon." Acts 1891-92, p. 962; *Wood v. Am. Nat. Bank*, 100 Va. 306, 309, 40 S. E. 931.

The declaration alleges that while the plaintiff was in the act of boarding one of the defendant's cars at the intersection of Church and Henry streets, in the city of Norfolk, the car was suddenly and prematurely started, and the plaintiff was thrown to the ground with such violence that her leg was broken at or near the ankle.

The defendant denied liability upon two grounds: (1) Because the accident was caused by the negligence of the plaintiff in jumping from a car while in motion; and (2) that, in consideration of the payment of \$50 and the doctor's bill for medical services rendered the plaintiff, she had acknowledged satisfaction, and executed and delivered a release of all claims and demands against the defendant on account of the injury.

Upon the question of negligence, the witnesses who testified on behalf of the plaintiff were the plaintiff herself, Mary Dean, her sister, Godfrey Watkins, and George Williams. The accident happened on Church street, which runs north and south, at or near the corner of Henry street, which runs east and west; and the case made by the declaration and the contention of the plaintiff is that she was thrown off "just as soon as the car started," while the competing theory of the defendant is that plaintiff jumped off the car after it had gotten under way, and while in motion. The ascertainment of the exact point at which the accident occurred is therefore of controlling importance.

Plaintiff testified that the car stopped to discharge and receive passengers at the southern corner of Henry street on Church street, and that she fell at the intersection of these two streets as soon as the car started, which, of course, fixes the place at which she fell as the southern corner of Henry street; and the testimony of Mary Dean is substantially to the same effect. Her witness Godfrey Watkins, on the contrary, says explicitly that she was thrown from the car north of the northern corner of Henry street. George Williams, also, after making contradictory statements, finally, on cross-examination, settles upon the northern corner of Henry street as the point at which plaintiff fell. Thus the plaintiff and her sister were contradicted by

two of her own witnesses on a most material point in the case, for, if her version of the affair be true—that she was thrown off at once, by the car starting prematurely—then the place where she fell could not have been north of Henry street, at which place the car was unquestionably in motion. Upon that issue she was also contradicted by four of the defendant's witnesses—one of them the conductor of a trailer car attached to the street car, and three of them disinterested passengers—all of whom testified that the car had crossed Henry street and was in motion when plaintiff jumped off and received the injury. It seems that Mary Dean had intended to board the car, but failed to do so; and the supposition is that, when plaintiff discovered that her sister had been left behind, she jumped off in order to join her.

It also appears that in the receipt executed by plaintiff to the defendant for \$50 in cash and the amount of the doctor's bill, which were agreed to be accepted in full settlement and release of all claim to damages against the defendant, she admitted that the injury was the result of her stepping from a moving car. It further appears from a contemporaneous report of the accident made by the conductor of the street car (produced on cross-examination of one of defendant's witnesses) that the car was running at the rate of six or eight miles an hour when the plaintiff was injured.

In the case of *Preston v. Otey*, 88 Va. 491, 14 S. E. 68, it was held that a party's admission was so inconsistent with his contention that a verdict in his favor ought to be set aside as against the evidence. And the court said in the case of *N. & W. R. Co. v. Poole*, 100 Va. 148, 40 S. E. 627, at page 153, 100 Va., page 629, 40 S. E.: "Where damages are claimed for injuries which may have resulted from one of two causes, for one of which the defendant is responsible, and for the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause. And he must also fail if it is just as probable that the damages were caused by the one as by the other, since the plaintiff is bound to make out his case by a preponderance of the evidence." *Searles v. Manhattan Ry. Co.*, 101 N. Y. 661, 5 N. E. 66; 1 *Shear. & Red. on Neg.* § 57; *C. & O. Ry. Co. v. Sparrow*, 98 Va. 640, 641, 37 S. E. 302.

The rule in this class of cases is that the evidence must show more than a probability of actionable negligence on the part of the defendant. Nevertheless the admission of the plaintiff, and the testimony of two of her witnesses, Godfrey Watkins and George Williams, are so opposed to her own testimony and theory of the cause of the accident that it is impossible for the court to determine with any degree of reliability which should be accepted as true. It is obvious, therefore, that any conclusion that might be reached in

the case favorable to plaintiff would not be warranted by any certain evidence, but would be based upon conjecture merely.

Upon the first issue, in view of the contradictory, confused, and inconclusive character of the testimony of the plaintiff and her witnesses, without regard to the countervailing evidence of the defendant, the verdict of the jury was a plain deviation from justice and the right of the case. As remarked, there was no reliable, substantial evidence to support the verdict, and the action of the court in setting it aside was without error.

The remaining ground of defense, as stated, is that plaintiff had received the sum of \$50, and payment of the doctor's bill, in satisfaction of all claims and demands against the defendant.

The settlement was made on July 28, 1901, and the action was not brought until April of the ensuing year. Plaintiff received the money and executed the release without any suggestion that she was a minor at that time. That contention was made for the first time when the action was instituted. While the evidence to sustain that issue is based upon the memory of unintelligent witnesses and is unsatisfactory, the view already taken by the court of the other branch of the case renders a consideration of the second ground of defense unnecessary.

Upon the whole case, the judgment complained of is without error, and must be affirmed.

(67 S. C. 541)

BLACKWELL v. McNINCH.

(Supreme Court of South Carolina. Dec. 1, 1903.)

APPEAL—REVIEW—FINDING BY MASTER— QUESTIONS NOT RAISED BELOW— PAYMENT—EVIDENCE.

1. A finding by the master, affirmed by the circuit judge on reference in an action on an unsecured note, cannot be reviewed on appeal.

2. An objection that the usury statute does not apply to the note in suit cannot be considered when not raised below.

3. In an action on a note, evidence considered, and held insufficient to show payment in full by personal services rendered under an agreement.

Appeal from Common Pleas Circuit Court of Greenwood County; Buchanan, Judge.

Action by Thomas R. Blackwell against James R. McNinch. Decree for defendant, and plaintiff appeals. Modified.

Wm. N. Graydon, for appellant.

JONES, J. This is an appeal from a decree of the circuit court affirming the report of the master, to whom all issues of law and fact had been referred. The master's report was as follows:

"This is an action to foreclose a mortgage and a suit on two unsecured notes. It ap-

pears that on the 21st day of November, 1889, one John I. McGhee held a mortgage over certain lands of defendant to secure the sum of \$1,440, evidenced by three notes bearing interest at 7 per cent. On these papers were indorsed two payments, amounting together to \$105.35. It seems, after a calculation was made, John I. McGhee agreed with James R. McNinch, the mortgagor and defendant herein, to take \$500 for the debt. James R. McNinch, not having all the money with which to take up the mortgage, had Thomas R. Blackwell, the plaintiff, to advance a part of it. It is alleged in the complaint that the plaintiff, at the request of the defendant, advanced \$462 and the defendant \$38, and the papers were assigned to the plaintiff by John I. McGhee. It is further alleged in the complaint that, in order to show the amount paid by the plaintiff and to show the amount of interest agreed to be paid by the defendant, the said James R. McNinch executed and delivered to the plaintiff his note for \$462, payable one year after date, with interest from maturity at ten per cent. per annum. The defendant admits the execution of this note and the payment thereon of \$121.74 on November 11, 1893, but denies the payment of \$10, October 27, 1898; alleges that the plaintiff advanced only \$420, and he (the defendant) advanced \$80; and pleads usury. For a further defense the defendant says that on account of and by reason of certain services he rendered the plaintiff at the request of the plaintiff and by an agreement with the plaintiff, the said debt had been fully paid, and the defendant pleads the same in satisfaction and payment thereof. As to the two \$165 notes sued on: The defendant admits the execution of both notes; alleges that he received only \$150 on each, that \$15 in each was usurious interest added, pleads payment and usury, and sets up a counterclaim for \$60 excess interest.

"From a careful consideration of the testimony, I find as matters of fact:

"First. That of the \$500 paid John I. McGhee for the assignment of the mortgage herein sued on Thomas R. Blackwell, the plaintiff, advanced \$420, and the defendant, James R. McNinch, \$80. Mr. and Mrs. McNinch both swear that McNinch advanced \$80 of this \$500 and Blackwell advanced \$420. The interest on \$420 for one year at ten per cent. is \$42, and \$42 added to \$420 makes \$462, the principal of the note sued on, and which does not bear interest until after maturity, a year from the date. Whether Mr. Blackwell advanced \$420 or \$462, the plea of usury fails, since ten per cent. was legal at the time, whether interest was collected before or after maturity.

"Now, as to the other defense, to wit, the services the defendant claims paid this debt. The testimony shows that the defendant moved on the plaintiff's plantation in 1887, and lived there until 1900. He lived there

as a renter a part of the time and as a crop-per a part. The plaintiff's place was a nine or ten horse farm. In 1887 the plaintiff moved off his place to Due West, and had the defendant move in the house vacated by himself. The defendant was subsequently put in charge of the whole place as overseer or keeper, and rendered valuable service to Mr. Blackwell, the plaintiff, in keeping up the plantation, by ditching, terracing, and repairing and building houses, for which Mr. Blackwell was to compensate him; and that Mr. Blackwell, in 1894, upon the defendant offering to pay him money on this mortgage debt, refused to accept the money, and told the defendant that, if he would remain on the place, and continue to render services for the unexpired term of ten years, he would surrender him the mortgage marked satisfied, in consideration of his services. The preponderance of the testimony, to my mind, establishes the fact that John R. McNinch rendered these services alleged to have been rendered the plaintiff, and that the plaintiff agreed with the defendant to accept these services in payment of the mortgage debt, and I so find.

"As to the note for \$165, dated January 30, 1894, I find from the testimony that it had been paid. That the said note was usurious, in that the original debt was \$150, and \$15 as interest for one year was added as interest on \$150. This note was given for money and supplies to be advanced, but, being included in the 1894 account of Blackwell against McNinch, which account appears to have been settled by compromise, I cannot find that the \$15 interest was paid as interest; hence the counterclaim as to this note is disallowed.

"As for the \$165 note of April 3, 1896, I find, as a matter of fact, from a careful consideration of the testimony and a comparison of the papers offered in evidence, that this note has been fully paid, and the said note was usurious, in that \$15 was added as interest for less than a year's time on \$150. The counterclaim to this note is sustained for twice the difference in interest at eight per cent. and ten per cent., to wit, in the sum of \$6.

"Upon the foregoing findings I conclude as matter of law: (1) That the complaint herein be dismissed, with costs. (2) That the defendant have judgment against the plaintiff for \$6. (3) That the mortgage herein sued on be delivered up and marked satisfied of record."

The exceptions relate merely to the findings of fact. With respect to the unsecured notes of \$165 each, we regard the conclusion of the circuit court as final. The action, in so far as it relates to these notes, is one at law, and no equitable defense is involved. The plaintiff, having waived trial by jury, is bound by the determination of the facts by the circuit court, and this court has no power

to review such findings of fact in an action at law.

We have not considered the point presented in argument by appellant's counsel that as to these notes which were executed prior to March 2, 1898, the usury law was repealed under section 1664, Code 1902 (Act 1898, 22 St. at Large, p. 749), for the reason that it does not appear that such question was raised before or considered by the circuit court, nor is there any exception specifically raising such question.

With respect to the foreclosure of the mortgage, the action is equitable, and this court may reverse the findings of fact therein if such findings are against the preponderance of the evidence. A careful consideration of the testimony leads us to the conclusion that the circuit court was in error in dismissing the complaint in foreclosure upon the ground stated—that defendant rendered services to plaintiff, and that plaintiff agreed with defendant to accept these services in payment of the mortgage debt. The complaint thus alleges the agreement in question: "That in November, 1893, upon the occasion of making the payment of \$121.74, mentioned in paragraph 5 of the complaint, the plaintiff promised and agreed with defendant that if he would continue in the performance of the services hereinabove mentioned until ten years had elapsed from the time when defendant moved on the lands, as herein stated, that plaintiff would satisfy in full the indebtedness of defendant to plaintiff, evidenced by the papers set out in paragraph 4 of the complaint, and the same cancel and deliver to this defendant." The only testimony offered to establish this alleged agreement was by the defendant alone, who testified as follows: "In 1894, I offered to pay Mr. Blackwell money on the land, and he refused to take it, saying that I had helped him four years, and, if I made out the ten years, he would give me up the mortgage. He said he would pay me if I would go ahead and help him out. I had worked five or six years when he promised to give me the mortgage. I had worked on and kept up the place for a little over four years." The defendant further testified that his services were worth \$400 for the whole time he was on plaintiff's place, if we limit the time of his services to 10 years. According to defendant's estimate, his services were worth \$40 per year. It does not appear at what time in 1894 this alleged agreement was made; but, after crediting the mortgage on November 11, 1893, with the payment of \$121.74, the annual interest of the balance of the debt exceeded the annual value of the services—a very improbable contract, to say the least of it. The plaintiff testifies: "In 1894 I never offered to give the mortgage to McNinch for services. Never did make any such contract with him." Remembering that the

burden of proof rested upon the defendant to establish the alleged agreement, and in view of the unreasonableness of such a contract, we do not think it could fairly be well said that the preponderance of the evidence was against the plaintiff, an unimpeached witness, who positively denied having made any such contract. But there is a strong circumstance in the case which corroborates the plaintiff, and is wholly inconsistent with the defendant's version. It appears that in 1899 the plaintiff assigned this mortgage to a Mr. Todd as collateral security, after procuring from defendant the receipt of \$121.74 for payment of November 11, 1893, for the purpose of placing upon the mortgage all proper credits, in accordance with the demand of Mr. Todd. The defendant thus testifies as to this circumstance: "In 1899, in February, Mr. Blackwell came down to my house for the \$121.74 receipt. Said he wanted to credit it on the mortgage, so he could use the mortgage with Mr. Todd. I asked him what Todd was doing with my papers. He said he was going to place the paper with Todd as collateral security. He wanted money, and Todd would not take it without all credits being put on it. He [Mr. Blackwell] never said I was not entitled to the mortgage. When he asked me for the receipt, I asked him what business Todd had with my papers, and he asked if I would not loan him \$500. He said he would not let me suffer, and I gave him the receipt the next morning." The defendant further testified: "When Mr. Blackwell came for the receipt I never forbade to pledge the mortgage to Mr. Todd, but I told Blackwell it was my mortgage. I never told Mr. Todd the mortgage was paid." With reference to this matter the plaintiff testified: "When I called on McNinch for the \$121.74 receipt, he did not hesitate to give it to me. He never laid any claim to the mortgage." The fact that the defendant aided plaintiff in 1899 in placing all proper credits upon the mortgage with a view to enable him to assign it as collateral to a third person, is wholly inconsistent with the idea that the mortgage was then paid by the services rendered. We have not considered in this connection the statute of frauds, which forbids action upon any agreement that is not to be performed within one year, unless the agreement be in writing, and signed by the party to be charged therewith, as no question has been raised with reference to said statute. The circuit court therefore erred in holding that the mortgage was paid by the services alleged to have been rendered under such an agreement and in dismissing the complaint. Subject to what we shall hereafter direct, the plaintiff was entitled to a decree of foreclosure for the sum of \$462, with interest from November 21, 1890, as stipulated, less credit of \$121.74, November 11, 1893, and the credit of \$10, October 27, 1898, admitted

by plaintiff, although denied by defendant, and less also the amount of \$6, allowed as a counterclaim by the master and circuit court in the action on the unsecured notes. Equity requires that the mortgage debt should be credited or reduced by whatever amount plaintiff is justly liable to pay defendant for services rendered. But as neither the master nor the circuit court has made any findings as to the value of such services and plaintiff's liability to pay therefor, independent of the alleged special agreement, which defendant failed to establish, we are not prepared to finally dispose of the case, and will remand it for an inquiry into those matters.

The judgment of the circuit court, in so far as it relates to the unsecured two notes of \$165 each, is affirmed; but in so far as it relates to the foreclosure of the mortgage it is reversed, and the case is remanded for such further proceedings as may be proper to carry out the views herein announced.

(87 S. C. 558)

MILFORD v. MILFORD.

(Supreme Court of South Carolina. July 9, 1903.)

USURY--EVIDENCE--PAYMENT OF NOTE--APPLICATION OF USURIOUS INTEREST.

1. In an action to foreclose a mortgage, evidence held to show that an amount added to the notes given for the price of land rendered them usurious.

2. Where a debtor agrees that certain payments shall be applied to certain notes as payment in full, and they are canceled and turned over to him, he cannot thereafter claim that usurious interest was collected on the notes.

3. Where a contract under which certain notes secured by mortgage were given is held usurious, and some of the notes have been paid in full and surrendered, the debtor cannot, by way of counterclaim, have the penalty for usurious interest thus collected credited on the balance of the principal due, but the creditor is entitled to judgment for balance of the principal, but without costs.

4. Where, in action on notes, defendant sets up counterclaim for usurious interest, and the court finds as a matter of fact that there has been no payment of usurious interest, and defendant does not appeal, there is no material error in failing to consider the counterclaim.

Appeal from Common Pleas Circuit Court of Greenwood County; Joseph A. McCollough, Special Judge.

Suit by Joseph H. Milford against John R. Milford. From a decree, plaintiff appeals. Modified.

Plaintiff appeals on following exceptions, charging error:

"(1) In overruling the sixth exception to the report of the master, which exception charged that the master erred in his findings as follows, to wit: 'Sixth. In holding that the additional amount inserted in the notes was illegal interest, instead of holding that it

went to make up the credit portion of the land sold; the error being that the testimony of both the plaintiff and the defendant was that \$2,251.20 was the sum agreed on by them as the credit price of the said tract of land.

"(2) In overruling the seventh exception of the plaintiff to the report of the master, which exception charged that the master erred in his findings as follows, to wit: 'Seventh. In not holding that the vendor and purchaser of land have the right to insert in their contract an additional sum in consideration of credit extended by the vendor, and the fact that it is a certain percentage on the purchase money cannot make any difference, unless it is provided in the contract that it shall be payable under the name of interest;' the error being that the statute against usury forbids the charging, taking, agreeing upon, or allowing a greater rate of interest than seven, or eight, or ten per centum per annum for the hiring, lending, or use of money or other commodity, and does not apply at all to land; and the decisions of this court being that an additional sum may be charged or agreed upon for the credit portion of the purchase money on sale of a tract of land, unless it is charged or agreed upon as interest by name.

"(3) In not holding that the testimony in this case shows that \$2,251.20 was the credit price of the land as agreed upon by the vendor and purchaser, and the fact that a different consideration was expressed in the deed could not change the rights and liabilities of the parties, the real consideration being set out in the notes and mortgage, and it being competent for the real consideration to be proved by parol.

"(4) In overruling the plaintiff's ninth exception to the report of the master, which exception charged that the master erred in his findings as follows, to wit: 'Ninth. In not holding that the defense of usury cannot be set up to the first two notes in this action, for the two reasons that the action is not brought on the first two notes or the first three notes, but on the last three, and that the money paid by the defendant was applied by agreement of the parties to the principal and interest due on the first three notes, leaving a balance due on the third note of \$40, and that the contract was fully executed as to such three notes;' the error being that the testimony of both the plaintiff and the defendant was that by agreement made between them the first nine payments were applied to the face of the first note, with interest thereon at ten per centum per annum until it was paid in full; then to the amount due on the second note according to its face, with interest thereon at ten per centum per annum, until it was paid in full; and then to the amount due according to the face of the third note, with interest thereon at ten per centum per annum, leaving a balance due

thereon of \$48.92; and that the defendant made no complaint except that there was an error in the date of a credit, which he did not try to correct.

"(5) In overruling the plaintiff's tenth exception to the master's report, which exception charged that the master erred in his findings as follows, to wit: 'Tenth. In finding and holding that there is due upon the mortgage debt only \$638.40, whereas he should have held, under the evidence submitted in this case, including the written papers, that there is due thereon more than \$1,100;' the error being that the parties hereto applied to the first three notes and interest the sum of \$1,807.87, leaving a balance due thereon of \$48.92, besides the whole amount due on the other three notes, to wit, on the fourth note, \$275, on the fifth note, \$320, and on the sixth note, \$362; and, if all interest should be disallowed, the plaintiff would still be entitled to judgment for over \$900.

"(6) In sustaining the defendant's second exception to the master's report, which charged that the master erred in his findings as follows, to wit: 'Second. The master should have found as matter of fact that all payments were made on the debt, and accordingly applied the payments made to the discharge of the principal debt without interest or costs;' the error being that his honor should not have considered at all an exception which does not specifically point out the error complained of, and that all the testimony submitted both by the defendant and the plaintiff showed that the first nine payments were applied by agreement of the parties first to the interest at ten per centum per annum on the first three notes, and then to the principal due thereon, leaving a balance of \$48.92 due on the third note; and therefore the said exceptions should have been sustained at most only as to the tenth payment of \$100, as to which there was no application made by the parties.

"(7) In finding and holding that the evidence showed that the purchase price of the land was only \$1,632, whereas he should have held that the testimony offered by both parties showed that the credit purchase price of the land was \$2,251.20.

"(8) In finding and holding that 'at the time these payments were made nothing was said as to their application'; the said finding being irrelevant to the questions in the case, as they had the right to make the application of the payments at the time they were made or at any time thereafter, and, the defendant having consented to such application and appropriation, he is bound thereby, and cannot now be allowed to question it.

"(9) In finding and holding that the plaintiff does not base his actions on the theory that those two notes, including usurious interest, had been paid; no exception or objection on that ground having been made by the defendant, and the testimony of both the

plaintiff and the defendant, admitted without objection by the defendant, showing that the first nine payments made were applied by the parties to the interest at ten per cent. and the principal due on the first three notes.

"(10) In not finding and holding that, where several notes of a series are paid and taken up, and the suit is brought on the remaining notes of the series, the contract as to the notes so paid off must be held to be executed, and the plea of usury in such notes so paid cannot be allowed in the suit on the remaining notes.

"(11) In finding and holding that the several notes mentioned in the complaint were evidences of one contract, the said finding being irrelevant to the issues before the court, and the testimony being that the parties treated them as separate and distinct transactions, and they being such in fact.

"(12) In holding that the plaintiff must be bound by the allegations of his complaint as to the sufficiency of the payments made to pay off the principal and interest of certain of the notes, not applying the same rule to the allegations made by the defendant in his answer, and then disregarding the testimony of both the plaintiff and defendant on that point, which was admitted without objection or exception on the part of the defendant.

"(13) In finding and holding that the plaintiff can only recover the principal sum, amount, or value so lent or advanced, without any interest, which amount is \$1,632; there being no evidence that any amount was lent or advanced, but that the land was sold for a certain credit price, and the plea of usury being applicable only to so much of the sum stated in each note as was reserved as interest *eo nomine*.

"(14) In finding and holding that at the time these various payments were made there was no direction as to their application, and the plaintiff was therefore bound to apply them to such legal obligation as he held against the defendant, such legal obligation being the purchase price of the land, to wit, \$1,632; such finding being erroneous in the following particulars: (a) In ignoring the principle that, where the rights of third persons are not in question, the parties to a contract for the payment of money may make any application of money paid by the debtor that they may see proper to make, and that such application may be made by them either at the time of payment or at any subsequent time, and when so made, neither party has the right afterwards to repudiate it. (b) The said parties did, in fact, make a different application of the payments from the one his honor thinks should have been made, and they had the legal right to make it. (c) In holding that the purchase price of the land was \$1,632, when the undisputed testimony both of the plaintiff and the defendant was that it was \$2,251.20.

"(15) In making the following findings in his said decree, to wit: 'I further conclude

from the pleadings and testimony that there has been no application of said payments or any part of them, to usurious interest.

* * * I have some doubts as to whether or not the parties could subsequently consent to their application to usurious interest, when no such application was made at the time.

* * * Be that as it may, I am satisfied from this testimony that no such agreement was had, and, indeed, by his complaint the plaintiff repudiates any such theory. The defendant certainly did not consent to such application, and the fact that he received the notes canceled would not be conclusive evidence of the fact, for the reason that, owing only so much of the notes as represented the legal debt, when that amount was paid he would be entitled to a surrender of the evidence of said debt. Besides this, he denies that any such application was made with his knowledge and consent.' The errors in said findings and rulings are as follows, to wit: (a) In finding that there was no application of the payments to the interest at ten per cent., and that the defendant did not consent to such application, the testimony of the defendant on that point being as follows: 'I know that the payments had been put on the first and second notes—that the \$50 paid the first two notes and some on the third, by Mr. Giles' calculation. * * * I agreed that the first notes were to be calculated at ten per cent. interest, and the amounts I paid to be applied on these first notes. The error in the Giles statement was a credit, was placed in the wrong place. I don't know where it was and how much it was.' (b) In doubting the right of the parties to agree on an application of payments after they had been made, it being the right of the parties to make such application at any time, if the rights of third parties are not affected thereby. (c) In finding that the plaintiff repudiates such theory, the rule being that both parties are equally bound by the allegations of the pleadings, and the testimony, which was admitted without objection, showing that the parties had made such application. (d) In holding that the defendant owed only so much of the notes as represented the legal debt, thus finding that a debt for usurious interest is not a legal debt; whereas it is respectfully submitted that an agreement to pay interest in excess of the amount allowed by law is not immoral and not illegal in any other sense than a debt barred by the statute of limitations is illegal, namely, that the law will not lend its aid to enforce the payment of it.

"(16) In finding that there is due to the plaintiff on the mortgage debt only the sum of \$224.13, whereas he should have found from the undisputed testimony in the case there is due the sum of at least \$1,000."

Graydon & Giles, for appellant. Sheppards & Grier, for respondent.

POPE, C. J. This appeal involves some alleged errors in the findings of fact and con-

clusion of law in the decree rendered in this case by Hon. Joseph A. McCollough, presiding as special judge in the court of common pleas for Greenwood county. We do not know that full justice will be done the parties litigant except by reproducing in this opinion the report of the master of Greenwood county and the decree of the special judge:

"I beg leave to submit the following report:

"This is an action to foreclose mortgage given November 26, 1890, by the defendant to the plaintiff, on the tract of land mentioned and described in the complaint, to secure the payment of six promissory notes made by the defendant to the plaintiff for the alleged purchase money of the said tract of land. The said notes aggregate \$2,251.20, which is the alleged purchase price paid for the said tract of land. The first note reads as follows: '\$363.20. On or before November 26th, 1901, I promise to pay Joseph H. Milford or order the sum of \$363.20, with interest from date of maturity until paid in full at ten per cent. per annum. Value received, in first payment of 136 acres of land this day conveyed to me. This note secured by mortgage this November 26th, 1890. J. R. Milford. Attest: C. A. C. Waller.' The second note, of same date, was for \$368.70, due November 26, 1892, and provided for interest from date of maturity at ten per cent. per annum. The third note, of the same date, was for \$370.70, and provided for interest from date of maturity, to wit, November 26, 1893, at ten per cent. per annum. The fourth note, of the same date, for \$377.70, provided for interest from date of maturity, to wit, November 26th, ten per cent. per annum. The fifth note, of the same date, was for \$388.20, provided for interest from date of maturity, to wit, November 26, 1895, at ten per cent. per annum. The sixth note, of the same date, was for \$398.20, and provided for interest from date of maturity, to wit, November 26, 1896, at ten per cent. per annum. The complaint alleges the following payments, which are admitted to be correct: (1) November 18, 1891, \$131; (2) November 12, 1892, \$190; (3) December 19, 1892, \$75; (4) November 14, 1893, \$200; (5) December 12, 1893, \$50; (6) November 19, 1894, \$100; (7) October 26, 1895, \$200; (8) December 21, 1895, \$50; (9) October 17, 1896, \$400; (10) January 14, 1898, \$100. The complaint further alleges that the first nine payments above set out were sufficient to pay and satisfy, and did pay and satisfy, the first two notes above mentioned, and the legal interest due thereon, and also the legal interest due on the other four notes, and the plaintiff canceled and delivered to the defendant the first two notes, and that the last payment was sufficient to pay and satisfy the interest due on the said last four notes, but left certain sums due on the principal; that there is now due and unpaid on the said debt the sum of \$1,156.09, with interest

thereon from the 14th of January, 1898. The defendant, answering, admits the execution of the said six notes and the mortgage, and the payments as above set out, but denies that the purchase price of the said tract of land was \$2,251.20, and alleges that it was only \$1,632, and no more. The defendant further alleges in his answer that to each of the said notes was added a usurious and unlawful interest, and that the note provided for a greater rate of interest than seven per cent. per annum; that the purchase price was \$1,632, and that the excess was usurious and unlawful interest added; that the defendant has paid the plaintiff on the principal sum, \$1,632, the sum of \$1,407.87, leaving due thereon the sum of \$224.13, without interest or cost. The defendant pleaded usury, and sets up a counterclaim for \$1,107.14, and asks that the complaint be dismissed, with costs. The plaintiff replied, denying the allegation of the counterclaim and pleading the statute of limitations. The plaintiff demurred to the defense contained in the answer, and also to the counterclaim, on the ground that the defense and counterclaim set out that the rate of interest was greater than seven per cent. only, but does not show that it was greater than eight per cent., and does not show what the excess was. (Demurrer overruled.) The plaintiff's attorney moved to amend his reply by inserting 'three' instead of 'six' before 'years.' (Amendment allowed.)

"I will consider first the question of usury. Section 1390 of the Revised Statutes [of 1893] is as follows: 'No greater rate of interest than seven per cent. per annum shall be charged, taken, agreed upon or allowed upon any contract arising in this state for the hiring, lending or use of money or other commodity, except upon written contract, wherein by express agreement a rate of interest not exceeding eight per cent. may be charged. No person or corporation lending or advancing money or other commodity upon a greater rate of interest shall be allowed to recover in any court of this state any portion of the interest so unlawfully charged; and the principal sum, amount or value so lent or advanced, without any interest, shall be deemed and taken by the courts of this state to be the true legal debt or measure of damages, to all intents and purposes whatever, to be recovered without costs: provided, that the provisions of this section shall not apply to contracts or agreements entered into or discounts or arrangements made prior to the first of March, 1890.' As the notes sued on in this case provide upon their face for a greater rate of interest than the law allowed, the defense of usury must, therefore, be sustained, and the principal sum considered the true legal debt.

"Now, as to the counterclaim. The plea of the statute of limitations is overruled. Claim for penalty for excepting the usurious interest is not barred in three years when set up as a counterclaim. Mortgage Co. v.

Gillam, 49 S. C. 345 [26 S. E. 990, 29 S. E. 203]. From the testimony I find as matters of fact: That the purchase price of the said tract of land was \$1,632, and the principal in each of the said six notes was as follows: First note, \$200; second note, \$225; third note, \$250; fourth note, \$275; fifth note, \$320; sixth note, \$362—total, \$1,632. That to the principal of each of the said notes was added interest at ten per cent. per annum upon certain sums of principal. The testimony of Mrs. Milford clearly shows what amount of original principal was taken and what interest was added, the usurious interest added being the difference between seven per cent. interest and ten per cent. interest. As a matter of fact I find the amount of usurious interest received by the plaintiff from the defendant to be \$155.25, as per a calculation to be attached as a part of this report. The fourth payment of \$200, on November 14, 1893, overpaid the first note, and the plaintiff received \$65.89 excess interest. The seventh payment, to wit, \$200, on October 26, 1895, overpaid the second note by \$18.52, and the defendant received up to and including this payment excess interest in all amounting to \$153.25. These two notes were paid in full, and subsequently canceled, and delivered to the defendant. As matter of law, the counterclaim should be sustained in twice the sum of \$153.25, to wit, in the sum of \$306.50.

"I find as matters of fact that there is due and unpaid on the principal sum the sum of \$638.40, which I ascertained by taking from the principal sum, \$1,632, the aggregate principal of the first two notes, to wit, \$425, the overpayment of the \$18.52 of the second note, and the three last payments made by the defendant. Wherefore I conclude as matters of law that the plaintiff is entitled to a judgment of foreclosure in the sum of \$331.98, the difference between balance of principal sum and the counterclaim allowed, without interest and cost.

"The testimony taken is herein attached as a part of this report.

"I further beg leave to report that if the usurious interest, to wit, \$65.89, received in the payment of the first note, November 14, 1893, is barred because of the lapse of six years before the commencement of this action, then in that event the counterclaim allowed should be reduced in the sum of twice \$65.89, and the judgment of foreclosure should be for \$463.76, but under the pleadings my views are as above set forth. Still it occurs to me that in a separate action to recover the penalty for the receipt of usurious interest paid six years prior to the commencement of the action, and when the particular note upon which the interest is received is paid in full six years prior to the suit, the claim would be held barred by the statute of limitations."

The decree of the circuit judge was as follows:

"This case was heard by me upon exceptions to the master's report, both on the part of the plaintiff and the defendant. Inasmuch as the report of the master contains a full and clear statement of the case, I shall not discuss the facts in detail, and content myself in confirming the master's conclusions of both law and fact, except as herein-after modified. The exceptions both on the part of the plaintiff and the defendant, in so far as they conflict with the views herein-after announced, are overruled.

"The principal question involved is that of usury. I concur in so much of the master's report as finds the debt in question usurious. The ten per cent. included in the several notes, which notes represented the debt for the purchase money of the land, was intended as interest, and therefore clearly usurious. According to the testimony on behalf of both the plaintiff and the defendant, the purchase price of the land was only \$1,632, and no more. The parties, if they had so desired, could have fixed the price at \$2,251.20; but they did not do so. It appears that the plaintiff has paid the defendant in all the sum of \$1,407.87, and I believe there is no dispute as to this fact. At the time these payments were made, I find from the testimony that nothing was said as to their application. It seems that some time afterward the parties met in the office of Mr. Giles, and a calculation was submitted, and, according to the testimony of the plaintiff, 'Mr. Giles calculated the interest on them [the notes], and, finding that enough had been paid to take up the notes, I delivered them.' These notes were calculated as per their face value, which included ten per cent. interest. The defendant says that he protested that the calculation was not correct, but accepted the notes. In his complaint the plaintiff does not base his action upon the theory that those two notes, including usurious interest, had been paid. He says 'that the first nine payments above set out were sufficient to pay and satisfy, and did pay and satisfy, the first two notes mentioned above, and the legal interest due thereon, and also the legal interest due on the other four notes, and the plaintiff thereupon canceled and delivered to the defendant the said first two notes.' The defendant denies this allegation of the complaint, sets up his counterclaim for usury, and claims that all of the payments that he made should be credited on the original debt of \$1,632, for which amount the plaintiff should have judgment, without interest or cost.

"I conclude as matter of law that the several notes mentioned in the complaint were evidence of one contract. See *Heyward v. Williams*, 63 S. C. 470 [41 S. E. 550]. The said notes upon their face provide for a greater rate of interest than the law allows, and a greater rate of interest than the law allows was claimed upon the principal and added to the notes at the time they were

drawn, thereby rendering the said debt usurious in its inception. I therefore conclude in this action that the plaintiff can only recover as against the defendant the principal sum, amount, or value so lent or advanced, without any interest, which amount is \$1,632.

"I further conclude from the testimony and pleadings in this case that at the time these various payments were made by the defendant there was no direction as to their application, and the plaintiff was therefore bound to apply them to the payment of such legal obligation as he held against the defendant. This legal obligation was the purchase price of the land, to wit, \$1,632.

"I further conclude from the pleadings and the testimony that there has been no application of the said payments or any part of them to usurious interest, and therefore the question of counterclaim fades from the case. I have some doubts as to whether or not the parties could subsequently consent to their application to usurious interest, when no such application was made at the time, so as to furnish the basis of a counterclaim; but, be that as it may, I am satisfied from this testimony that no such agreement was had, and, indeed, by this complaint the plaintiff himself repudiates any such theory. The defendant certainly did not consent to such application, and the fact that he received the notes canceled would not be conclusive evidence of the fact, for the reason that, owing only so much of the notes as represented the legal debt, when that amount was paid he would be entitled to a surrender of the evidence of said debt. Besides this, he denies that any such application was made with his knowledge and consent.

"I therefore conclude that the defendant is entitled to a credit of \$1,407.87, this representing the total amount of his payments on the debt, \$1,632 being the purchase price of the land, without interest, leaving the defendant due the plaintiff the sum of \$224.13, for which amount he is entitled to judgment, without interest or costs."

The plaintiff's many exceptions will be reported with the case. However, we will pass upon each one of them.

1. Unfortunately for the plaintiff, in contending that the credit price was the amount of the mortgage, he forgets that the plaintiff himself conveyed this land by his deed for the sum of \$1,632, and not the sum of \$2,251.20. The latter sum was produced by adding the interest to the six notes, due respectively one, two, three, four, five, and six years after the date of the deed. The fact of these notes, without interest, foots exactly \$1,632, the sum named in the deed. This exception is overruled.

2. There is no weight or force in this exception. The overwhelming weight of the testimony is in favor of the master and circuit judge in this matter. This exception is overruled.

3. This exception is overruled. The testimony shows there was no credit price of the land. The land sold on a credit, and a mortgage was given for the six notes and interest accruing after the sale. The deed shows what was the price fixed upon at which the land was sold. Of course, parties could make a "credit price" sale, but the trouble is that the testimony shows that these parties did not do so.

4. We think there is merit in this exception, which we will endeavor to unfold. The plaintiff in this complaint did not sue on the first three notes. He admitted in his said complaint that such three notes were paid. He only claimed \$6.99 on the third note (and his firmness in still holding out before Mr. Giles for this sum of \$6.99 is what has cost him this suit, no doubt). The plaintiff turned over to the defendant two or three years before this suit was brought, the first two of such notes as fully paid, and the defendant received them as fully paid, and has had them in his possession ever since. Consider in this connection what both the plaintiff and the defendant stated in their testimony was their object in having Mr. Giles to make his calculation for the two. John R. Milford said: "This paper shown me is the Giles calculation. This calculation was made to settle the dispute as to whether the third note was paid." Joseph H. Milford, the plaintiff, testified: "Mr. John Milford said the third note was paid, and I told him I thought not, and we left it to Mr. Giles to make by agreement between us." Again, Mr. John R. Milford testified: "I agreed that the first note was to be calculated at ten per cent. interest, and the amounts I paid to be applied on those first notes." (Italics ours.) Inasmuch as there are no third persons, such as creditors of John H. Milford, to object to the credit being applied to the first three notes, he (John R. Milford) had a right at any time to consent to this application of its payment. Once he agreed to this arrangement, and the arrangement was then carried out, he could not afterwards successfully object. The first three notes were thereby paid, and no longer play any part in this controversy, for the transaction whereby the first three notes became paid is an executed transaction. It is a law in this state that you cannot impute usury to an executed transaction. Chief Justice McIver stated in *Butler v. Butler*, 62 S. C., at page 174, 40 S. E., at page 141: "Section 1390 [Rev. St. 1893] only prohibits the recovery of any interest upon a contract tainted with usury, and there is nothing in the statute which either expressly or by necessary implication provides that interest paid for or to the commencement of any action upon a contract infected with usury and credited as such shall be regarded as a payment upon the principal sum loaned and so credited. In other words, section 1390 does not purport to disturb an executed transaction, but simply provides that when the pow-

er of the court is invoked for the enforcement of a contract which was either usurious in its inception or has since become so by the subsequent payment of usurious interest, or by any other means, that the creditor shall not be allowed to recover any more than the principal sum loaned, without interest or costs. For example, if A. executes his note whereby he promises to pay to B. a specified sum of money at a designated time, with interest from the date of the note at lawful rate of interest, and the contract subsequently becomes tainted with usury by the payment of interest at a rate in excess of the lawful rate, section 1390 does not purport to disturb such payment by declaring that it shall operate as a credit on the principal of the note, but simply declares that, if the payee undertakes to enforce the payment of such contract by any proceeding at law, he will not be allowed to recover anything more than the principal sum loaned, without any interest or cost; but this cannot affect interest already paid and credited as such." This decision of this court was affirmed in the case of *Bird v. Kendall et al.*, 62 S. C. 178, 40 S. E. 142. We will have occasion hereinafter to state the effect of these decisions in a practical way. This exception is sustained.

5. This exception must be sustained for the following reason: The principal of the debt was the sum of \$1,632. The principal contained in the first three notes was (\$200, \$225, and \$250) \$675. The principal in the last three notes (\$362, \$320, \$275) was the amount due on the principal, \$957. Now, no interest is to be charged on the last three notes from 1890 to the date of the judgment—nearly 13 years—because the interest which was to be paid, as shown by the notes and mortgage, was 10 per cent., which is admitted to be usurious. All the plaintiff can legally claim or recover because of his charge of usurious interest is the balance of his principal, \$957. But it might be suggested that the defendant paid 10 per cent. on the first three notes, and that such notes should have the interest which defendant paid on those added to such principal, \$675, of such first three notes, and the aggregate deducted from the principal, \$1,632. To do this, however, would be to interfere with an executed transaction. The defendant admitted that he had already paid these notes and the interest thereon before suit was brought on the last three notes, and the plaintiff only sued upon the last three notes. Here this exception is sustained.

6. We see no force in this exception. It is overruled.

7. We have already, by what we have held in considering the first three exceptions, overruled this exception.

8. We think this exception should be sustained. We have already held that the parties to the suit agreed upon an application of the defendant's payments to the first three notes.

9. For reasons already given this exception is sustained.

10. For reasons already given this exception is sustained.

11. The contract between the parties was for the sale of the land at the price of \$1,632, and a credit was given for that price in six notes, each note separate and distinct. Three of those notes have been paid, leaving three notes unpaid. The judgment of the court must be directed to the last three notes, which alone plaintiff sued to recover. This exception is sustained.

12. We sustain this exception for reasons already given.

13. This exception is overruled for reasons already given.

14. We sustain this exception for reasons already given.

15. We sustain this exception for reasons already given.

16. We sustain this exception for reasons already given. The plaintiff is entitled to have his judgment against the defendant and a foreclosure of his mortgage to recover the sum of \$157, without interest and without cost.

It is the judgment of this court that the judgment of the circuit court be modified as herein required.

On Rehearing.

PER CURIAM. The defendant has filed a petition for rehearing in this case on several grounds, one of which is that the court overlooked the fact that defendant, by his answer, among other things sets up a counterclaim. His honor the circuit judge, in his decree, which is set out in the opinion, uses this language: "I further conclude from the pleadings and the testimony that there has been no application of the said payments, or any part of them, to usurious interest, and therefore the question of counterclaim fades from the case. I have some doubt as to whether or not the parties could subsequently consent to their application to usurious interests, when no such application was made at the time, so as to furnish the basis of a counterclaim. But be that as it may, I am satisfied from the testimony that no such agreement was had, and, indeed, by his complaint, the plaintiff himself repudiates any such theory. The defendant certainly did not consent to such application, and the fact that he received the notes canceled would not be conclusive evidence of the fact, for the reason that, owing only so much of the notes as represented the legal debt, when that amount was paid, he would be entitled to a surrender of the evidence of said debt. Besides this, he denies that any such application was made with his knowledge and consent." We construe this as a finding of fact that there has been no payment of usurious interest. The defendant did not appeal from this finding of fact, nor did he serve notice that he would rely upon a reversal

of this finding as an additional ground for sustaining the judgment of the circuit court. Under these circumstances this court is of the opinion that there was no material error in failing to consider the counterclaim, for, if it was a fact that no usurious interest was received or taken, then there was no basis for the application of section 1391, Rev. St. 1893, as to counterclaim.

Another ground relied upon for a rehearing is, it is submitted, that the court overlooked the fact that there was no application of the last payment of \$100, and was therefore in error in applying it to discharge the interest at 10 per cent. on the third note. This ground must be sustained, and the judgment of this court must be modified accordingly, but we see no necessity for ordering a reargument.

After careful examination of all other questions presented by the petition, we are satisfied that no material question of law or fact has either been disregarded or overlooked.

It is therefore ordered that the judgment of this court be modified in the particular hereinbefore mentioned, and that the order heretofore granted staying a remittitur be revoked.

(67 S. C. 548)

HILL v. SOUTHERN RY.

(Supreme Court of South Carolina. Dec. 1, 1903.)

RAILROADS — CHARTER — CONSTRUCTION — APPEAL—REVIEW—EXCEPTIONS— QUESTION FOR JURY.

1. A provision in a railroad charter authorizing it to build a railroad on the most practical route from S., "passing near the village of U." does not prevent the railroad company from passing through the village of U., but only requires it to be built at such a distance as to be convenient to the inhabitants of the village.

2. An exception on appeal alleging error in the granting of a nonsuit will not be considered where such ground was not urged below.

3. The question of title to land claimed by a railroad as a right of way is for the jury, where there is evidence of adverse use of a part of it in a manner inconsistent with its use for right of way.

4. An exception that the court erred in not allowing plaintiff to rebut presumption of statute, and what her father said about the right of the railroad company to go through the premises, and that there was never any deed to the land or right of way through the premises, is too general.

Appeal from Common Pleas Circuit Court of Union County; Buchanan, Judge.

Action by Ann E. Hill against the Southern Railway. Judgment of nonsuit, and plaintiff appeals. Reversed.

J. Clough Wallace, for appellant. O. P. Sanders, for respondent.

GARY, A. J. This is an appeal from an order of nonsuit. The complaint alleges that the plaintiff is the owner and in the exclusive and peaceable possession of a certain lot

of land in the town of Union, containing 1½ acres, situate within a quarter of a mile of the courthouse and within the original limits of said town, as shown by the charter of 1837; that the defendant, on the 15th day of November, 1898, and on divers other days, wrongfully, unlawfully, willfully, and maliciously, and against the consent and written objection of the plaintiff, entered upon said lot, dug up her soil, trampled her grass, etc., to her damage \$2,000. The defendant, by its answer, denied the material allegations of the complaint and set up certain defenses, which are not material in considering the questions raised by the exceptions.

The assignment of error in the exceptions numbered 1, 2, and 3 will be considered together, and are as follows: "(1) Because his honor erred in holding that the presumption of right and title to the Spartanburg & Union Railroad Company, under section 11 of its charter, by grant from the owner of the land upon which the said railroad may be constructed, together with 100 feet from the center of the track on each side of the same for railroad purposes, where there was no written agreement or contract between the owner and the company, unless suit was brought within the period limited, applied to lots and lands within the corporate limits of the town of Union at the date of said charter; and in granting the nonsuit on this ground, and in holding that the presumption of the statute did not so apply, and in not refusing on that ground the motion for nonsuit. (2) Because his honor erred in holding that under the act of 1855, renewing and amending the charter of the town of Union (12 Stat. at Large, p. 371), the stating (in section 2 thereof) 'the Spartanburg and Union Railroad depot now in course of erection in said town' 'as a center' from which the corporate limits of said town should be measured one-half mile, instead of from the courthouse, gave the railroad company the right to go through and exercise the right of eminent domain, and have all the benefits of the presumptions under section 11 of its charter in the town of Union, as incorporated at the date of the charter of the railroad company, as fully as if the said company had specifically provided that the said company should have the right to build and construct its road through the village of Union; and in granting the nonsuit on this ground. And he further erred in not holding that the act in no way affected the rights and liabilities of the said railroad company under its charter, and in not refusing the nonsuit for that reason. (3) Because his honor erred in holding that the making (in the amended town charter, 12 Stat. at Large) the railroad depot the point from which to measure the corporate limits of the town showed the intention of the Legislature in the charter of the railroad company (1845) to give the railroad company the right of eminent domain in, and the right to construct its road through, the town

of Union as then incorporated, and to give the railroad company everything it should need or want anywhere."

The act chartering the Spartanburg & Union Railroad Company authorized it to construct a railroad "on the most practical route from the town of Spartanburg passing near the village of Union to connect with the Greenville & Columbia Railroad or the Charlotte & South Carolina Railroad," etc. It was not the intention of the Legislature to prevent the railroad from passing through the village of Union, but to require that it should be built at such distance as to be convenient and useful to the inhabitants of the village. This purpose was subserved by building the railroad through the village. The railroad company, under its charter, had the same right to acquire a right of way through lots in the village as in other lands. These exceptions are therefore overruled.

The fourth exception is as follows: "(4) Because so much of section 11 of the said railroad company charter as gives a grant from the owner by statutory presumption to the said railroad company to the land on which its road should be constructed, together with 100 feet from the center of the track on either side thereof, for railroad purposes, where there was no written contract, if suit not brought within the period limited, was and is unconstitutional and void, under the Constitution of this state and of the United States, in that it in effect took and takes private property without compensation; and the nonsuit should have been refused on this ground."

This exception cannot be sustained for the reason that the question presented by it was not raised on circuit, and his honor the presiding judge did not rule upon it.

The fifth exception is as follows: "(5) Because, even if the presumption of the statute did apply to lots and land in the town of Union, there was evidence to show continuous adverse obstruction of the right for more than twenty years by plaintiff and those through whom she claimed, and the judge should have sent the issue to the jury, and his not doing so and granting the nonsuit was error."

The record contains the following statement: "J. Clough Wallace, Esq., being duly sworn, testifies as follows: 'Did you ever hear a conversation between your grandfather and Mr. Meng and Mr. Jeator, who was president of the Southern Road at that time? A. Yes, sir. Q. State what that conversation was? Mr. Sanders: We object. I don't think any conversation between these parties can affect this case at all. If we have got a right of way there, we had it under the charter, which says what our limit is. The Court: Suppose the charter does not give you that right? When did this conversation occur? A. In 1866 or '67, after the road was built. Mr. Sanders: We submit that is incompetent. Court: I think that is incompetent.

Mr. Wallace: We claim, if the state gave them a presumptive right of way, we propose to show that the right of way has been obstructed for forty years. Court: In that view, I think it is admissible. A. In 1866, I was sitting on the western porch of the residence with my grandfather, and Mr. Jeator, who was then the president of the railroad, came down the railroad. It was in the morning, just after breakfast time. Mr. Jeator came down from his residence. On the triangle lot through which this side track is now put there was a big red oak tree right edge of the cut. In years the weather had washed the dirt from under the root of this tree, and the top, which I suppose was 50 feet, died, and Mr. Jeator came along and called grandfather to that tree and said, "Mr. Meng, that tree is dangerous, and I would like to have it cut down." My grandfather said, "No, sir; you have got no right to touch that tree." Mr. Jeator said, "Well, I know I didn't have a right to do it, but it is somewhat dangerous, and I thought you would be willing." My grandfather said, "No, let it stand like it is." There was also testimony to show that in the lifetime of plaintiff's father, who died in 1869, the lots in question were fenced up to the edge of the railroad, and that he claimed the land exclusively as his own. In *Railway Co. v. Beaudrot*, 63 S. C. 266, 41 S. E. 299, Mr. Justice Jones thus states the doctrine in such cases: "It appears in the 'case' that the defendant had erected within the alleged right of way a substantial fence inclosing what defendant claimed exclusive of any right therein by plaintiff. Such an assertion of right to exclusive occupancy of the land is not compatible with the right of easement belonging to the plaintiff. If such adverse holding should run for the statutory period, the easement would be defeated. We do not say that the mere use or occupation of land within the right of way acquired by a railroad company is such adverse use as would give currency to the statute of limitations, unless the use is inconsistent with the easement; but we do say that the inclosing of land within the right of way under a claim of exclusive right to use and occupation, and a refusal to remove the inclosure after demand therefor, is some evidence of the assertion of a claim, incompatible with plaintiff's alleged easement, which, under the issues raised, ought to have been submitted to the jury." This principle is affirmed in the case of *Matthews v. Seaboard Air Line Ry. Co.*, 46 S. E. 335, which has just been filed. This exception is sustained.

The sixth exception is as follows: "(6) Because his honor erred in not allowing plaintiff to prove by her own testimony and other evidence to have followed to rebut the presumption of the statute, what her father said about the right of the railroad company to go through the premises, and that there was never any deed or grant to the land or right of way through the premises in question."

This exception is too general for consideration.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

(118 Ga. 310)

JOHNSTON v. STATE.

(Supreme Court of Georgia. March Term, 1903.)

For majority opinion, see 45 S. E. 381.

CANDLER, J. (dissenting). "In a criminal proceeding the pendency of a former indictment for the same offense is no ground for a plea in abatement or in bar, although the accused may have been arraigned thereon and have filed a plea." *Irwin v. State*, 117 Ga. 706, 45 S. E. 48. In my opinion, it can make no difference that the venue of the former indictment may have been changed, and the accused tried thereon, but neither acquitted nor convicted. The second indictment in the county of the original indictment is an entirely different proceeding, and is not affected by the ineffectual attempts to dispose of the case in the county to which the venue of the original indictment was changed.

(134 N. C. 225)

CHEEK v. OAK GROVE LUMBER CO.

(Supreme Court of North Carolina. Feb. 16, 1904.)

EXCLUSION OF EVIDENCE—WAIVER OF EXCEPTION—LOCOMOTIVES—SETTING FIRE—EVIDENCE—ABSENCE OF SPARK ARRESTERS—HARMLESS ERROR.

1. Plaintiff, by introducing in evidence the whole of a paragraph of the answer, waives his exception to the refusal to allow him to introduce part only of it.

2. In an action for the burning of plaintiff's timber by sparks from defendant's engine, evidence that a year later, at another place, it set fire to timber, is properly excluded.

3. Any error in allowing defendant in an action for the burning of timber by sparks from its engine to introduce testimony describing the engine, and stating that when equipped with a spark arrester it did not steam well, but that this was taken off, and it then steamed all right, is harmless, the court having instructed that defendant was liable if the engine set the fire.

4. Though prior to the action for the burning of timber by sparks from an engine defendant's president and general manager, who did not see the fire set, stated that the engine set it, defendant is not estopped to show he was mistaken.

5. The fact that defendant's engine was not equipped with a spark arrester, though negligence, does not make it liable for a fire without proof that it set it.

Appeal from Superior Court, Halifax County; Moore, Judge.

Action by Agnes R. Cheek against the Oak Grove Lumber Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Day & Bell and T. C. Harrison, for appellant. W. E. Daniel, E. L. Travis, and Claude Kitchin, for appellee.

CONNOR, J. This action is prosecuted by the plaintiff to recover damages alleged to have been sustained by the negligence of the defendant, in that it negligently and carelessly failed and neglected to equip its engine with spark arresters and other appliances to prevent the escape of fire and sparks when passing over the lands of the plaintiff, whereby much valuable timber standing on her land was destroyed, etc. The defendant denied the material allegations in the complaint, and thereupon the following issue was submitted to the jury: "Did the defendant negligently and wrongfully burn the plaintiff's timber, as alleged in the complaint?" After the introduction of other testimony the plaintiff offered to read in evidence a portion of the fourth paragraph of defendant's answer, to wit, "That it admits the engine used by it for hauling logs was not equipped with a spark arrester." The defendant objected, and to the court's ruling sustaining the objection the plaintiff excepted. The plaintiff thereupon introduced the whole of said paragraph, to wit: "That the fourth section thereof is untrue, save and except that it admits that the engine used by it in hauling logs was not equipped with a spark arrester; but it avers there was no necessity therefor, and the failure to so equip it was not negligence." Without passing upon his honor's ruling, we have no hesitation in coming to the conclusion that the exception was waived by the action of the plaintiff in reading to the jury the entire paragraph of the answer. If the plaintiff had relied upon the exception and thereby lost the benefit of the admission in the answer, she would be in a position to have this court decide whether there was reversible error in the ruling of his honor. She abandoned the exception, and by reading the entire paragraph got the benefit of the admission. The learned counsel in their brief complain that the portion of the paragraph which they desired to exclude "was a statement of bad law, which could not explain or modify the admission." His honor so instructed the jury. We cannot perceive how the plaintiff has any cause to complain in this respect.

The plaintiff proposed to show by the president and general manager of the defendant corporation that the same engine, one year after the fire in question, at another place some miles from the defendant's farm, set fire to timber. The exclusion of this evidence forms the basis of the plaintiff's second exception. We concur in his honor's ruling. The proposed evidence involved too many collateral inquiries, and was calculated to mislead and confuse the jury in respect to the fact in issue. It is often difficult to

accurately trace the line which separates evidence which is relevant—that is, has a visible, reasonable connection with the fact in issue—from that which is too remote and constitutes no evidence. The fact that the engine which was charged with the injury to the plaintiff's timber, 12 months after and at another place, fired timber, gave no aid to the jury in answering the issue, unless it was followed by a mass of other testimony showing similarity of conditions, etc. Pearson, O. J., in *Bottoms v. Kent*, 48 N. C. 154, thus states the rule: "As a condition precedent to the admissibility of evidence, the law requires an open and visible connection between the principal and the evidentiary facts. This does not mean a necessary connection which would exclude all presumptive evidence, but such as is reasonable and not latent or conjectural." In *State v. Vinson*, 63 N. C. 335, Rodman, J., says: "If the fact offered to be proved be equally consistent with the existence or nonexistence of the fact sought to be inferred from it, the evidence can furnish no presumption either way, and should not be admitted." *State v. Brantley*, 84 N. C. 766; *Grant v. Railroad*, 108 N. C. 462, 18 S. E. 209; *Ice Co. v. Railroad*, 126 N. C. 797, 36 S. E. 279.

The president and general manager of the defendant was permitted to testify, after objection, that his engine had no spark arrester. "It was a cog-gear locomotive engine—kind usually used on such roads. That it at one time had a spark arrester. Did not steam well, and was taken off. The results were poor. Could not get any steam. Took it off. Got good results, steamed all right." Plaintiff's counsel insist that this testimony was incompetent, and excepted to its admission. We can perceive no valid objection to it, and in the light of his honor's charge it was entirely harmless. The defendant was certainly entitled to describe to the jury the construction, equipment, and operation of its engine. The value of the testimony, as relieving the defendant of liability, was for the jury under proper instructions from the court. The exception cannot be sustained.

Plaintiff introduced a witness who testified that the president and general manager of defendant said to him in response to the question, "Did your engine set it afire?" "Yes, my engine set it afire, but fire had been there before." There was other testimony tending to show that defendant's engine set fire to the timber. No eyewitness testified to the fact. The defendant introduced testimony tending to show that the timber was set on fire from other causes. His honor instructed the jury that, although they should find that the engineer of the defendant told the plaintiff's witnesses that the defendant's engine set fire to the plaintiff's timber, that did not necessarily render the defendant liable, unless the jury find that the defendant's engine did actually set fire to the tim-

ber, but that the jury were at liberty to consider all the evidence, the facts and circumstances testified to by the witnesses, and find whether defendant's engine did actually set fire to plaintiff's land or woods or not. Plaintiff excepted. It was not claimed that the defendant's general manager saw the engine set fire to the timber. The plaintiff insists that, if the jury believe that the president made the admission, the burden was shifted, and put upon the defendant the labor of showing that the fire was not the result of negligence. We cannot concur in this view. The testimony, if believed, did not estop the defendant from showing that its general manager was mistaken in saying that the engine set fire to the timber. The admission does not come within the rule which binds a party to a "solemn admission" made in the pleading. It may well be that the general manager, from the facts and circumstances known to him, honestly believed that the engine set fire to the timber. This was competent testimony, but did not work an estoppel upon the defendant to show the fact to be otherwise. In the light of his honor's charge it is evident that the jury found that the defendant's engine did not set fire to the timber. His honor told the jury that if they found the defendant's engine was not equipped with a spark arrester, and that the fire was caused by the failure of the defendant to equip its engine with a spark arrester, that they should answer the first issue "Yes." This was equivalent to telling the jury that the failure to have a spark arrester was negligence, and that if, by reason thereof, the plaintiff sustained the injury complained of, the defendant was liable. This instruction was strictly in accordance with the rulings of this court. It being conceded that the engine had no spark arrester, the only question under his honor's instructions for the jury to answer was whether the engine set fire to the timber and the failure to have the spark arrester was the proximate cause thereof. These matters were peculiarly within the province of the jury. We concur in the plaintiff's contention that the failure to furnish the engine with a spark arrester was negligence, and his honor so instructed the jury, leaving to them the question whether the engine set fire to the timber, and whether the failure to have a spark arrester was the cause thereof. The proposition maintained by the plaintiff is that the defendant's engine set fire to her timber; that it had no spark arrester; that the failure to have a spark arrester was negligence per se. If we concede this proposition, the plaintiff must, before she can maintain her action, show that the failure to have a spark arrester was the proximate cause of the fire. "Negligence, no matter in what it may consist, cannot result in a right of action, unless it is the proximate cause of the injury complained of by the plaintiff."

Elliott on Railroads, § 711; Henderson v. Traction Co., 132 N. C. 779, 44 S. E. 598; Butts v. Railroad, 133 N. C. 82, 45 S. E. 472; Edwards v. Railroad, 129 N. C. 79, 39 S. E. 730.

We think that his honor's instructions fully cover every phase of the controversy, and that plaintiff's exceptions cannot be sustained. Upon a careful examination of the entire record, we find no reversible error, and the judgment must be affirmed.

MONTGOMERY, J., did not sit on the hearing of this case.

(134 N. C. 607)

STATE et al. v. BUTT et al.

(Supreme Court of North Carolina. Feb. 16, 1904.)

PREMATURE APPEAL—JUDGMENT AFFECTING SUBSTANTIAL RIGHT—TAXATION OF COSTS OF FRIVOLOUS PROSECUTION.

1. A judgment of a justice adjudged the prosecution frivolous and malicious (in which case Code, § 3756, requires the costs to be taxed against the complainant or prosecutor), and that O. pay the costs. O. was a witness for the prosecution, but the warrant had been issued on the affidavit of W., another witness. On appeal the superior court remanded the case to the justice to serve notice on W. and O. to show cause why one or the other should not be marked "Prosecutor," and taxed with the costs; the justice to find the facts, reform his judgment accordingly, and make return to the court. *Held*, that appeal of O. from the order of the court was premature, as the justice may find in his favor, and Code, § 548, requires for an appeal a judgment affecting a substantial right.

Appeal from Superior Court, Halifax County; Moore, Judge.

On a prosecution of W. H. Butt and another, the justice taxed J. O. Heptinstall with the costs, and he appealed to the superior court, and from its order he again appeals. Dismissed.

Day & Bell, for appellant. The Attorney General, for the State.

CLARK, C. J. The defendants were tried before a justice of the peace for an offense within his jurisdiction. He adjudged the defendants not guilty, and that the prosecution was frivolous and malicious, and that "J. O. Heptinstall pay the costs of the action." In such cases, Code, § 3756, requires that the costs be taxed "against the complainant or prosecutor." J. O. Heptinstall was one of the witnesses for the prosecution, but the warrant had been issued upon the affidavit of J. W. Heptinstall, another witness. From such order taxing him with the costs, J. O. Heptinstall appealed to the superior court. The judge remanded the case to the justice of the peace, with directions to serve notice upon J. W. and J. O. Heptinstall "to show cause why one or the other should not be marked 'Prosecutor,'" and taxed with the costs, and further ordered that "said justice of the peace shall find the facts, and reform his judgment in accordance therewith," and make return to the court. From this order,

and also from the refusal to set aside the order of the justice taxing him with the costs, before such finding returned by the justice, J. O. Heptinstall appealed to this court.

The appeal is premature. In execution of said order, the justice may find the facts in favor of said J. O. Heptinstall, and reform the judgment accordingly, which would render this appeal useless. The appellant should have noted his exception, and, if the justice should find the facts against him, they would be reviewable by the judge. *State v. Murdock*, 85 N. C. 598; *State v. Powell*, 86 N. C. 640. The judge's findings of fact would be binding upon us, and no appeal would lie, except upon the ruling of law upon such finding. *State v. Hamilton*, 106 N. C. 660, 10 S. E. 854; *State v. Morgan*, 120 N. C. 563, 28 S. E. 634. Here the judge has made no ruling, except the very proper one that the justice must find the fact whether J. O. Heptinstall was the real prosecutor. In *State v. Roberts*, 106 N. C. 662, 10 S. E. 900, where the appellant was taxed in the superior court with costs without a sufficient finding of facts, this court held that this was error, but that the superior court at a subsequent term could still investigate the matter, either on motion of the solicitor, or ex mero motu even, and find the facts, and tax the prosecutor with the costs if justified by such finding of facts. This was cited and approved in *State v. Sanders*, 111 N. C., at page 702, 16 S. E. 320. As, under Code, § 895, the costs in such cases can in no event be taxed against the county (*Merrimon v. Commissioners*, 106 N. C. 369, 11 S. E. 267), and, if the prosecution is frivolous and malicious, as here adjudged, the costs are taxable against the "prosecutor or complainant" (Code, § 3756), it is but just that the matter should be re-referred to the justice, to ascertain who was the prosecutor, unless the judge had chosen to find that fact himself, as he might have done. The absence of J. W. Heptinstall doubtless caused him to remand to the justice to find the facts upon notice to both J. O. and J. W. Heptinstall. Though the affidavit was made by J. W. Heptinstall, it may be that J. O. Heptinstall was the real prosecutor, and the facts should be found. The appeal is premature, for there has been no judgment of the superior court affecting a substantial right, and authorizing an appeal. Code, § 548.

Appeal dismissed.

(134 N. C. 220)

DICKENS et al. v. PERKINS et al.

(Supreme Court of North Carolina. Feb. 16, 1904.)

PLEADING—VARIANCE—SUBMISSION OF ISSUE—INSTRUCTIONS.

1. Where the complaint alleged that one agreed to pay \$200 to another, who thereupon agreed to purchase land at a judicial sale and convey it to persons named, so far as the

proof tended to show that the person who received the \$200 was to advance any additional sum necessary to purchase the land, and to reconvey the land when he was repaid such advance, there was a substantial variance.

2. Under Code, § 391, providing that an issue of fact arises on the pleadings when a material fact is alleged by one party and controverted by the other, a complaint simply alleging that one agreed to purchase land at a judicial sale and convey it to third persons does not justify the submission to the jury of the issue whether the purchaser bought the land under the parol agreement and with the understanding that when he was repaid the money he advanced to buy the land he should convey it to others, the plaintiffs not being entitled to avail themselves of a different contract than they pleaded, except by amendment, as authorized in Code, § 273.

3. Where a complaint alleged that one agreed, on payment to him of \$200, to purchase land at a judicial sale and convey it to third persons, and the issue was submitted whether he bought under the parol agreement and with the understanding that when he was repaid what he advanced to buy the land he should convey it to the third persons, an instruction that if the jury found the contract was made as alleged in the complaint they should answer the issue "Yes" was error, different contracts being stated in the complaint and the issue.

Appeal from Superior Court, Halifax County; Geo. A. Jones, Judge.

Action by Mary G. Dickens and others against Helen Perkins and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

Thos. N. Hill and E. L. Travis, for appellants. Day & Bell, W. E. Daniel, and Battle & Mordecai, for appellees.

WALKER, J. This action was brought to enforce a parol trust. The plaintiffs allege in their complaint that, in 1871, W. M. Perkins entered into a parol contract with Melissa J. Dickens whereby he promised and agreed that if she would pay him the sum of \$200 he would buy a tract of land, which is known as the "Emsley Dickens Home Tract," at the judicial sale then about to be made by the administrator of Emsley Dickens, for the use and benefit of Mary Jane Dickens during her life, and at her death the remainder in fee for the use and benefit of the children of said Melissa J. Dickens, and that he would have a deed for the land made to himself, and would then convey the land as above indicated. That the money was paid to him, and at the sale made by the administrator he bought the land and took a deed therefor in his own name, and that instead of complying with his agreement to execute the deed to Mary Jane Dickens for life, with remainder to the children of Melissa J. Dickens, he, by his will, devised the land to the said Mary J. Dickens for life and remainder in fee to the defendants Helen, Bettie, and Nellie Perkins, in utter disregard of the rights and equities therein of the plaintiffs, who are the children of Melissa J. Dickens. It is further alleged that W. M. Perkins has died, having left a will which has been duly admitted to probate. There

are other allegations in the complaint which it is unnecessary to set out, for it is not material that they should be considered in the view we take of the case as it is now presented.

The defendants, who are the heirs, devisees, and executor of W. M. Perkins, in their answer deny that he entered into the agreement with Melissa J. Dickens which is described in the complaint, and, while they admit that he bought the land and took the deed for the same in his own name, they deny that it was done under any parol agreement that he would hold it in trust as alleged by the plaintiffs, but, on the contrary, they aver that he bought the land for himself, and took the deed in his own name without any trust attached thereto in favor of any of the plaintiffs, and that he thereby became the owner of the land in fee and in his own right. It is admitted that the land was devised by him in his will in the manner alleged in the complaint. They further aver that at the administrator's sale the said W. M. Perkins purchased the land at the price of \$468, which amount he paid to the administrator, and they insist that, if the plaintiffs are entitled to a conveyance of the land and the \$200 was paid by Melissa J. Dickens to W. M. Perkins, then and in that case the plaintiffs should be required to pay to the executor of W. M. Perkins the sum of \$268, it being the difference between the \$200 alleged to have been paid by Melissa J. Dickens and the amount paid by W. M. Perkins to the administrator of Emsley Dickens for the land; and they further insist that the said sum of \$268 should be declared by the court to be a charge upon the land. At the trial the court submitted to the jury the following issue: "Did W. M. Perkins buy the land described in the complaint under the parol agreement and with the understanding that he would take a deed for the same, and, when he was paid the money advanced for said purpose, would convey a life estate in the same to Mary J. Dickens, with the remainder in fee to the children of Melissa J. Dickens?" The defendants duly excepted to the submission of the issue. An issue of fact, as defined by the Code, arises upon the pleadings when a material fact is alleged or maintained by the one party and controverted by the other. Code, § 391. Issues do not arise upon the evidence, nor should they be so framed as to require the jury to find facts which are merely evidential. There is no allegation in the complaint that the parties entered into any such contract as the one set out in the issue. The contract alleged by the plaintiffs to have been made, and denied by the defendants in their answer, instead of being the one described in the issue, is quite different in its essential features, and involves different rights and liabilities. If the plaintiffs were unable to show by their proof that the contract was made as alleged, and by the evi-

dence established a different agreement, they could have availed themselves of the latter, and have enforced the same only by an amendment, provided the cause of action was not thereby substantially changed. Code, § 273. The plaintiffs alleged that W. M. Perkins had agreed that, upon the payment to him of \$200, he would buy the land at the sale, and hold the same for the uses already mentioned, and convey it afterwards to the same uses, and that the \$200 had been paid, which entitled the plaintiff to a conveyance when W. M. Perkins bought the land; while there was proof tending to show that it was agreed between the parties that Melissa J. Dickens should pay to W. M. Perkins \$200, which she did, and that he should advance whatever additional amount might be necessary to pay for the land, and that, with this understanding, he would purchase the land at the sale, and, upon being repaid the amount advanced by him, he would convey the same to Mary J. Dickens for life, with the remainder to the children of Melissa J. Dickens. This must, at least, be taken as the plaintiffs' understanding of the testimony, because they did not except to the issue, and must therefore have thought that there was evidence to warrant an affirmative answer to it by the jury. But the proof, in this view of it, did not sustain the allegation, and there was therefore a substantial variance, if not a failure of proof. Clark's Code, § 271, and notes; Faulk v. Thornton, 108 N. C. 314, 12 S. E. 998, and cases cited. As there was no other allegation in the pleadings, either in the complaint or the answer, which could raise the issue framed by the court and duly excepted to by the defendants, it was error to submit it to the jury. *Fortesque v. Crawford*, 105 N. C. 29, 10 S. E. 910; *Sprague v. Bond*, 113 N. C. 551, 18 S. E. 701; *Wright v. Cain*, 93 N. C. 296; *Miller v. Miller*, 89 N. C. 209. As we have already stated, this defect may be cured by proper amendment, if the plaintiffs intend to rely upon the contract as set out in the issue.

If the proof should be construed as tending to show only that Melissa J. Dickens paid the \$200 upon the agreement that W. M. Perkins should buy the land and take a deed therefor to himself, and then convey it to the parties above named according to the uses declared in the contract, and that any additional amount advanced by him should be paid by Mary J. Dickens, the payment of the same not to be a condition precedent to the conveyance, but he to rely for reimbursement solely upon the personal promise or obligation of Mary J. Dickens, it would not warrant an affirmative finding upon the issue submitted, and this brings us to the only remaining exception of the defendant which we deem it necessary to consider.

However the case may stand upon the pleadings and proof, or upon the issue submitted and any reasonable interpretation of

the testimony, we find that his honor's charge in one respect cannot be sustained. The court charged the jury substantially that, if they found the contract was made as alleged in the complaint, that is, that W. M. Perkins was paid the \$200 upon his promise to buy the land and hold it in trust and to convey it to Mary J. Dickens for life, with remainder to the children of Melissa J. Dickens, they should answer the issue "Yes." The issue did not embrace only the facts recited in the charge, and the jury were therefore, in effect, instructed that, if they were satisfied that W. M. Perkins made the contract as stated in the charge, they should answer the issue "Yes," which of course required them to find that he made another and different contract. This was error. There was no correspondence between the allegation of the complaint and the issue, in respect to the terms of the contract, and none between the issue and the charge of the court.

At the next trial, the defendants may, by tendering proper issues and by prayers for instructions, present the other questions argued in this court as to the illegality of the consideration of the contract and the statute of limitations, if it becomes material that they should be passed upon. The question relating to the validity of the parol trust can better be considered when the terms of the contract are ascertained.

For the reasons already given, we do not think the case was correctly tried in the court below, and a new trial must therefore be awarded. New trial.

(124 N. C. 223)

SUMNER et al. v. EARLY et al.

(Supreme Court of North Carolina. Feb. 16, 1904.)

AGREEMENT FOR PARTITION OF LANDS—REFUSAL TO PERFORM—REMEDY—SUIT FOR SPECIFIC PERFORMANCE.

1. Where tenants in common of one tract of land and tenants in common of another mutually agreed that all the lands should be partitioned "as if they held the said lands as tenants in common," the remedy on the refusal of the tenants in common of one of the tracts to carry out the agreement is by suit for specific performance, and not by a special proceeding for partition, the agreement being executory only.

Appeal from Superior Court, Hertford County; M. H. Justice, Judge.

Action by J. B. Sumner and others against B. F. Early and others. From a judgment dismissing the action, plaintiffs appeal. Reversed.

This is a civil action, in which the plaintiffs aver that on the 4th day of March, 1890, the plaintiffs and defendants entered into a written contract, set out in the complaint, whereby the plaintiffs, being the owners, as tenants in common, of certain lands describ-

¶ 1. See Partition, vol. 33, Cent. Dig. § 22.

ed therein, and the defendants, being the owners of other lands, mutually agreed that all of said lands should be partitioned, and that they would select three disinterested men to make the partition "as if they held said lands as tenants in common." The terms and provisions of said contract are set forth in detail in the paper writing which is made a part of the complaint. The plaintiffs allege that the defendants refused to carry out and perform their part of the contract, whereas the plaintiffs have always been ready and willing to perform the contract on their part. They demand judgment that the contract be specifically performed, and that partition be made in accordance with the terms thereof. The defendants, in their answer, admit the execution of the contract, and aver matters in avoidance of the plaintiffs' right to have specific performance and partition. At October term, 1903, of the superior court of Hertford, a jury was duly impaneled to try the issues raised by the pleadings, whereupon the defendants moved to dismiss the action for that the court had no jurisdiction. The motion was allowed, and the plaintiffs appealed.

Winborne & Lawrence, for appellants.
Francis D. Winston, for appellees.

CONNOR, J. (after stating the case). The motion of the defendants is based upon the position that the plaintiffs' remedy for the refusal of the defendants to perform their contract was a special proceeding, of which the clerk had original jurisdiction. If the contract had contained appropriate words of conveyance whereby the parties conveyed to each other the title to the lands described therein as tenants in common—that is, if it were an executed contract—the position of the defendants would have been correct. The contract is, however, executory, and the remedy upon it is for specific performance. If the court shall, upon a trial of the issues raised by the pleadings, adjudge that the plaintiffs are entitled to a decree, it will, in furtherance of the remedy, appoint commissioners to make partition, and thus give complete relief. "When the title of a co-tenant is equitable merely, and he is entitled to a conveyance of the legal title, he may, by proper pleadings, assert his rights, and obtain a decree of the court compelling those in whom the legal title rests to convey according to the partition awarded. But when the sole purpose of the bill is to procure a partition, it will not be granted on the ground that the plaintiff is entitled to a conveyance. He must first, in the same or an independent suit, obtain a decree declaring the right to a conveyance. Freeman on Cotenants and Partition, § 518. "A partition of lands among several joint owners will not be made unless those by whom the partition is sought have a legal title to the portions claimed by them. A party who has a mere equitable

right to a conveyance of an undivided interest is not in a position to ask for a partition." Williams v. Wiggand, 53 Ill. 238. In that case it is said that in a bill for specific performance a prayer may be joined for partition, but, when the sole purpose of the bill is for partition, it will not be allowed merely on proof that the complainant is entitled to a conveyance. No partition can be ordered until the equitable rights are determined and adjudged. It is well settled that the clerk in the exercise of his statutory jurisdiction in special proceedings, may not administer equities or equitable relief. This jurisdiction is vested solely in the superior court in term. The language of Mr. Justice Davis in *Edland v. Edland*, 96 N. C. 488, 1 S. E. 858, is appropriate to and decisive of this appeal: "Equitable elements exist in this case and involve questions of law and fact which could not be adjudicated before the clerk, and which, under the old practice, would have been cognizable in a court of equity, and it is properly a 'civil action' within the definition of Pearson, C. J., in *Tate v. Powe*, 64 N. C. 644." Pollard v. Slaughter, 92 N. C. 72, 58 Am. Rep. 402; Parton v. Allison, 109 N. C. 674, 14 S. E. 107. We therefore conclude that the action is properly brought. The defendants' motion to dismiss should have been denied. Judgment dismissing the action will be reversed, and the court will proceed to hear and determine the cause upon the pleadings.

Reversed.

(124 N. C. 217)

MEEKINS v. NORFOLK & S. R. CO.
(Supreme Court of North Carolina. Feb. 16, 1904.)

DEATH—PROXIMATE CAUSE—NEGLIGENCE—NATURAL CAUSES—EVIDENCE—DAMAGES.

1. Plaintiff might recover for the death of his decedent if a cause of the death was a disease but the disease was accelerated and death hastened by the negligent act of the defendant.

2. In an action for death, evidence that the decedent would have died in a short time from natural causes was competent on the question of damages, but incompetent on the issue of defendant's negligence.

Appeal from Superior Court, Tyrrell County; Council, Judge.

Action by J. C. Meekins, administrator, against the Norfolk & Southern Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

E. F. Aydlett and I. M. Meekins, for appellant. Pruden & Pruden and Shepherd & Shepherd, for appellee.

DOUGLAS, J. This is an action to recover damages for the death of the intestate from injuries alleged to have been received through the negligence of the defendant. The first issue was as follows: "Was the death of the intestate, John Jones, caused by the

negligence of the defendant as alleged in the complaint?" This issue was answered "No," which rendered the remaining issues immaterial.

There are several exceptions, nearly all to the charge or failure to charge; but as they are so connected with the evidence that they may not arise upon a new trial, we will confine ourselves to the exception which alone seems necessary for the determination of this appeal. The court charged as follows: "If the jury shall find that intestate's death was caused by disease, and would have occurred from disease which he had at the time of the accident to him, even if the accident had not befallen him, then they shall answer the first issue 'No,' even if they shall further find that the fall aggravated his disease and hastened his death." In this instruction there was substantial error for which a new trial must be granted. The first part of the instruction would of course be correct if taken by itself, as the defendant would not be liable for the death of the intestate if a pre-existing disease were its proximate cause; but in contemplation of law the cause of death is that which produces death at the time it happens. The unlawful killing of a human being would be none the less murder or manslaughter, as the case might be, even if the innocent victim were in the last stages of a fatal disease. We see no reason why the defendant should not be held civilly liable for negligently doing an act, the intentional commission of which might subject an individual to the punishment of death. Any other construction of law would be liable to the gravest consequences.

It has been repeatedly held by this court that substantial damages are recoverable where the death of the intestate was hastened or accelerated by injuries resulting from the negligence of the defendant. In *Lewis v. Raleigh*, 77 N. C. 229, where the jury found that "the death of John Godwin was accelerated by the noxious atmosphere of said guardhouse," it was held, in a well-considered opinion, that his administrator could recover. In *Gray v. Little*, 126 N. C. 385, 85 S. E. 611, this court says on page 387, 126 N. C., page 611, 35 S. E.: "His honor, in charging the jury, substantially followed the charge approved in *Benton v. Railroad*, 122 N. C. 1007 [30 S. E. 333], and in addition thereto instructed the jury in these words: 'But in considering the second issue as to the cause of the death of the plaintiff's intestate, if you find that the death of the intestate was only hastened or accelerated by the acts or omissions of the defendant as alleged, then you are instructed that, in answering the third issue as to damages, you cannot award the plaintiff any more than nominal damages; that is, such small sum, as, for instance, five cents, or other small sum, because in such state of the case, if the death of the intestate was only hastened or accelerated by the defendant, you could only

respond to this issue in nominal damages.' [Exception.] The error in that part of the charge lies in considering the act expediting death as a mere technical injury. This is not the language of the law nor of the textbooks on criminal matters. There are instances in the common-law reports where the accelerator paid the severest penalty known to the law. We know of no decision of a final appellate court in this country declaring otherwise." In view of the uniform decisions of our own state, it is needless to cite outside authorities; but a further discussion of the question may be found in *Railroad v. Northington* (Tenn.) 17 S. W. 880, 16 L. R. A. 268, and in 1 *Thompson, Neg.* § 149.

The evidence tending to show that the intestate would in any event have died in a short time from natural causes was competent upon the issue of damages, but was utterly immaterial upon that of negligence. For this erroneous instruction of his honor, a new trial is ordered. New trial.

(134 N. C. 245)

**CHEESBOROUGH et al. v. ASHEVILLE
SANATORIUM et al.**

(Supreme Court of North Carolina. Feb. 16, 1904.)

**MECHANIC'S LIEN—CORPORATION PROPERTY—
DEED OF TRUST—PRIORITY—MATERIALS FURNISHED—WORK AND LABOR.**

1. Under Code, § 1255, as amended by Laws 1897, p. 511, c. 334, providing that mortgages of incorporated companies shall not exempt the property of such corporations from execution for labor performed, and omitting the words "nor for materials furnished," contained in the section prior to its amendment, claimants, who "performed work" and "furnished materials" for a corporation, and in doing the work used said materials subsequent to the registration of a deed of trust of its property, were not entitled to priority over the deed of trust for the materials furnished.

Appeal from Superior Court, Buncombe County; Hoke, Judge.

Action by Thomas P. Cheesborough and others against the Asheville Sanatorium, in which J. C. McPherson and T. G. Clark were permitted to file a complaint. From a judgment for plaintiff, said McPherson and Clark appeal. Affirmed.

This action was brought by the plaintiffs for the purpose of enforcing the execution of the trusts declared in a certain deed executed by the defendant corporation to J. S. Adams. Charles McNamee was appointed receiver. At August term, 1899, the appellants were allowed to make themselves parties to such action, and filed their complaint therein. The cause was submitted to his honor upon an agreed state of facts. The defendant was, on and before the 30th day of September, 1897, a corporation created and organized under the laws of this state. On said day the said corporation executed to the Board of Home Missions of the Presbyterian Church certain bonds aggregating the sum of \$30,-

000, and, for the purpose of securing the payment thereof, executed a deed in trust upon its land and buildings in the city of Asheville, which was duly registered in Buncombe county on the 3d of January, 1898. Between the 9th of February, 1898, and the 15th of July, 1899, the plaintiffs McPherson & Clark, pursuant to a contract made with said corporation, "performed labor" and "furnished materials" for it, and in doing said work used said materials, which said materials were furnished and used by them on the buildings situate on the land and premises of the defendant corporation, particularly described in the notice of lien filed by said plaintiffs. Said work and material were reasonably worth the prices set out and charged therefor. By the terms of said contract the said corporation became indebted to the plaintiffs McPherson & Clark in the sum of \$646 for said labor and work and materials so furnished. Of said sum \$115.60 is for items marked "work" in the bill of particulars filed with the notice of lien, the remainder of said sum being for "materials furnished." The plaintiffs filed their notice of lien in compliance with the provisions of section 1781 of the Code on the 16th day of August, 1899, and on the 19th day of October, 1899, filed their complaint in this action. The Board of Home Missions filed its answer to said complaint, alleging the execution of the said deed in trust; and denying the plaintiffs' right to any lien on said property, or priority in the proceeds of the sale thereof over the payment of the bonds held by said Board of Missions and secured by said deed in trust. His honor adjudged that the defendant corporation was indebted to the plaintiffs McPherson & Clark in the sum of \$646.15, with interest, and of this amount the sum of \$115.61, being for "work and labor," constituted a lien upon said property, and had priority over all other liens whatsoever, and over all mortgages and deeds in trust thereon, and that said sum be paid out of the proceeds of the sale of the property of the defendant corporation in preference to all other claims, etc. The plaintiffs excepted to the refusal of his honor to declare the entire amount of their claim entitled to priority, and appealed.

F. A. Sondley, for appellants. Merrimon & Merrimon and J. D. Murphy, for appellee.

CONNOR, J. (after stating the case). The exception to the judgment of his honor involves the construction of section 1255 of the Code, as amended by chapter 334, p. 511, Pub. Laws 1897. The section of the Code as originally enacted declared that "mortgages of incorporated companies * * * shall not have power to exempt the property of such incorporations from execution for labor performed, nor for material furnished, nor for torts committed." This section was construed by this court in *Coal Co. v. Electric Light Co.* (1896) 118 N. C. 232, 24 S. E. 22. The General Assembly, at the session of 1897, amend-

ed the section by striking therefrom the words "for material furnished such corporation." Chapter 334. The sole question presented by this appeal therefore is whether the plaintiffs are entitled to priority over the deed in trust executed prior to the commencement of the work or the furnishing of the materials. There can be no doubt that, as against the defendant corporation, the plaintiffs have a lien pursuant to the provisions of section 1781 of the Code, providing for liens "for work done * * * or materials furnished." This lien, however, is subordinate to the registered deed in trust, attaching, as it does, at the time of the beginning of the work or furnishing materials. *Burr v. Maulsby*, 99 N. C. 263, 6 S. E. 108, 6 Am. St. Rep. 517; 20 Am. & Eng. Enc. (2d Ed.) 479. While, therefore, as was said by the court in *Coal Co. v. Electric Light Co.*, supra, the right of priority asserted by the plaintiffs is not based upon the idea of a lien, we may resort to the construction put upon statutes providing for mechanics' liens to aid us in ascertaining and giving expression to the legislative intent. It is significant that the amendment of 1897 to section 1255 follows the decision of this court in *Coal Co. v. Electric Light Co.*, supra, being enacted at the next succeeding session of the General Assembly. "Whether mechanics' liens should be construed strictly or liberally is a question upon which there is a hopeless division of opinion." *Bolsot on Mechanics' Liens*, § 34. The author cites a large number of cases in which various opinions are expressed. Upon this question we prefer to adopt the following principles thus stated by him: "There is a line of decisions that seems to take a middle ground, holding that the statute should be reasonably construed, so as to ascertain the intent of the Legislature, and to require a substantial compliance with the requirements of the statute, without extending its provisions beyond the plain language of the act." *Id.* § 87. This court, in *Cumming v. Bloodworth*, 87 N. C. 83, drew a clear distinction between a lien for labor performed and one for material furnished, holding that in respect to the former the Legislature had the power, pursuant to article 10, § 4, of the Constitution, to provide for a lien for "work done" having priority over the right to the homestead, but had no such power in respect to "materials furnished." The current of authority tends to sustain the distinction made by this court. *Bolsot on Mechanics' Liens*, §§ 235, 241. This court, in *Broyhill v. Gaither*, 119 N. C. 443, 26 S. E. 31, says: "The laborer's lien is solely for 'labor performed.' The mechanic's lien is broader, and includes the 'work done'; i. e., the building built or superstructure on the premises." This language would seem to be decisive of this appeal, as, since the amendment of 1897, the right of priority secured by section 1255 is confined to "labor performed," and the amendment expressly excludes "materials

furnished," thus narrowing the class of persons and claims entitled to its protection within a much smaller compass than the language of section 1781.

His honor having separated the items in the bill of particulars for "work done" from those for "materials furnished," we are not called upon to decide the question discussed by counsel as to the rights of the laborers who, in the performance of their contract, and as an essential part of their work, used materials.

It is difficult to reconcile the large number of the decisions found in the Reports of the different states concerning lien laws, and we carefully refrain from announcing any principle of construction further than is necessary to dispose of this appeal. Upon the facts found by his honor, we are of the opinion that he correctly construed the statute as amended.

Affirmed.

(134 N. C. 236)

FIDELITY & DEPOSIT CO. v. JORDAN et al.

(Supreme Court of North Carolina. Feb. 16, 1904.)

EQUITY — JURISDICTION — JUSTICES OF THE PEACE—APPEAL—SUBROGATION—PLEADING.

1. An objection to the jurisdiction, though waived in the court below, may be raised on appeal.

2. The superior court, and not a justice of the peace, had jurisdiction of an action by a creditor seeking to be subrogated to the rights of other creditors of the same debtor, whose claims he had paid.

3. A complaint alleged that plaintiff was the surety on the official bond of a clerk of court, who received, as clerk, large sums of money, a large part of which he deposited in the bank, and that he misappropriated the trust funds so received by him to the amount of nearly \$1,800, which has been paid by the plaintiff, as surety, and that the defendants received a check from the clerk for \$197.86 on the bank, and that amount, out of the trust funds in the bank, was paid to him on the check. *Held*, that as plaintiff alleged that the clerk misapplied the fund so received by him, but did not allege that he misapplied that part deposited in bank, and as every intendment is to be made against the pleader, it did not appear that defendants had received any of the funds misappropriated, and plaintiff showed no right to be subrogated to any rights as against defendants.

4. If the clerk had misapplied that part of the fund deposited in the bank, plaintiff had a right of subrogation, though he had secured no assignment of the claims of creditors.

5. The trial court might, on application, permit the plaintiff to amend his complaint, under Code, § 273, permitting the court, before or after judgment, to allow a pleading to be amended by inserting other allegations material to the case.

Appeal from Superior Court, Hertford County; M. H. Justice, Judge.

Suit by the Fidelity & Deposit Company against William Jordan and another. From a judgment for plaintiff, defendants appeal. Reversed.

Winborne & Lawrence and Geo. Cowper, for appellants. Pruden & Pruden and Shepherd & Shepherd, for appellee.

WALKER, J. This action was brought by the plaintiff in the court below for the recovery of \$197.86, and was tried upon demurrer to the complaint. The plaintiff, a corporation, alleged that, at the request of John F. Newsome, clerk of the superior court of Hertford county, it became surety on his official bond, as it was authorized by law to do, in the sum of \$15,000, with the usual conditions; that said Newsome, as clerk and receiver, by virtue of his office, received large sums of money to be held by him for several parties, and a large part thereof he deposited in bank, to his credit as "clerk and receiver"; that he defaulted and misapplied the trust funds so held by him, to the amount of nearly \$1,800, and thereafter, he having died, a judgment was recovered against his administratrix and the plaintiff, his surety, for \$909.80, which amount, and the further sum of \$507.75, which he had also converted or misapplied, the plaintiff was compelled to pay, as surety; that prior to his death the said Newsome, being individually indebted to the defendants, gave them a check drawn by him, as "clerk and receiver," to their order, on the bank in which the trust funds had been deposited, for the sum of \$197.86, in payment of said indebtedness, and the check was afterwards paid to them out of the trust funds; that defendants had no claim upon the said funds, and knew at the time they received the check and the money paid thereon that the giving of the check was a misappropriation of the trust funds by Newsome. It is then alleged "that the plaintiff is advised and believes, and so avers, that it is subrogated to the rights of those whose debts against the said clerk and receiver it has paid, and is entitled to recover in this action, of the defendants, the sum received by them as aforesaid of John F. Newsome, deceased." The plaintiff demands judgment for the sum of \$197.86 and the costs. The defendants demurred substantially upon the following grounds: (1) That the court has no jurisdiction of the action. (2) It appears from the complaint that the plaintiff paid the alleged fiduciary claims for money wrongfully converted by his principal without having the same assigned to it, and thereby discharged the same, and for this reason it has no legal or equitable demand against the defendants, by subrogation or otherwise. (3) That the plaintiff, in its complaint, does not state a cause of action because, first, it does not appear that plaintiff is subrogated to the rights of any person or persons having any cause of action against the defendants; second, it is not stated to whom the plaintiff paid the said money, nor how much it paid to any one person, nor does it appear by proper averment to whose right the plaintiff seeks to be subrogated. The demurrer was overruled, and

judgment rendered for the plaintiff, to which the defendants excepted and appealed.

The objection to the jurisdiction was waived in the court below, but the defendants' counsel insisted upon it in this court, as he had the right to do. We think, however, that it is without any merit. The cause of action attempted to be set up by the plaintiff is equitable in its nature, and can be enforced only in the superior court. The court of a justice of the peace has no jurisdiction by which it can affirmatively administer an equity. This has been repeatedly decided. *Barry v. Henderson*, 102 N. C. 525, 9 S. E. 455, and cases cited. While it is a court for the enforcement of remedies merely legal, it may so far recognize an equity involved in any action pending before it as to permit it to be pleaded as a defense. *Bell v. Howerton*, 111 N. C. 69, 15 S. E. 891; *McAdoo v. Callum*, 86 N. C. 419.

The defendants next contend that the plaintiff, having paid the judgment recovered against it, and the other part of the debt due by its principal, without having taken an assignment to itself for the same from the creditors, has thereby discharged the indebtedness, and deprived itself not only of the right to enforce payment of the particular judgment and claim thus discharged by it, but has also lost all right to be substituted in the creditors' place to all collateral rights and securities to which the creditors were entitled, or which they held at the time of the payment, and that by the payment it became merely a simple-contract creditor of its principal, without any security for its debt, and its only remedy is by personal action against the administrator to recover the amount so paid by it. It is very true that in order to enforce the payment of a judgment obtained upon a debt, or to recover upon the debt in its original form, if it has not been reduced to judgment, it is necessary that the surety, when he pays the debt, however it may be evidenced, should have it assigned to a third person in trust for his benefit; and, if such an assignment is taken, the debt is kept on foot, although the money be paid to the creditor by the surety, and its vitality is preserved, even at law, and much more in equity, and he may enforce payment of it just as the creditor could have done before the payment was made. *Hanner v. Douglass*, 57 N. C. 262. But it is not required that this should be done in order to preserve the collateral remedies or securities of the creditor. It is only the debt or security upon which the judgment has been taken, or the note or other instrument given to the creditor as evidence of the indebtedness, that is discharged by the payment; and in such a case an equity arises at once in favor of the surety making the payment to have all the securities held by the creditor, and which have not been extinguished by the payment of the debt—such as the bond securing the principal debt—transferred to him; and he is entitled to be subrogated to

all the rights and remedies which the creditor has against the debtor, and to avail himself of them as fully in every particular as the creditor could have done. This principle of equity we consider as well settled by the authorities. *Liles v. Rogers*, 113 N. C. 197, 18 S. E. 104, 37 Am. St. Rep. 627. The distinction we have drawn is clearly and tersely stated by Rodman, J., for the court, in *McCoy v. Wood*, 70 N. C. 125, as follows: "The law is that if a surety pays the bond of his principal, for which there is no collateral security, the bond is thereby extinguished, unless he takes an assignment to a trustee. But in equity it is held that, if the creditor has taken a collateral security for the debt, the surety, on payment, is subrogated to the rights of the creditor in the security, without an express assignment." While the original debt, whether in the form of a judgment or a bond, is discharged by the payment, the surety becomes a simple-contract creditor of his debtor; and to this new relation equity attaches what is called the "right of subrogation," which is defined to be the substitution of one person in the place of another, whether as a creditor or the possessor of any other rightful claim, and the substitute is put in all respects in the place of the party to whose rights he is subrogated; the principle having been adopted from the civil law by courts of equity. It is treated as a creature of equity, and is so administered as to secure real and essential justice, without regard to form, and independent of any contractual relations between the parties to be affected by it. It is broad enough to include instances in which one party pays the debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter. *Sheldon on Subrogation*, p. 2. By another, the doctrine of subrogation is said to be distinctly a creature of equity, having its basis in natural justice, irrespective and independent of rules and forms of law. But in equity no contract is necessary upon which to base the right. It is a remedy which a court of equity seizes upon in order to accomplish what is just and fair between the parties, where a party who is seeking the aid of the court and the benefit of the rule has been no mere volunteer, and where his action has been based upon general equitable rules, which it is the particular province of a court of equity to enforce. "Subrogation is the substitution of one who, under the compulsion of necessity, or for the protection of his own interest, has discharged a debt for which another is primarily liable, in the place of the creditor, with all the security, benefits, and advantages held by the latter with respect to the debt. One of the prerequisites to the exercise of the right is the complete discharge of the debt." 2 Beach, Mod. Eq. Jur. §§ 797, 798. In conformity to this established doctrine, it has been held that the sureties of an insolvent clerk of the court, upon a breach of trust

by their principal, will, in equity, be entitled to all the remedies and securities that belong to a cestui que trust, or creditor, against one who co-operated in the breach of trust. *Bunting v. Ricks*, 22 N. C. 130, 32 Am. Dec. 699, cited and approved in *Powell v. Jones*, 36 N. C. 337.

The case of *Fox v. Alexander*, 36 N. C. 340, seems to be directly in point as an authority in support of the doctrine that, when a surety has paid a judgment against his principal (in that case, a guardian), he may by action follow and recover any of the fund which has been wrongfully converted or misapplied by the principal, and which has been received from him by a third person, with notice of its fiduciary character, in payment of a debt due him from the surety's principal, even though the judgment which was obtained against the surety and his principal on account of the breach of trust has been paid and discharged. In that case the guardian transferred to the defendant, in payment of the debt due to him, a note payable to himself as guardian. The ward recovered judgment against his guardian for the amount of his defalcation; the bond transferred to the defendant being a part of the trust property, which was misapplied by the guardian, and for which misapplication the judgment was given. This judgment the sureties paid without having any assignment made to a third person for their benefit. It was held that, as the sureties had thus been compelled to pay the ward the amount due to him, they had the right, in a court of equity, to stand in his place, and follow the trust fund in the hands of the defendant, and to have satisfaction of him to the amount thereof. This case, it would seem, is a full and complete answer to the contention of the defendants' counsel, and sustains the plaintiff's right to a recovery, if it has made the necessary allegations to raise this equity of subrogation in its behalf. While it may be needless for us to cite authorities to show that the defendant is liable to account for the money received by him on the check, upon the ground that he is constructively a trustee of the same, having received it with full notice that it was part of the trust fund, the principle upon which such a liability rests is fully discussed in the following cases: *Edwards v. Culberson*, 111 N. C. 342, 16 S. E. 233, 18 L. R. A. 204; *Powell v. Jones*, 36 N. C. 337; *Liles v. Rogers*, supra; *Bunting v. Ricks*, supra. Having received the fund with notice of the breach of trust, he is held to have participated therein, and becomes himself, by construction of a court of equity, a trustee of the fund for the benefit of the party entitled to the same, and the latter may pursue and recover it for the purpose of "indemnity and recompense"; and a court of equity will not stop the pursuit until the means of ascertainment and identification of the fund fail, or the rights of bona fide purchasers for value, without notice of the trust, or

of some person having a superior equity, have intervened. *Edwards v. Culberson*, supra.

While this right of subrogation exists, and will always be enforced when a case is presented, to the facts and circumstances of which it is adapted, we do not find in the plaintiff's complaint sufficient allegations to bring its cause of action within the application of the rule; and this requires us now to consider the defendants' last contention—that the plaintiff has not alleged facts sufficient to show that it is entitled to represent and stand in the place of any person entitled to the money which was paid by the bank to the defendants on the check. The plaintiff alleges that Newsome received large sums of money as clerk, a large part of which he deposited in the bank, and that he misappropriated the trust funds so received by him, to the amount of nearly \$1,800, which has been paid by the plaintiff, as surety, and that the defendants received a check from Newsome for \$197.86 on the bank, and that amount, out of the trust funds in the bank, was paid to him on the check. It does not appear from this allegation with sufficient distinctness, even under the liberal provisions of the Code, that the money which the defendants received was any part of that which was converted or misappropriated by Newsome, and which plaintiff was compelled to pay. It will be observed that the plaintiff does not allege that the trust fund misapplied by Newsome, the amount of which it was required to pay, was the same which had been deposited in the bank. The fund in the bank did not constitute all of the trust funds which had been received by Newsome as clerk. It is alleged that he had received large sums of money, a part of which he placed in the bank. It appears, therefore, that the fund converted by Newsome, and for which plaintiff was held liable, and the amount of which it afterwards paid, may have been that part of the "large sum of money" alleged to have been held by Newsome which was not deposited in the bank by him. Thus the matter is involved in the greatest doubt and uncertainty, and we are left entirely to conjecture as to what are the real facts. If the fund, for the conversion of which by Newsome the plaintiff was made liable, was not deposited in the bank, then it is very clear that the plaintiff is not entitled to recover in this action, as it seeks to recover upon the theory that the defendants have received a part of the trust fund which was deposited in the bank. The defect in the pleadings is to be found in the fifth section of the complaint, where it is alleged that Newsome misapplied the trust fund so received by him, not the fund so received by him and deposited in the bank. Newsome having received other funds than those which he placed in the bank, we must assume, in the absence of more specific allegation, that they were the funds misapplied by him, and for which misapplication or con-

version the plaintiff was held liable. If this be true, the defendants cannot be liable to the plaintiff, as they received no part of the fund which was not deposited in the bank. The rule of pleading is that every intentment is to be made against the pleader. In *Wright v. McCormick*, 67 N. C. 27, Rodman, J., says: "It is a rule of construction, of which no pleader has a right to complain, that all uncertainties and ambiguities in his pleadings shall be taken in the sense most unfavorable to him, for he has at all times the power, and it is his duty, to make them plain." But, however this may be, and while we are sure that the failure to make the necessary allegation was a mere inadvertence, we cannot ascertain and pass upon the rights of the parties by mere conjecture. The demurrer in this respect must be sustained, but, as the plaintiff may have a good cause of action, which is defectively stated in the complaint, the court below may, upon proper application, and in the exercise of its discretion, allow the pleading to be amended. Code, § 273; *Proctor v. Ins. Co.*, 124 N. C. 265, 32 S. E. 716.

The court erred in overruling the demurrer. Let the case be remanded, with the direction to proceed further therein in accordance with this opinion. Error.

(52 W. Va. 616)

McNEELEY et al. v. SOUTH PENN OIL CO. et al.

(Supreme Court of Appeals of West Virginia. March 28, 1903.)

On petition for rehearing. Denied.
For former opinion, see 44 S. E. 508.

NOTE BY BRANNON, J. Upon a petition for rehearing, the court carefully examined the case, and saw no ground for rehearing. It occurs to me to add this note, to present a further view for the position taken in the above opinion that never for a moment was there any adverse possession until after the death of Nathan Higgins. I have stated above that it is impossible to say that, as the possession under the executory contract was not hostile to Nathan Higgins, it was nevertheless hostile to his wife; and I say again that there could not be a possession adverse to half the tract, half the acre, half the pebble, half the molecule. But reflect further that nobody will say that as to Nathan Higgins the possession as to the whole tract was adverse. Every one must admit that it was friendly. This being so, we then bring in the fact that between Higgins and his wife there was a relation of privity and unity—that of joint tenancy—and the same character the possession bore to Nathan Higgins it bore to his wife. The possession being by executory contract while the wife lived, and not being adverse to him, neither was it adverse to her. He was her

tenant, as well as his tenant. Dry law views them as such. A court of law views them as such, and adverse possession is governed by this view. Had Higgins made a deed, instead of a contract, the possession would have been adverse to him; and, being adverse to him, so it would have been as to her.

But even if the possession had been adverse to Mrs. Higgins while she lived, at her last breath the law cut off that adverse possession because of her husband's curtesy. Her heirs were instantly barred from suit by an act of God, for which they are not responsible, and they should not suffer therefrom. Upon her death the law gave their father curtesy, and that prevented their suit, and they had to obey the law. So far as disability of infancy is concerned, the statute did not stop. As to it they could sue, but then that curtesy stood in their way, and it prevented them from suing until the last breath of their father. That was not a disability, and is not tested by the law of disability. How can it be said, with reason or justice, that, when only two years of adverse possession had passed, the heirs are barred? They are entitled to the full period given by the statute. It is immaterial to say whether the statute was suspended during curtesy, so as to allow possession before the death of the wife to be tacked to that after the death of the husband, or whether the possession during her life was tolled—taken away—and a new cause of action accrued after the husband's death. The case of *Steele v. Gellatly*, 41 Ill. 39, supports the position taken in the above opinion as the import of *Jackson v. Johnson*, in saying that the statute cannot run until there is a person who can sue, and that "so decided have the courts been on this point that, although it is a general rule, when the statute has begun to run, it shall continue to run in spite of supervening disability. Yet in the case of *Jackson ex dem. Swartwout v. Johnson*, 5 Cow. 74, 15 Am. Dec. 433, the court held that the statute having commenced to run, actually ceased during the period when the person having the right had no legal power to enforce it. This question is, of course, wholly distinct from that of mere disabilities. Whether married women or infants, or any other class of persons having an estate, shall be considered as under disabilities, and therefore excused from bringing suit, or what time shall be allowed them after such disabilities are removed, are questions for the Legislature, and the courts have only to obey its behests. But the case we are considering is not one of technical disability, in the ordinary sense of the term, where the persons having the right have also the legal power to assert it in the courts, but are excused on account of infancy or coverture; but it is one where the claim sought to be barred has been in such a position that it could not be asserted by any one. If a

claim of this character could be barred, it would be simple confiscation, without crime, fault, or laches on the part of the owner, and we cannot suppose the Legislature so intended."

The law cannot deny action, and yet confiscate property for failure to sue. So applied, the statute would be unconstitutional.

(134 N. C. 608)

STATE v. POYNER et al.

(Supreme Court of North Carolina. Feb. 23, 1904.)

MAINTAINING NUISANCE—LIABILITY OF EMPLOYEES.

1. Persons who, as employes of another, place posts in a waterway, constituting a nuisance, may not, 12 years after they have ceased to be in his service, be convicted of maintaining the nuisance.

Appeal from Superior Court, Currituck County; Council, Judge.

A. J. Poyner and another were convicted of maintaining a nuisance, and appeal. Reversed.

Pruden & Pruden and Shepherd & Shepherd, for appellants. The Attorney General and E. F. Aydtlett, for the State.

CONNOR, J. The defendants were indicted for erecting and maintaining a public nuisance, in that they "did erect, place, and put in Wills Island Lead, a common highway, certain piles and posts, and unlawfully and willfully doth continue said obstructions and impediments," etc. There was evidence tending to show that Wills Island Lead is a waterway extending from one end to the other of Currituck Sound; that it was navigable, and used by the citizens for hunting and fishing. There was also evidence that the stakes and obstructions placed in said waterway have remained there until the trial of this indictment, and were put there by the defendants; that they were put there from 10 to 13 years before the presentment or indictment herein; that the work was done by the defendants, who were laborers employed by and under the direction of one Thomas J. Poyner, who was superintendent of the Currituck Shooting Club; that defendants left the employment of said Poyner and said club the same year the obstructions were put in, and had not been in the service of either since, nor had they had anything to do with said obstructions.

The defendants' counsel, in apt time, requested the court to charge the jury: "If the defendants were laborers, and employed in the service of T. J. Poyner, or other employer, and, as such employes and laborers, under direction of the said employer, more than two years before the finding of the bill of indictment in this case, drove said stakes, and thereafter had nothing to do with keeping of and maintaining said obstructions, they cannot be convicted, and you should return a verdict of acquittal." The court declined

to give this instruction, and the defendants excepted. The court instructed the jury that, if they believed the evidence, they should find the defendants guilty, notwithstanding the lapse of time since they did the work and ceased their connection with the matter. The defendants duly excepted, and, from judgment upon a verdict of guilty, appealed.

The indictment is drawn in accordance with the decision of this court in *State v. Narrows Island Club*, 100 N. C. 477, 5 S. E. 411, 6 Am. St. Rep. 618, and charges a nuisance at common law for placing obstructions in a public highway—navigable water—and for continuing and maintaining the same. If the bill charged the defendants with placing the obstructions in the highway, they could not have successfully defended themselves by showing that they did so by direction of their employer. *State v. Campbell*, 134 N. C. —, 45 S. E. 844. They would, however, have been entitled to an acquittal because more than two years had elapsed since the commission of the offense. The Attorney General insists that the indictment is also for continuing and maintaining a nuisance, and that against this offense the statute does not run so long as the nuisance continues. This is undoubtedly true, as held by this court in *State v. Holman*, 104 N. C. 861, 10 S. E. 758. The present Chief Justice says: "The state was entitled to show the existence of the nuisance at any time within two years before the indictment." In that case the defendants owned the land upon which the milldam complained of was situate. They had control of it, and actively maintained it. In this case the defendants, laborers in the employment of other persons, in the discharge of their duty, and by their direction, put the stakes in 12 years ago. They had no interest in the matter, and nothing to do with keeping them there or maintaining the obstruction. During the same year they left the employment. It does not seem that in any proper or legal sense the defendants can be said to maintain the nuisance. The industry of the defendants' counsel has brought to our attention the case of *Lyman v. Dorr*, 1 Aikens (Vt.) 217, in which the distinction is very clearly pointed out. Rogle, J., says, "When a person in his own right, and for his own benefit, commits a trespass by erecting a nuisance on another's land, it is but reasonable that he should remain liable for the continuing injury. And on the other hand, if he committed the original trespass as an agent and for the benefit of another, the continuance should not be regarded as his act, but as that of the principal." It would be a strange result if the law should hold a laborer liable for maintaining a nuisance erected by him in the course of his employment, and by direction of his employer, 12 years after he had quit the service, and had not since had any connection with the master. Certainly, if a civil action would not lie, he could not be indicted and convicted of a criminal offense.

The court should have given the instruction asked, and, for the refusal to do so, the defendants are entitled to a new trial.

(134 N. C. 354)

DISOSWAY v. EDWARDS.

(Supreme Court of North Carolina. Feb. 23, 1904.)

BONDS—PENALTY—LIQUIDATED DAMAGES—CONSTRUCTION—BREACH—JUDGMENT FOR DAMAGES—ABSENCE OF PROOF.

1. An allegation, after averring a breach of a bond, that plaintiff is "endamaged to the amount of one thousand dollars," although it is not such a specific allegation of fact as to be deemed admitted by demurrer, is sufficient to entitle plaintiff to an inquiry as to his actual damages, where the cause of action is admitted by demurrer.

2. Courts incline to construe a bond as penal in character, unless such a construction would tend to defeat its essential object, even where it is expressly stated that the amount of the bond is intended as stipulated damages.

3. In an action on a bond conditioned for the performance of an agreement not to engage in a certain business, it was error to enter judgment for the full amount of the bond, on overruling a demurrer to the complaint, where there were no specific allegations as to the damage suffered, or showing that the amount of the bond was not unreasonable, and no proof was taken on the subject.

Appeal from Superior Court, Craven County; Moore, Judge.

Action by Mark Disosway against A. M. Edwards. From a judgment for plaintiff, defendant appeals. Reversed.

This is an action upon a bond executed by the defendant in the following words: "Know all men by these presents that I, A. M. Edwards of Craven County, N. C. acknowledge myself indebted to Mark Disosway in the sum of One Thousand Dollars. The condition of this bond is such that if the said A. M. Edwards shall at any time, within the next twenty years from date hereof, engage in the sale of spirituous liquors either directly or indirectly within the limits of the city of New Berne, N. C., then this bond to be in full force and effect, and the said Mark Disosway, his heirs or assigns, in that case, is fully authorized hereby to at once take steps for the enforcement of this obligation, otherwise this bond to become null and void. A. M. Edwards. [Seal.] Witness, R. B. Nixon." The complaint alleges a breach of the bond, inasmuch as the defendant continues to engage in the sale of spirituous liquors in said city of New Berne, and further alleges, in separate paragraphs, that he is thereby "endamaged to the amount of one thousand dollars," and that "the defendant is indebted to him in the sum of one thousand dollars." The defendant demurred upon the following grounds: "(1) That the bond set out in the fourth paragraph of the complaint is in restraint of trade, tending to create a monopoly, contrary to public policy, null, and void.

(2) For that in any event such a bond could only be good to the extent of securing actual damage sustained, and the complaint does not set forth any fact from which the court can see that the plaintiff has sustained any damage whatever." Whereupon judgment was rendered as follows: "This cause coming on to be heard upon the complaint of plaintiff, and demurrer thereto filed by the defendant, and upon argument of counsel said demurrer being overruled, and the defendant allowed to answer over, but, declining to answer, excepts to the order of the court overruling said demurrer, and appeals to the Supreme Court, it is thereupon ordered and adjudged that the plaintiff recover of the defendant the sum of one thousand dollars upon the verified complaint of the plaintiff—no answer being filed by the defendant—with interest until paid, and the costs of action."

W. D. McIver, for appellant. O. H. Gulon, for appellee.

DOUGLAS, J. (after stating the case). We think the demurrer was properly overruled on both grounds, but that there is error in the judgment in allowing the full amount of the bond, in the absence of sufficient allegations in the complaint to enable the court to hold, as matter of law, that the penalty of the bond is in the nature of stipulated or liquidated damages. The plaintiff alleges that he is "endamaged in the sum of one thousand dollars," and, while this is not such a specific allegation of fact as is deemed admitted by the demurrer, yet it is sufficient to entitle him to an inquiry as to his actual damages, in view of the admission of his cause of action. It is not stated in the bond that it is intended to cover stipulated or liquidated damages, and, while such an inference might be drawn from some of the attending circumstances, it is not sufficiently strong to overcome the general rule of interpretation. As the primary object of the allowance of damages is to recompense the plaintiff for the actual loss sustained from the injury—that is, to make him whole—courts are always inclined to construe a bond as penal in its nature, unless such a construction would tend to defeat its essential object. This is true even when it is expressly stated that the amount of the bond is intended as stipulated damages. There are cases where the full amount so stipulated is allowed—as, for instance, where it is extremely difficult or practically impossible to ascertain the actual damage; but even then we think that, to entitle the plaintiff to more than nominal damages, sufficient facts should appear, either by proof or admitted allegations, to show that some actual loss has been sustained, and that the amount of the bond is not unreasonable. These questions are fully discussed by this court in *Lindsay v. Anesley*, 28 N. C. 186; *Thoroughgood v.*

Walker, 47 N. C. 15; Burrage v. Crump, 48 N. C. 330; Wheedon v. Am. Bonding Co., 128 N. C. 69, 38 S. E. 255. The general rule is thus stated by Chief Justice Marshall in *Taylor v. Sandford*, 7 Wheat. 13, 17, 5 L. Ed. 384: "In general, a sum of money in gross to be paid for the performance of an agreement is considered as a penalty, the legal operation of which is to cover the damages which the party in whose favor the stipulation is made may have sustained from the breach of contract by the opposite party. It will not, of course, be considered as liquidated damages, and it will be incumbent on the party who claims them as such to show that they were so considered by the contracting parties." This principle is further discussed in 4 Am. & Eng. Enc. 699; 19 Am. & Eng. Enc. 397, 402; 5 Cyc. 848. We are not inadvertent to the line of decisions distinguishing between ordinary contracts and those stipulating against carrying on a trade or business; but, while in such cases the courts are more inclined to allow liquidated damages, yet in all cases the clear intention of the parties, and the reasonableness of the amount, must affirmatively appear, to withdraw the case from the operation of the general rule.

We are deciding the case as it is presented to us, but upon a trial on the merits it may be made to appear that liquidated damages were reasonably intended. We would suggest that both the plaintiff and the defendant be allowed to amend their pleadings so as fully to present the questions at issue.

The defendant strenuously contends that the contract is against public policy, as being in restraint of trade. We are not prepared to say that the contract is so unreasonable as to be void under our line of decisions, and we are not disposed to extend the rule in favor of the multiplication of saloons. The following cases from our own Reports may be taken as exemplifications of the general rule: *Baker v. Cordon*, 86 N. C. 116, 41 Am. Rep. 448; *Cowan v. Fairbrother*, 118 N. C. 412, 24 S. E. 212, 32 L. R. A. 829, 54 Am. St. Rep. 733; *Kramer v. Old*, 119 N. C. 1, 25 S. E. 813, 34 L. R. A. 389, 56 Am. St. Rep. 650; *King v. Fountain*, 126 N. C. 196, 35 S. E. 427; *Hauser v. Harding*, 126 N. C. 295, 35 S. E. 586; *Jolly v. Brady*, 127 N. C. 142, 37 S. E. 153. We think that this is a case which must be finally determined upon all the facts as they may be made to appear upon the trial of the issues.

Error.

(134 N. C. 249)

WILLIAMS v. SMITH.

(Supreme Court of North Carolina. Feb. 23, 1904.)

LIBEL—ACTION—NOTICE—PLEADINGS—AMENDMENT—ANONYMOUS PUBLICATION.

1. A complaint in an action for libel published in a newspaper is demurrable if it fails to allege that before bringing suit plaintiff gave the

notice required by Pub. Laws 1901, p. 784, c. 557, at least five days before instituting proceedings for such publication, specifying the article and the statement therein alleged to be defamatory.

2. A complaint failing to aver the giving of such a notice may be amended.

3. A newspaper article signed "Smith," written by one with such surname, was not anonymous, within the provision of Pub. Laws 1901, p. 784, c. 557, that the requirement of notice of intention to bring an action for libel published in a newspaper shall not apply to anonymous publications.

Appeal from Superior Court, Craven County; Moore, Judge.

Action for libel by John H. Williams against Isaac H. Smith. From a judgment overruling a demurrer to the complaint, defendant appeals. Reversed.

D. L. Ward, for appellant. H. C. Whitehurst, for appellee.

CONNOR, J. The plaintiff alleged that the defendant wrote and published in the *Newbern Daily*, a newspaper published in the city of Newbern, of and concerning him, a certain article entitled "An Honorable Man"; that said article was a malicious libel, etc. The article was signed "Smith," and refers to the defendant as "one Williams." The defendant demurred to the complaint, and among other grounds for demurrer says, "That the plaintiff should allege that before bringing his suit he gave the defendant five days' notice in writing, specifying the article and the statement therein which he alleges to be false, as required by chapter 557, p. 784, of the Laws of 1901," etc. From a judgment overruling the demurrer the defendant appealed.

The appeal presents for construction sections 1 and 3, c. 557, p. 784, Pub. Laws 1901, known as the "London Libel Law," in the first section of which it is enacted: "That before any proceedings either civil or criminal, shall be brought for the publication in a newspaper or periodical in this state, of a libel, the plaintiff or prosecutor shall, at least five days before instituting such proceedings, serve notice in writing on the defendant or defendants, specifying the article and the statement therein, which he alleges to be false and defamatory. If it shall appear upon the trial that said article was published in good faith," etc., "only nominal damages shall be recovered," etc.

Neither our own nor the researches of the learned and diligent counsel have enabled us to discover any case in which this or any similar statute is construed in regard to an action for libel. We are compelled, therefore, to resort to an examination of the question upon general principles and the construction put upon statutes relating to other actions in which the same or similar provisions are found. "Under the rule both of the common law and under the Codes, when the statute gives a new remedy and prescribes conditions, or if an action of a certain class or

against certain parties be authorized only after the performance of similar conditions, the performance of these conditions, whether the right of action exists at common law or is created by statute, must be alleged in the complaint and proved at the trial." 4th Enc. Pl. & Prac. 655. The principle is clearly stated and well illustrated in *Reining v. Buffalo*, 102 N. Y. 308, 6 N. E. 792. The Legislature of New York enacted that "no action to recover or enforce any claim against the city shall be brought until the expiration of forty days after the claim shall have been presented," etc. *Ruger, C. J.*, said: "The inquiry is whether this provision was intended as a condition precedent to the commencement of an action, or simply to furnish a defense to the city in case of an omission to make such demand. We think the plain language of the statute excludes any doubt on the subject. It absolutely forbids the prosecution of any action until the proper demand has been made. It attaches to all actions whatsoever, and by force of the statute becomes an essential part of the cause of action, to be alleged and proved as any other material fact. It does not purport to give the city a defense dependent upon an election to use it, but expressly forbids the institution of any suit until the preliminary requirements have been complied with. * * * It is competent for the Legislature to attach a condition to the maintenance of a common-law action as well as one created by statute, and, when this is done, its averment and proof cannot safely be omitted."

This court has given to a similar statute the same construction. Section 757 of the Code provides "that no person shall sue any city, county, or other municipal corporation for any debt or demand whatsoever unless the claimant shall have made a demand upon the proper municipal authorities." The section expressly requires the demand to be alleged in the complaint. This court has uniformly held that a failure to allege the demand may be taken advantage of by demurrer. *Love v. Commissioners*, 64 N. C. 706. *Bynum, J.*, in *Jones v. Commissioners*, 73 N. C. 182, says: "That a demand was necessary before action begun is well settled. If, therefore, it had appeared from the complaint that no demand had been made, that would have been good cause of demurrer." *School Directors v. Greenville*, 130 N. C. 87, 40 S. E. 847. In *Nichols v. Nichols*, 128 N. C. 108, 38 S. E. 296, it is held that the provision in the statute (Code, § 1287) that in an action for divorce the complaint should be accompanied by an affidavit setting forth that the facts relied upon as ground for divorce had existed, to plaintiff's knowledge, six months, was mandatory, and that filing such affidavit was essential to give the court jurisdiction of the action. *Hopkins v. Hopkins*, 132 N. C. 22, 43 S. E. 508.

This construction has been put upon statutes imposing upon plaintiffs the duty of

making demand or giving notice prior to bringing actions by all of the courts whose reports we have examined. It will be observed that in the clause of the act immediately following that under discussion the language is materially changed—"If it shall appear on the trial," etc. The first clause imposes upon the plaintiff, before instituting the action, the duty of making the demand, and giving the defendant opportunity to take the steps by which he may not defeat the right of action, but protect himself against the recovery of punitive damages. The plaintiff, however, says that this provision of the Code does not apply to this case. Section 3: "This shall not apply to anonymous communications and publications."

We find that the word "anonymous" is defined in the *Century Dictionary* as "of unknown name; one whose name is withheld, as an anonymous author, or as an anonymous pamphlet; or without any name; wanting a name; without the real name of the author; nameless." The article is signed "Smith." The defendant's name is Isaac H. Smith. He refers to the plaintiff as "one Williams," and speaks of him as having been party to the suit for the recovery of usury. We are of the opinion that this article does not come within the definition of an anonymous publication.

Without passing upon the other grounds, we conclude that his honor should have sustained the second ground of demurrer. Of course, the plaintiff will be entitled to amend his complaint in the superior court and make the necessary allegation. It is a defective statement of a cause of action, and may be cured by amendment. *Johnson v. Finch*, 93 N. C. 205.

Let it be certified that there was error in overruling the demurrer.

Error.

WALKER, J., took no part in the decision of this case.

(124 N. C. 258)

EARLY et al. v. EARLY.

(Supreme Court of North Carolina. Feb. 23, 1904.)

PLEADINGS—WAIVER OF DEFECTS—INHERITANCE OF REMAINDER—DEATH OF REMAINDERMAN AND HEIR BEFORE LIFE TENANT.

1. Defects in the answer are waived by plaintiffs agreeing that the judge shall find the facts and render judgment thereon.

2. Testator devised land to T., his son, after the death of M., testator's wife. M. survived testator, T., and J., the only child of T., who died intestate, without issue, after T. Held that, under Code, § 1281, providing that when any person dies intestate seised of an inheritance, or of any right thereto, or entitled to any interest therein, it shall descend under the rules there prescribed, the heirs of J., and not those of T., inherit the remainder.

Appeal from Superior Court, Bertie County; Cooke, Judge.

Action by Josiah Early and others against Ella Early. Judgment for defendant. Plaintiffs appeal. Affirmed.

Francis D. Winston, for appellants. J. B. Martin, Day & Bell, and Shepherd & Shepherd, for appellee.

WALKER, J. This is an action for the recovery of real property. A jury having been waived, the court found the following facts: "(1) Andrew Early, late of Bertie county, owned in fee simple at his death a tract of land on which he lived, called his 'Home Place,' in said county, lying on both sides of the public road from Hexlena to Conaritsa Church. (2) That on December 27, 1895, said Early made his will, which was thereafter duly admitted to probate, and which is made part hereof, in which he devised his said lands as follows: 'Sixth. I give and bequeath to my sons Andrew Early and Tobias Early, after the death of my wife Mary Early, to be equally divided in acreage, giving my youngest son Tobias Early the place on which my dwelling and out-house now stand.' (3) Mary Early, the life tenant, survived her husband, Andrew, her son Tobias, and the child Tobias, named hereafter, and died before this action began. (4) Tobias died intestate before this action commenced, and before the said Mary, leaving him surviving, his widow, the defendant, Ella Early, and his infant child by said Ella, and also his brothers and sisters of the whole blood, the plaintiffs above named, except T. T. Wynns, the husband of Annetta. (5) That the said infant child of Tobias and Ella died intestate without issue, and without brother or sister, or issue of such capable of inheriting, leaving his mother the said Ella him surviving." Upon the foregoing facts the court rendered judgment against the plaintiffs, to which they excepted and appealed.

The plaintiffs' counsel moved in this court for judgment on the pleadings, because it is alleged in sections 5 and 7 of the complaint that the plaintiffs are the owners of the land, and that the defendant has no interest therein; to which allegation the defendant answers "that, as in plaintiffs' complaint alleged, sections 1, 2, 5, and 7 are not true." No such motion was made in the court below. Admitting, for the purpose of the argument, that the answer is defective in that it does not contain a sufficient denial of the material allegations of the complaint under section 253 of the Code, as construed in *Rumbough v. Improvement Co.*, 106 N. C. 461, 11 S. E. 528, cited by the plaintiffs' counsel in support of his motion, we are yet of the opinion that the plaintiffs cannot now take advantage of the formal defect, as their motion comes too late. If they were entitled to judgment upon the pleadings, they should have asserted their right to it before the case was submitted to the judge below to find the facts and declare the law arising

thereon. When the plaintiffs agreed that the facts of the case should be found by the judge, and a judgment rendered thereon, any and all defects in the answer were thereby waived, and all irregularities cured. *Foreman v. Hough*, 98 N. C. 386, 3 S. E. 912; *Greensboro v. Scott*, 84 N. C. 184; *Robbins v. Killebrew*, 95 N. C. 19; *Hines v. Railroad*, Id. 484, 59 Am. Rep. 250.

The plaintiffs contend that they are the owners of the land, because there was a failure of lineal descendants of Tobias Early, Sr., and therefore the inheritance descended to them as the next collateral relations of the person last seised, who are of the blood of Andrew Early, the ancestor of Tobias Early, Sr., and from whom the latter, who would have been one of the heirs of Andrew Early, received the inheritance by devise. Code, c. 28, rule 4. The plaintiffs' right to recover turns, therefore, upon the question whether Tobias Early, Sr., or Tobias Early, Jr., was the person last seised at the time of the death of the latter. If Tobias Early, Jr., was the person seised at the time of his death, the inheritance vested in his mother, who survived him, and who is defendant in this action, as we will presently show; but, if he was not thus seised, then his father, Tobias Early, Sr., was the person last seised of the inheritance, and the plaintiffs, as his next collateral relations, are entitled to the land for the recovery of which this action is brought. The plaintiffs' counsel relied upon the case of *King v. Scoggin*, 92 N. C. 99, 53 Am. Rep. 410, in support of the position that Tobias Early, Sr., was, at the time of the death of Tobias Early, Jr., the person last seised, and not the latter, as Tobias Early, Sr., was the first purchaser of the remainder and the only one of the two who could have had any seisin, and as Tobias Early, Jr., acquired the inheritance by descent from his father during the continuance of the particular estate—that is, the life estate of Mary Early—and the remainder thus descended created no seisin in Tobias Early, Jr., and consequently no new stock of descent. The case, abstractly considered, is full authority for the contention of the plaintiffs, and seems to have established the following rules to determine who will take when the remainder or the reversion, during the continuance of the particular estate, descends to an heir who dies without issue, namely: "(1) When the reversion or remainder expectant upon a freehold estate comes by descent, and the reversioner or remainderman dies during the continuance of the particular estate, he who would claim the estate by inheritance must make himself heir to the original donor, who erected the particular estate, for it is the old inheritance. (2) Where the reversion or remainder comes by descent, and before the determination of the particular estate it is conveyed by deed or devise to a stranger, the donee takes by purchase. He becomes a new stock of descent, and the estate will

descend to his heirs. (3) Where the remainder or reversion is acquired by purchase, he who would claim the estate must make himself heir to the first purchaser of the remainder or reversion at the time when it comes into possession; for the remainderman or reversioner, by such purchase, has become a new stirps of descent." Under the third of the rules stated by the court the plaintiffs claim that they are entitled to the land, as there was no seisin in Tobias Early, Jr., and the defendant, Ella Early, though heir to him, could not make herself heir to the first purchaser or person last seised, Tobias Early, Sr., at the time the remainder vested in possession by the death of Mary Early, the life tenant.

The question as to what will constitute sufficient seisin to make a new stock or stirps of inheritance (*seisina facit stipitem*) is exhaustively and learnedly discussed by Ashe, J., in *King v. Scoggin*, and the rules and principles applicable to the special facts of that case and to the particular matter then under investigation were correctly stated by him. It will be observed that he was endeavoring to show that the plaintiffs in that case, who could recover only upon the strength of their own title, and not upon the weakness of their adversary's, had failed to show any title as the heirs of George Hay, Jr., who was held to be the new stock of inheritance, or the person last seised, within the meaning of the rules of descent then in force. He expressly says that it was not necessary to investigate the defendant's title, and the court was therefore not even called upon to decide whether, under the law of descent in this state as it then existed, George Wesson, under whom the defendant claimed, did not have such actual seisin, or its equivalent in law, as to constitute a new stock of inheritance. That case was decided upon the old law, which has been greatly modified by the amendments to be found in the Revised Code, chapter 38, and the present Code, chapter 28.

The plaintiffs also relied upon the case of *Lawrence v. Pitt*, 46 N. C. 344, which presented the very question we now have under consideration. The inheritance there was claimed by the father from his son, who, in his turn, had inherited it from his mother, and she, in her turn, from her mother; the estate being a reversion in land expectant on the termination of a life estate. The son died before the expiration of the life estate, and it was held that the inheritance did not vest in the parent or father under the sixth canon of descent. That case, like the case of *King v. Scoggin*, is not in point, as both of them were decided upon descents which occurred before the year 1851, and to the facts of those cases, therefore, the law as first amended by the enactment of the Revised Code of 1854 did not apply. In the case of *Lawrence v. Pitt*

the court laid down the following principle: "Where the estate descended is a present estate in fee, no person can inherit it who cannot, at the time of the descent cast, make himself heir of the person last in the actual seisin thereof. But of estates in expectancy, as reversions and remainders, there can be no actual seisin during the existence of the particular estate of freehold; and consequently there cannot be any mesne actual seisin which of itself shall turn the descent so as to make any mesne reversioner or remainderman a new stock of descent, whereby his heir, who is not the heir of the person last actually seised of the estate, may inherit. The rule, therefore, as to reversions and remainders expectant upon estates in freehold, is that, unless something is done to intercept the descent, they pass, when the particular estate falls in, to the person who can then make himself heir of the original donor who was seised in fee and created the particular estate, or, if it be an estate by purchase, the heir of him who was the first purchaser of such reversion or remainder. It is no matter in how many persons the reversion or remainder may, in the intermediate period, have vested by descent; they do not, of course, form a new stock of inheritance. The law looks only to the heir of the donor or first purchaser." And this is the law as stated by Blackstone, who says: "So, also, even in descents of lands by our law, which are cast on the heir by act of the law itself, the heir has not plenum dominium, or full and complete ownership, till he has made an actual corporal entry into the lands; for, if he dies before entry made, his heir shall not be entitled to take the possession, but the heir of the person who was last actually seised. It is not, therefore, only a mere right to enter, but the actual entry, that makes a man complete owner, so as to transmit the inheritance to his own heirs. *Non jus, sed seisin, facit stipitem.*" The court, in applying this rule to the facts in that case, held that, as descent was cast upon the son during the continuance of the particular estate of freehold, the father could not take as his heir, nor could the inheritance vest in him under the sixth canon of descent, as he could not make himself heir to him who was the first purchaser or person last seised of the reversion.

It would be vain and useless now to discuss at any length the principles of the common law in regard to seisin as applied to the canons of descent in force prior to the enactment of the Revised Code, for by the latter the law in that respect has been so radically changed as to require almost a reversal of these principles in ascertaining who is entitled to the inheritance when descent is to be traced from the person last seised; but a brief review of the old law in regard to seisin will not be out of place, and may enable us the better to understand and con-

strue the law as amended by the Revised Code. At the common law seisin signified the possession or occupation of the soil by a freeholder, one who has at least a life estate in the land. This seisin was of two kinds—seisin in deed or in fact, which was when the person had the actual seisin or possession or occupation of the land with the intent, as is sometimes said, to claim a freehold interest; and seisin in law, which was a bare right to possess or occupy the land or freehold, or, as otherwise defined, a right of immediate possession according to the nature of the estate. 2 Blk. 104-129; 1 Washburn, R. P. 33, 34. The difference between the two is thus illustrated: "Where a freehold estate is conveyed to a person by feoffment, with livery of seisin, or by any of those conveyances which derive their effect from the statute of uses, he acquires a seisin in deed and a freehold in deed. But where a freehold estate comes to a person by act of law, as by descent, he only acquires a seisin in law, that is, a right to the possession; and his estate is called a freehold in law. For he must make an actual entry on the land to acquire a seisin or a freehold in deed." 1 Cru. Digest, tit. 1, § 24; Coke, Lit. 266b; and section 448, H. & B.'s Notes, 1.

The essential principle of the ancient law of inheritance was that the stock of descent could not be established except by actual seisin of the freehold of inheritance, and the rule is thus comprehensively stated by Blackstone: "We must also remember that no person can be properly such an ancestor as that an inheritance of lands or tenements can be derived from him, unless he hath the actual seisin of such lands, either by his own entry or by the possession of his own or his ancestor's lessee for years, or by receiving rent from a lessee of a freehold; or unless he hath had what is equivalent to corporal seisin in hereditaments that are incorporeal, such as the receipt of rent, a presentation to the church in case of an advowson, and the like. But he shall not be accounted an ancestor, who hath had only a bare right or title to enter or be otherwise seised. And therefore all the cases which will be mentioned in the present chapter are upon the supposition that the deceased (whose inheritance is now claimed) was the last person actually seised thereof. For the law requires this notoriety of possession as evidence that the ancestor had that property in himself, which is now to be transmitted to his heir, which notoriety had succeeded in the place of the ancient feudal investiture, whereby, while feuds were precarious, the vassal on the descent of lands was formally admitted in the Lords' court (as is still the practice in Scotland), and there received his seisin, in the nature of a renewal of his ancestor's grant, in the presence of the feudal peers, until at length, when the right of succession became indefensible, an entry on any part of the lands within the country (which, if dis-

puted, was afterwards to be tried by those peers) or other notorious possession was admitted as equivalent to the formal grant of seisin, and made the tenant capable of transmitting his estate by descent. The seisin, therefore, of any person, thus understood, makes him the root or stock from which all future inheritance by right of blood must be derived, which is very briefly expressed in this maxim, '*Seisina facit stipitem.*'"

We must conclude, after carefully reading *Lawrence v. Pitt*, 46 N. C. 344, which was decided in 1854, that it was thought the then existing law, as declared by the court, which had its origin in the feudal system, and which was applied in that case, should be changed, and brought more into harmony with modern conditions and requirements. It was manifestly in consequence of that decision that the amendments to the Revised Statutes of 1836 were made in the Revised Code of 1854, which amendments are as follows: Rule 1 of chapter 38 of the Revised Statutes provides that: "Inheritances shall lineally descend to the issue of the person who died last actually or legally seized, forever, but shall not lineally ascend, except as is hereinafter provided for," while section 1 of chapter 38 of the Revised Code provides that: "When any person shall die seized of any inheritance, or of any right thereto, or entitled to any interest therein, not having devised the same, it shall descend under the following rules: Rule 1. Every inheritance shall lineally descend forever to the issue of the person who dies last seized, entitled or having any interest therein, but shall not lineally ascend, except as hereinafter provided." By the proviso to rule 6 of the Revised Statutes, where the person last seized left no issue, nor brother, nor sister, nor the issue of such, the inheritance vested for life only in the parents of the intestate, or either of them, or the survivor of them; while by the corresponding rule in the Revised Code and the present Code it vests in the father, if living, and, if not, then in the mother, if living, in fee. But, in order that the meaning of the Legislature, as expressed in section 1 of the Revised Code, might be made plain and unmistakable, it was enacted by rule 13 of chapter 38 that "every person in whom a seisin is required by any of the provisions of this chapter shall be deemed to have been seized, if he may have had any right, title or interest in the inheritance." We therefore see that the seisin, either in law or in deed, of the common law, is not the seisin of the statute. The former requires that there shall be either actual possession or the right of immediate possession, while the latter requires that there need be only a right to or interest in the inheritance, with or without actual possession or the present right of possession, in order to establish a stock sufficient as a source of descent. It is therefore perfectly clear that under the law applicable to our case—that is, the law of the Revised

Code as brought forward in the present Code—all that is required to constitute a sufficient seisin for the creation of a new stock of inheritance or stirps of descent is that the person from whom the descent is claimed should have had, at the time of the descent cast, some right, title, or interest in the inheritance, whether vested in possession or not, for the language of the statute is explicit that a person having any such right, title, or interest shall be deemed to have been seised thereof. We are not entirely without what we regard as an authoritative interpretation of this new provision of the law. In *Sears v. McBride*, 70 N. C. 152, the plaintiff, Thomas Sears, claimed title to the land as heir of his son. The original owner of the land, or propositus, was Eliza McPherson, who intermarried with Isaac Fanshaw, and died, leaving issue by him, a son, William Sears, who died in 1852, leaving his father surviving him. In 1871, Isaac Fanshaw, who had a life estate in the land as tenant by the curtesy, died, the plaintiff surviving him. The defendants were the next collateral relations of Eliza McPherson, from whom the estate descended. This case, in its facts, is substantially like the case of *Lawrence v. Pitt*, supra. The court held that as the law stood in 1852, and by which the case must be governed, the defendants were entitled to recover, and in discussing the question involved uses this language (Settle, J., speaking for the court): "If this case were governed by the rules of descent to be found in the Revised Code, c. 38, the plaintiff would be entitled to the land in controversy in fee simple; but since it is governed by the rules as found in the Revised Statutes, c. 38, he can take nothing. The learning on this subject is so fully and satisfactorily stated in *Lawrence v. Pitt*, 46 N. C. 344, that we shall not discuss the subject further than to apply the law to the facts before us." "But the law has been materially changed, as will be seen by reference to the Revised Code, which enacts: 'Rule 1. Every inheritance shall lineally descend forever to the issue of the person who died last seised, entitled or having any interest therein,' etc. And, further, as if to remove all doubt, rule 13 is enacted, which declares: 'Every person in whom a seisin is required by any of the provisions of this chapter shall be deemed to have been seised if he may have had any right, title or interest in the inheritance.' So that now neither actual nor legal seisin is necessary to make the stock in the devolution of estates." "And it will be observed that while the proviso to rule 6 in the Revised Statutes gives in certain contingencies only a life estate to the parents, etc., yet in the Revised Code, under the same contingencies, an estate in fee simple is given to the father, if living, and, if not, then to the mother, if living." While the precise point we are considering was not presented in that case so as to impart to the judgment of the court controlling authority

as a precedent, the emphatic language of the court, which we have quoted, and which is singularly applicable to our case, induces us to regard it as if it had the force and effect of an actual decision, even if the language of the law was not in itself plain or unambiguous. In addition to this, it will be observed that in the case of *Lawrence v. Pitt*, Battle, J., referring to the contention of the plaintiff's counsel that in pleadings and other proceedings at the common law a person is often said to be seised of the reversion, and that, therefore, the term "seised" may well be applied to reversions under our statute of descents, says that, if our statute used only the word "seised" or "seisin," the argument would be a strong one; but that it used the words "actually or legally seised," and those words must be construed as they were used at common law in the case of dower, curtesy, and descent. It is clear that the court would have regarded the use of the term "seised" without the other words "actually" and "legally" as sufficient to describe the right, title, or interest which a person even at common law had in a reversion or a remainder expectant upon an estate of freehold. The words "actually and legally" were omitted from the Revised Code, c. 38, and the present Code, c. 28, and we cannot avoid the inference that this was done designedly in deference to the intimation of the court in *Lawrence v. Pitt*, for the purpose of conforming the statute in this respect to the other amendments of it, so that "there will be left no hinge or loop to hang a doubt on" as to the true intent and meaning of the Legislature.

Our conclusion must be that in this case the infant son of the defendant Ella Early, at the time of his death, though it occurred when the particular estate of freehold was still outstanding, had that right, title, or interest in the inheritance, remainder as it was, which in law is deemed to be a sufficient seisin to create a stock of inheritance in him; and, he having died, as stated in the facts found by the court, without any issue capable of inheriting, nor brother, nor sister, nor the issue of such, the inheritance, under rule 6, c. 28, of the Code, vested in the defendant, Ella Early, and she is the owner of the land as between herself and the plaintiffs, the life tenant Mary Early having died before this action was commenced. For this reason the judgment of the court below was right, and must therefore stand.

Affirmed.

DOUGLAS, J., dubitanta.

(134 N. C. 274)

WOODARD v. SAULS.

(Supreme Court of North Carolina. March 1, 1904.)

ACTIONS—VENUE—NECESSARY PARTIES.

1. Where a complaint alleged, among other things, that defendant had transferred to plain-

tiff a debt against S. as collateral, which S. had refused to pay on the ground that defendant had notified him not to pay the same, and asked judgment for the recovery of such debt, S. was a necessary party, unless a nonsuit was entered as to that part of the complaint.

2. A complaint alleged that defendant was liable to plaintiff on a promissory note, and for other sums in which plaintiff had incurred liability as defendant's surety. It also alleged that defendant had turned over certain notes as security, but had got possession of, and failed to apply the same on the indebtedness, and ancillary process in claim and delivery was sued out. *Held*, that a personal judgment against defendant, a determination of the liability incurred by plaintiff as surety, and an adjudication that the collaterals should be applied thereto, were the chief causes of action, and not the recovery of the specific notes demanded; and hence the venue was not governed by the situs of the notes, under Code, § 190 (4), providing that actions for the recovery of personal property shall be brought in the county where the property is situated.

Appeal from Superior Court, Wilson County; Ferguson, Judge.

Action by S. A. Woodard against J. R. Sauls. From a judgment for plaintiff, defendant appeals. Affirmed.

Pou & Brooks and Finch, Pou & Fuller, for appellant. F. A. & S. A. Woodard and Shepherd & Shepherd, for appellee.

CLARK, C. J. This action was brought in Wilson superior court by plaintiff, who resides in that county, and summons was served on the defendant by the sheriff of Johnston. The complaint avers that the defendant is indebted to the plaintiff by promissory note, and for further large sums in which the plaintiff is liable as surety for defendant, and that to secure such indebtedness the defendant had turned over to the plaintiff sundry notes, a large portion of which were due by residents of Wilson county, and secured by property in said county; that the defendant afterwards got possession of a portion of said notes to be collected by him as agent of plaintiff, and applied on said indebtedness, which defendant has not done; and that defendant got possession of another portion of said collaterals surreptitiously without the knowledge or consent of the plaintiff, and retains the same, to recover which notes the plaintiff sued out the ancillary proceeding of claim and delivery. Further, the complaint avers that the defendant transferred to him a debt against one Lee Sauls, which the latter refused to pay on the ground that the defendant has notified him not to pay the same, and that the defendant is a resident of Wilson, but temporarily in Johnston, county, and asks judgment for the recovery of the sum due by said promissory note, and for liability on the other indebtedness as to which plaintiff is surety; also for the recovery of the Lee Sauls debt, and for recovery of said collateral notes by claim and delivery, and judgment upon the replevin bond given by defendant in said claim and delivery proceedings. The defendant

filed an affidavit averring that he is a resident of Johnston county, and the notes sought to be recovered are situated in that county, and asking a removal of the cause. The judge did not find the fact whether defendant was a resident of Johnston county or not, and refused to remove the cause. Had he found that the defendant was in fact a resident of Wilson, the finding would have been final, and the cause might well be sent back to the end that this fact might be passed upon, as the court does not pass upon questions of law upon a hypothetical state of facts. It is also clear, though no objection has been made on that ground, that Lee Sauls is a necessary party to the action, unless a nonsuit is entered as to that part of the complaint, or by amendment he be now made a party. But, passing by these matters, the only point presented by the appeal is the refusal to remove, the defendant contending that by Code, § 190 (4), as amended by chapter 219, p. 232, Laws 1889, this, being an action for "recovery of personal property," should be brought in the county of Johnston, and hence is removable thither, the defendant having demanded a removal in apt time under Code, § 195. This would be true if it had been found as a fact that the defendant was a resident of Johnston county, and the notes were there, and the recovery of the personalty was the sole relief demanded, or even the chief relief, the others being incidental, as in *Mfg. Co. v. Brower*, 105 N. C. 440, 11 S. E. 818; *Connor v. Dillard*, 129 N. C. 50, 39 S. E. 641. But here the obtaining personal judgment for the amount due and the determination of the liability incurred by the plaintiff as surety and adjudging the collaterals named should be applied thereto were the chief causes of action. The recovery of possession of the collateral notes was incidental. Action for the recovery of the debt against Lee Sauls was necessarily brought in Wilson.

No error.

(124 N. C. 77)

EWBANK v. TURNER et al.

(Supreme Court of North Carolina. Dec. 18, 1903.)

DENTIST — BOARD OF EXAMINERS — POWER — PLEADING — AMENDMENT — JURISDICTION AT CHAMBERS — MANDAMUS.

1. When the summons in a case of which the superior court has jurisdiction is returnable at chambers, but the complaint shows a cause of action which should be heard at term, it may be amended so as to bring the case within the jurisdiction of the judge at chambers, especially in view of Code, §§ 623, 256, and section 255, as amended by Laws 1887, p. 518, c. 276, providing for a transfer of causes from the judge to term, from the clerk to term, and from the judge to the clerk.

2. In an action in which the only relief demanded is a writ of mandamus to compel the board of dental examiners to issue to the plaintiff a certificate of proficiency in dentistry, an allegation that the board's wrongful refusal to issue such certificate has damaged him in the

sum of \$5,000 or more does not take the case out of the jurisdiction of the judge at chambers.

8. Under Code, §§ 3149-3153, and Laws 1887, p. 402, c. 178, amended by Laws 1891, p. 203, c. 251, providing for examination of applicants for a certificate authorizing them to begin the practice of dentistry by a board of examiners to be elected by the North Carolina Dental Society, where the board has given an examination, and refused a certificate on account of incompetency of the applicant, mandamus will not lie to compel the issuance of a certificate.

Appeal from Superior Court, Henderson County; B. F. Long, Judge.

Action by Fred W. Ewbank against V. E. Turner and others, composing the board of examiners of the North Carolina Dental Society. From a judgment dismissing the action for want of jurisdiction, plaintiff appeals. Action dismissed.

Davidson, Bourne & Parker, Jones & Rec-tor, and E. W. Ewbank, for appellant. Bus-
bee & Busbee, for appellees.

CLARK, C. J. The complaint alleges that the plaintiff graduated with distinction in the dental department of the Baltimore Medical College, an institution of high and well-recog-nized standing, after prosecuting his studies in dentistry therein for the prescribed period of three years; that thereafter he made ap-plication to the proper authorities for license to practice dentistry in South Carolina, and after examination he was found duly pro-ficient and qualified, and license was issued to him, under which he practiced in that state; that thereafter, on removal to this state, he made application for examination and license under our laws; that, the board not being in session, under the provision of the statute he was examined by a single member of the board, was found duly qual-ified and proficient, and was given a tem-porary license 26th January, 1902, which for certain reasons was renewed by a second temporary license till the meeting of the full board, 19th June, 1903; that under these licenses he practiced dentistry for nearly a year and a half, and built up a lucrative practice; that on 19th June, 1903, he was examined by the full board, and, though he, as he avers, showed on such examination that he "possessed the necessary and required proficiency in the knowledge and practice of dentistry, and underwent a satisfactory ex-amination, as required by the statute in such case made and provided, as will abundantly appear from an inspection of his examina-tion papers, the said board, and the majority of the defendants composing said board, un-lawfully, unjustly, and arbitrarily, and with-out just cause or reason, and abusing the discretion with which they were clothed by the laws of North Carolina, refused, and yet refuse, upon the repeated demands of the plaintiff, to issue and grant to him a certificate of proficiency, to which he was and is entitled, and which it was and is the duty of the defendants to issue and grant." The

above is the gist of the complaint, which further avers that, by reason of such re-fusal to issue him a certificate of proficiency upon such examination, the defendants com-posing the board of examiners of the North Carolina Dental Society "thereby wrongfully, arbitrarily, unjustly, and unlawfully pre-vented him from engaging in the practice of dentistry in this state, to his great damage, to wit, in the sum of five thousand dollars or more," and prays for a mandamus to com-pel said board to issue to the plaintiff "a certificate of proficiency in the knowledge and practice of dentistry," and that "he have such other and further relief as he may be entitled to in the premises." An answer was filed, denying that the plaintiff had passed a satisfactory examination, or was entitled thereon to a certificate of proficiency, and denying that the action of the board could be reviewed by the courts. The summons was made returnable at chambers. The plaintiff moved (1) that the court submit the issues raised by the pleadings to a jury at the next term, under the proviso in Code, § 623; (2) that the plaintiff be permitted an inspection and to take a copy of his ex-amination papers; (3) that he be permitted to take a copy of the examination papers pre-pared and submitted by certain parties named, which were submitted to the board upon their examination to practice dentistry at the same time and place when the plaintiff was rejected. These motions were each refused, and the plaintiff excepted. The defendants moved to dismiss for want of jurisdiction, on the ground that this was an action for a money demand, and the summons had been made returnable before the judge at cham-bers. The plaintiff thereupon moved to strike out the words "to his great damage, to wit, in the sum of five thousand dollars or more." The court denied this motion upon the ground that it had no power to allow such amend-ment, and the plaintiff excepted. The court thereupon dismissed the action on the ground that it had no jurisdiction thereof. The plaintiff again excepted, and appealed.

When the summons in a case of which the superior court has jurisdiction is brought before the clerk, to term, or before the judge at chambers, it is equally in the superior court, and there is no defect of jurisdiction. If brought before the clerk, when it should have been brought to term, it is said in El-lott v. Tyson, 117 N. C., at page 116, 23 S. E. 103, when it gets "into the superior court by appeal or otherwise the latter has juris-diction of the whole cause, and can make amendment of process to give effectual juris-diction. Such amendment will be presum-ed, or the Supreme Court, even, can amend the process, if necessary." Quoting McLean v. Breece, 113 N. C. 390, 18 S. E. 694; citing Capps v. Capps, 85 N. C. 408; Cheatham v. Crews, 81 N. C. 343; Robeson v. Hodges, 105 N. C. 49, 11 S. E. 263; and adding, "Un-like the court of the justice of the peace, the

clerk is really a part of the superior court, and a case wrongfully instituted before him, upon appeal, only needs an amendment of process to justify the original service." The same principle as to the jurisdiction of the superior court is recognized by chapter 276, p. 518, Laws 1887, amending section 255 of the Code (see Clark's Code [3d Ed.] § 255), and cases cited in *Roseman v. Roseman*, 127 N. C., at page 497, 37 S. E. 518, reaffirmed in *Re Hybart's Estate*, 129 N. C., at page 131, 39 S. E. 779; *Ury v. Brown*, 129 N. C. 271, 40 S. E. 4; *In re Anderson*, 132 N. C., at page 247, 43 S. E. 649; *Railroad v. Stroud*, 132 N. C., at page 416, 43 S. E. 913. For the same reason, if a case is before the judge at chambers, if there are issues of fact appearing upon the pleadings, the cause should not be dismissed, but should be transferred to term for trial before a jury (Code, § 623), just as the clerk might so transfer it (Code, § 256). As said in cases above cited, it would be strange to dismiss an action already in the superior court because before the clerk, or the judge at chambers, and tell the plaintiff to come back into the same court before the same judge, the same clerk being present, at term, by service of another summons upon the same parties. The remedy is not to dismiss, but (the parties being already in court by service of summons) simply to transfer the cause to the proper docket. This does no one any detriment, saves time and costs, and avoids the unseemly countermarching incident to the old practice when a plaintiff was put out of court by one door if he wrongly brought an action for assumpsit, for instance, and was left to guess by which door he should come back into the same room—whether by labeling his action "trover," "trespass," "detinue," or other process, the correctness of which guess he could only prove by a costly process of elimination. Even when an action is brought in the superior court, but in the wrong county, there being general jurisdiction, the action is now not dismissed, but is transferred to the court in the proper county.

The court erred in dismissing the action for want of jurisdiction. It was in the court that had jurisdiction. No amendment was necessary, but, if it were desirable, it was error to hold that the court had no power to allow it. *Piercy v. Watson*, 118 N. C. 976, 24 S. E. 659; *Thomas v. Womack*, 64 N. C. 657. Besides, the incidental averment that the plaintiff "was damaged five thousand dollars or more" did not make it an action for a money demand. It was, certainly in view of the disclaimer of the plaintiff, an action solely for a mandamus to obtain the "certificate of proficiency," and hence it presented only matter of which the judge had jurisdiction at chambers.

The defendants move in this court to dismiss the action because the complaint does not state a cause of action, in view of the plaintiff's averment that he does not seek to

recover damages. The requirements as to examination and procurement of a certificate before beginning the practice of dentistry in this state are set out in chapter 178, p. 402, Laws 1887, amended by chapter 251, p. 203, Laws 1891 (which are substituted for Code, § 3148), and Code, §§ 3149-3156. The power of the Legislature to require examination and certificate as to the competency of persons desiring to practice professions or skilled trades is upheld, after a review of the authorities, in *State v. Call*, 121 N. C. 643, 28 S. E. 517. That decision was reaffirmed in *State v. McKnight*, 131 N. C. 717, 42 S. E. 580, 59 L. R. A. 187, the court calling attention to the fact that the state exercises this police power for the protection of the public from imposters and incompetents, and not to the end of conferring exclusive privileges upon any particular body of men, for to do the latter is prohibited by the state Constitution, §§ 7, 31, art. 1, which forbids exclusive privileges and monopolies. It is a power to be exercised for the public good, and the Legislature is to judge of the method of appointing the examiners, and can prescribe the nature of the examination, unless it appear plainly that the power to regulate is used in reality in violation of the guaranties in the above-cited article of the Constitution, and for the purpose of conferring exclusive privileges, and not solely for the protection of the public. *State v. Biggs* (at this term) 46 S. E. 401. No such violation of these constitutional guaranties appears or is alleged in this case. Code, § 3149, provides for a board of examiners, to consist of six members of the North Carolina Dental Society, to be elected by said society. The presumption is that this honorable body will elect six of its ablest and most prominent members for the important duty of keeping up the standard of their profession by a just, reasonable, and impartial examination of applicants. Should this important duty be neglected, and incompetent or unworthy members be chosen, the remedy is by legislative repeal, or change of the method of selecting the board. Section 3151 provides that "said board shall grant a certificate of proficiency in the knowledge and practice of dentistry to all applicants who shall undergo a satisfactory examination, and who shall receive a majority of votes of said board upon such proficiency." The lawmaking power having intrusted such examination to the board thus constituted, and required that the examination shall be satisfactory to them, and such requirements being reasonable and in violation of no constitutional provision, the courts cannot intervene, and direct the board to issue a certificate to one who the majority of the board have held has not passed a satisfactory examination, because, upon the examination of experts, the court or jury might think the examination of the plaintiff ought to have been satisfactory to the board. That is a matter resting in the consciences and judg-

ment of the board, under the provisions of the law, and the courts cannot by a mandamus compel them to certify contrary to what they have declared to be the truth. Had the board refused to examine the applicant upon his compliance with the regulations, the court could by mandamus compel them to examine him; but it cannot compel them to issue him a certificate, when the preliminary qualification required by law, that the applicant shall be found proficient and competent by the examining board, is lacking. *Burton v. Furman*, 115 N. C. 166, 20 S. E. 443; *Loughran v. Hickory*, 129 N. C. 281, 40 S. E. 46.

But the plaintiff contends that, suppose his averment is true, that the defendants "wrongfully, unlawfully, unjustly, arbitrarily, and without just cause or reason," declined to issue him license; has he no remedy? Certainly he has a remedy, for no one is authorized to discharge a public trust in that manner. But the remedy is not by mandamus to compel the board to certify contrary to their consciences and judgment, and no certificate of proficiency can issue, under the statute, except upon a certificate of satisfactory examination by the board. One remedy, if there should ever happen such abuse of trust, is, as already stated, by the Legislature repealing the act, or providing a different method of selecting the board, or regulating the method or course of examination, or prescribing a review of the finding of the board by some other body, if the General Assembly should think proper. Another remedy would be to follow the precedent set by applicants for license to practice law, who, when rejected, study their prescribed course over again, and stand for examination at the next regular day. This is perhaps the most sensible course, for no man ever knows his profession too well.

Another remedy still: If the applicant avers his rejection was caused by improper motives, his remedy is an action for damages against the individuals composing the board; alleging bad faith or arbitrary disregard of their duties, or improper animus against the plaintiff, or other malversation in their discharge of duty. In such action it might be difficult to prove the charges, unless by declarations made by the defendants themselves, for certainly the examination paper of the plaintiff himself would not be competent, in the first place, since, though experts might testify to its sufficiency in their judgment, that does not negative the good faith of the board, whose judgment, if exercised in good faith, is a protection to them. Malicious, illegal, or arbitrary action must be shown by direct evidence, and not by inference to be drawn by the jury from the fact that the opinion of witnesses introduced as experts may differ from the opinion of a legal board of examiners as to the sufficiency of the examination. It is only when there shall be other evidence first introduced, laying a sufficient ground, aliunde, for a charge of bad

faith and misconduct, that the examination paper of the plaintiff could possibly be competent, and then only in corroboration of the evidence first introduced. And in no aspect could the papers of other applicants at the same time and place be put in evidence, for, even if they had been admitted to practice on insufficient answers, the plaintiff was not hurt thereby, and the introduction of irrelevant matter would only confuse the issue, which would be whether the plaintiff was refused a certificate, though he was shown to be qualified by his answers, by the arbitrariness, improper animus, and misconduct of the examining board. We mention this point, as the refusal of the motions to permit the inspection and copying of the examination papers was discussed before us and ably presented in the argument of counsel. The granting a certificate to practice involves matters of judgment and discretion on the part of the board, and will not be enforced by mandamus. *State v. Gregory*, 83 Mo. 123, 53 Am. Rep. 565; *Hart v. Folsom*, 70 N. H. 213, 47 Atl. 903.

The complaint, alleging as ground of misconduct merely the fact that the examination should have been found sufficient by the board, does not state a cause of action authorizing the issuing of a mandamus. *People v. Dental Examiners*, 110 Ill. 180; *Dental Examiners v. People*, 123 Ill. 227, 13 N. E. 201; *Williams v. Dental Examiners*, 93 Tenn. 619, 27 S. W. 1019, and cases therein cited at page 628, 93 Tenn., 27 S. W. 1019; *State v. Coleman*, 64 Ohio St. 377, 60 N. E. 568, 55 L. R. A. 105. Mandamus cannot be used as a writ of error to revise and reverse erroneous judgments of a subordinate tribunal (in that case, a board of health), and the court "will not and cannot look into the evidence of fact upon which the judgment of the board was based, for the purpose of determining whether the conclusions drawn from it were correct or incorrectly formed." *Kirchgesner v. Board of Health*, 53 N. J. Law, 594, 22 Atl. 226.

Let it be entered: Action dismissed.

(134 N. C. 209)

STATE v. PARKER.

(Supreme Court of North Carolina. Dec. 19, 1903.)

RAPE—EVIDENCE—DECLARATIONS OF PROSECUTRIX—IMPEACHMENT OF WITNESS—CORROBORATION—PRESUMPTIONS—INSTRUCTION—RESTRICTING EVIDENCE TO SPECIAL PURPOSE.

1. It will be presumed in favor of a conviction of rape, where declarations of prosecutrix as to the acts of defendant were introduced "for the purpose of corroborating the prosecutrix," that an attempt had been made to impeach the credibility of prosecutrix on her cross-examination, or that witnesses had been introduced by defendant for that purpose.

2. In a prosecution for rape, where declarations of prosecutrix were admitted to corroborate her testimony, the court should have instructed the jury, without any special request, as to the purpose and effect of such corrobora-

tive testimony, and it was not sufficient merely to charge that such statements were claimed by the state to corroborate her evidence on the stand.

3. In a prosecution for rape, declarations of prosecutrix as to the acts of defendant are not substantive evidence in proof of the fact, but are admissible merely as corroborative of prosecutrix as a witness after an attempt has been made to impeach her.

4. In a prosecution for rape, the court should have charged as to the nature and meaning of corroborative evidence, and not have merely called attention to the argument and contention of the state's counsel as to the effect of such evidence, without instructing the jury as to whether such contention properly stated the law.

Clark, C. J., dissenting.

Appeal from Superior Court, Durham County; W. R. Allen, Judge.

John Parker was convicted of rape upon a child less than 10 years of age, and appeals. Reversed.

James Fuller, for appellant. The Attorney General, for the State.

MONTGOMERY, J. The crime of which the prisoner has been convicted—rape upon a little girl of less than 10 years of age—is a most unusual one and most revolting. The evidence is not before us. It would be difficult to imagine a case in which the rules (1) that the evidence should be such as to satisfy the jury beyond a reasonable doubt of the defendant's guilt, (2) that none but competent evidence should be received by the court, and (3) that evidence competent for a special or restricted purpose should be confined to that end and clearly explained by the court to the jury, were more in point than the present case. The only exception that appears in the record is one directed to the alleged failure of his honor to properly instruct the jury in respect to certain evidence that was offered and received as corroborative in its nature. The prosecutrix had been examined as a witness for the state. The solicitor then put in evidence the examination of the prosecutrix, taken by the justice of the peace, D. C. Gunter, when the matter was being investigated by him, "for the purpose of corroborating the prosecutrix." The solicitor then introduced W. A. Cobb "for the purpose of corroborating Lilly Lyon," who testified substantially that he was a policeman of the city of Durham, and that on the evening of the 22d of February, 1902, about 10 days after the crime was said to have been committed, at the home of the mother of the prosecutrix, the prosecutrix told him that the prisoner came to her home and hired her to go with him to his home to wait on his wife, who was then sick; that he started with her, and took her out of the way into the woods, and then violently and against her will ravished her; that he then carried her to his home, and on the next day took her with him to the same woods and did

the same thing to her. If the above was all that there is in the case, there would be no error in the proceeding; for we must presume, nothing to the contrary appearing in the record, that the prosecutrix, when on the witness stand, had been assailed on her cross-examination to such a degree as to amount to an attempt to impeach her credibility, or that witnesses had been introduced by the defendant for that purpose. But after the case was made out and agreed upon by the solicitor and the counsel of the prisoner, counsel applied to the judge who tried the case for an amendment to the statement of the case on appeal, so that it might appear that his honor did not explain to the jury in the charge that the statement referred to in the evidence of Gunter and the evidence of Cobb was to be considered as corroborative evidence only. His honor stated that he could not say with certainty whether he did so or not, but that he was willing for Mr. Foushee (acting solicitor) to make the amendment if he thought proper to do so, provided the statement was made as follows: "Upon objection being made to the statement referred to in the evidence of Gunter and to the evidence of Cobb, the court stated in the presence of the jury that the evidence would be admitted only as corroborative of the evidence of the prosecutrix. In the charge to the jury the court recited the evidence of the prosecutrix, and said substantially, 'The state contends that the jury ought to believe her, etc., and that she is corroborated.' The state says that she made the same statement before Gunter and to Cobb, and that these statements corroborate her evidence upon the stand. In other words, the state argues that she made the same statement before, and that this should lead the jury to believe what she now testified to." We are of the opinion that upon the amendment made to the case on appeal, in the language required by his honor, the jury was not properly instructed upon the matter of the corroborative evidence of Gunter and Cobb. Of course, when the evidence was introduced, and when it was received as corroborative evidence, it was in the presence of the jury, for it was for their consideration, but that did not satisfy the demands of the law.

In *Sprague v. Bond*, 118 N. C. 551, 18 S. E. 701, the evidence there introduced was only competent for the purpose of corroboration, and that was conceded when it was offered, and for that purpose alone did his honor admit it. The court there, discussing the same question which had been decided in *Bullinger v. Marshall*, 70 N. C. 520, said: "The learned justice who delivered the opinion of the court in that case was evidently loath to yield to this innovation as he considered it, foreseeing, as he no doubt did, that it would be most difficult to restrain the effect of such evidence and prevent it from operating on the minds of the jury as substantive proof of the facts in dispute. Be-

cause there is this danger of its exercising an improper influence on the jury, it is incumbent on the judge presiding at the trial, where such corroborative evidence is introduced, to see to it, even without any request for special instructions, that the jury fully understand the use they are permitted to make of it, and we must hold that the failure to caution them in this particular, when such a request is made as was done by the defendants here, entitled them to a new trial." It is true that in the case before us there was no exception taken in the trial below to his honor's failure to further instruct the jury on the matter under discussion, and it was not called to the attention of the court at the time he was delivering the charge nor in the motion for a new trial. It was, however, incumbent on him to do so without any special request at the hands of counsel, as we have seen in the case of *Sprague v. Bond*, supra; and, if it was incumbent on him to have done so without a special request to that end, then his failure to do so, that fact appearing before us, was error. This is a life and death matter, and we cannot agree that evidence which was purely corroborative should have been received on the trial as corroborative evidence, and then submitted to the jury without a sufficient explanation of the nature and character of that kind of evidence, simply because counsel omitted to make a special request for that purpose. But again, upon the amendment as allowed by his honor, it is apparent that the evidence of the prosecutrix was the matter corroborated, and not the witness. The evidence of a witness cannot be strengthened—cannot be corroborated—by the repetition of the same statement made to others at different times. A falsehood may be as often repeated as the truth; and corroborative evidence of this kind has no force as substantive evidence to prove the facts, but only to remove the imputation which has been cast upon the witness upon his cross-examination, or by an attack upon his credibility by other witnesses. Associate Justice Reade, in the case of *State v. Parrish*, 79 N. C. 610, said, "It is like to evidence of character, which only affects the witness." That judge further said in the same case: "The rule is that when the witness is impeached (observe that, when the witness is impeached) it is competent to support the witness by proving consistent statements at other times, just as a witness is supported by proving his character, but it must not be considered as substantive evidence of the truth of the facts any more than any other hearsay evidence. The fact that supporting a witness who testifies does indirectly support the facts to which he testifies does not alter the case. That is incidental. He is supported, not by putting a prop under him, but by removing a burden from him, if any has been put on him. How far proving consistent statements will do that must depend

upon the circumstances of the case. It may amount to much or very little." It appears further upon the amendment that his honor did not say one word himself to the jury as to the nature and meaning of corroborative evidence. He only called attention to the argument and the contention of the counsel for the state, without instructing them as to whether that argument and contention embraced the law as it should have been given. The jury never got his explanation of corroborative evidence. They got only the contention of the state; that contention being, as we have seen, not the law. It made no difference that counsel for the prisoner and the solicitor for the state argued the evidence of Cobb and Gunter as corroborative evidence. His honor not having explained what such evidence meant, the jury had to choose between the strength and soundness of the arguments and contentions of the respective counsel. They should have had the guidance under the law of his honor.

New trial.

CLARK, C. J. (dissenting). The prisoner was convicted of a most revolting crime, but this court felt compelled to grant a new trial upon a technical ground that could hardly be conceived to have affected the verdict. *State v. Parker*, 132 N. C. 1014, 48 S. E. 830. Again convicted, the prisoner again asks a new trial upon the purely technical ground that the judge in his charge to the jury did not tell them that certain evidence was offered as corroborative, and not as substantive, testimony, though the solicitor had so stated when the testimony was offered, and the judge stated in the presence of the jury that he admitted it only as corroborative, and not substantive, testimony, and in his charge to the jury told them that the state relied on such evidence as corroborative of the testimony of the prosecutrix. Every presumption is in favor of the correctness of the proceedings below, and appellate courts should not be astute to find reasons for a new trial. It should plainly appear that the appellant was prejudiced by the alleged error, and that but for such error, in all reasonable probability, the conviction would not have occurred. There have been decisions, it is true, of recent origin, that the judge in his charge to the jury should single out the corroborative testimony, and tell the jury that it is corroborative and not substantive; but certainly failure to do so should not be held reversible error unless the attention of the court was called to it by a prayer to so instruct, especially when, as in this case, the judge and solicitor both stated, when the evidence was introduced, that it was merely corroborative, and the judge in his charge to the jury stated that the state relied upon such evidence as corroborative of the evidence of the prosecutrix. By virtue of our amendment to rule 27 (46 S. E. v.), the court will henceforward hold it not rever-

sible error to fail to repeat in the charge that the evidence is merely corroborative when it is so stated on its admission, unless specifically prayed to so charge. The rule heretofore held is not a vested right, and a failure to observe it should not, in the absence of all other ground of exception, authorize us to set aside this second time the solemn verdict and judgment of the trial court. Besides, no exception of this kind was taken at the time or appeared in the case as first settled by the judge. Finally yielding to the importunity of counsel for the prisoner, the judge admitted an amendment, saying, after the lapse of months, "I cannot say with certainty whether I did so or not"—i. e., charge that the evidence was to be considered as corroborative only. As he could not recollect, he certainly could not authorize an amendment that he did not so charge. If it was error, and even prejudicial error, to fail to charge upon the corroborative evidence more explicitly, such failure should have positively and affirmatively appeared, and the failure of the judge merely to recollect, after a great lapse of time, "whether I did so [charge] or not," should not be taken as proof that he did not. A trial is too solemn and expensive a matter to have a conviction—especially a second conviction—set aside because the judge could not recollect whether a certain phrase, which would not have affected the verdict in all human probability, was positively and certainly used by him.

In *State v. Powell*, 106 N. C. 635, 11 S. E. 191, it was held that while the court should instruct the jury that corroborative evidence should not be considered in any other light, yet, unless it affirmatively appeared that this was not done, it will be presumed that it was. This was reiterated and reaffirmed. *State v. Brabham*, 108 N. C. 796, 13 S. E. 217; *Byrd v. Hudson*, 113 N. C. 211, 18 S. E. 209. Here, no exception for failure to so charge was made till after the case on appeal had been settled. It should have been called to the attention of the court by a prayer to charge. Even if an exception for failure to so charge had been set out in the prisoner's case on appeal, the recollection of the judge would have been fresh. But if the mere fact that after the lapse of months he cannot recollect positively "whether he did so charge or not" should be allowed hereafter—as in this case—as valid ground for a new trial, few verdicts, especially in state cases, will stand. It is too much to expect trial judges to carry such details in their memories.

(184 N. C. 270)

MILLER v. STATE.

(Supreme Court of North Carolina. March 1, 1904.)

COURTS—SUPREME COURT—ORIGINAL JURISDICTION—CLAIMS AGAINST STATE.

1. A claim of the clerk of the superior court for fees in actions instituted by the state, for which it has been adjudged liable, is not a

"claim against the state," within the meaning of Const. art. 4, § 9, giving the Supreme Court original jurisdiction to hear such claims.

2. Const. art. 4, § 9, giving the Supreme Court jurisdiction to hear claims against the state, and report to the Legislature thereon, does not apply to cases involving no question of law, but merely questions of fact upon which the Legislature has already passed.

Original proceedings in the Supreme Court on a claim of Mollie A. Miller, administratrix of Festus Miller, against the state. Dismissed.

Busbee & Busbee and Womack & Hayes, for plaintiff. The Attorney General, for the State.

MONTGOMERY, J. Under the terms and provisions of chapter 119, p. 218, of the Public Laws of 1887, several hundred persons made entries of certain oyster lands subjected to entry by that act, and received grants therefor. By the provisions of chapter 287, p. 237, of the Public Laws of 1893, the solicitor of the First Judicial District was directed to institute proceedings in ejectment against such persons as had received grants for natural oyster or clam beds; and under the directions of that statute the solicitor commenced suit against 694 of those persons, who had received grants under the provisions of the act of 1887. One of the suits was tried, and the plaintiff's action was not sustained, and nonsuits were taken in all of the other actions. In the case of *Blount, Solicitor, v. Simmons et al.*, 119 N. C. 50, 25 S. E. 789, this court held that the state, under section 536 of the Code, was liable for the costs. Afterwards the plaintiff in this action, in a certain judgment rendered in the superior court of Pamlico county against the state, for the sum of \$4,096.60, on account of fees due the officers in the above-mentioned actions, was adjudged entitled to \$3,872.20 thereof for fees due to Festus Miller, clerk of the superior court of Pamlico county, her intestate. Before that judgment was rendered, Festus Miller, the plaintiff's intestate, received an auditor's warrant to the amount of \$4,851.41 for fees due him in these cases, but the treasurer declined to pay the same, or any part of it. The plaintiff's intestate, at the session of the General Assembly of 1899, presented her claim against the state for these fees, and the matter received a full and careful investigation of that body. The whole proceedings were laid before this court, and, if this was a case where the court had jurisdiction under article 4, § 9, of the state Constitution, we could not conscientiously recommend to the General Assembly a settlement of this matter different from the one which was made. We are of the opinion, however, that we have no jurisdiction in the premises. In the first place, the demand of the plaintiff is not such a claim against the state as is in contemplation of article 4, § 9, of the Constitution. In the case of *Blount v. Simmons*, 119 N. C.

50, 25 S. E. 789, this court said: "The costs in this case are not strictly a claim against the state, as contemplated by article 4, § 9, but only an incident of an action by the state for which its agent has assumed that it will be liable to the same extent as private persons." In the next place, there is no question of law involved in this matter. Only matters of fact were in dispute, and they have been passed upon by the General Assembly; and where such a condition of things exist we are not called upon to recommend any line of conduct to the legislative body. In the case of *Reynolds v. The State of N. C.*, 84 N. C. 460, this court said: "We are fully satisfied, on a perusal of the papers in the proceeding, of the correctness of the view taken in *Bledsoe v. State*, ante [64 N. C.] 392, to wit, that our 'recommendatory jurisdiction' in regard to claims against the state does not embrace cases involving mere matters of fact, and that it was not the intention of the framers of the Constitution to impose upon the court the labor of the trial of facts, and that the jurisdiction is confined to claims where, the facts being agreed on, it was supposed an opinion of the Supreme Court on important questions of law would aid the General Assembly to dispose of such cases; it having been before a question whether the judges could, consistently with their constitutional duties, communicate an opinion to the Legislature." In *Horne v. The State*, 82 N. C. 382, the court said: "This provision of the Code is very broad in its terms—'any person having any claim'; and, regarded in the light of a contemporaneous exposition of the Constitution, would seem to embrace all claims against the state; but this court, in construing the section of the Constitution referred to (section 9 of article 4) held that it was intended to apply only to cases wherein questions of law were involved, and that the jurisdiction of this court ought not to be exercised in small matters of small value, particularly when there is no doubt about the law." In *Reeves v. The State*, 93 N. C. 257, the same view was expressed, and the court added: "If the claim is a plain one, only involving questions of fact, it ought to be taken at once before the Legislature, unless its nature be such as that it may be presented to the auditor, or some other appropriate authority, for adjustment and allowance." This case, as we have said, does not involve any question of law, for this court had, at its February term, 1897, in the case of *Blodnt v. Simmons*, 120 N. C. 19, 26 S. E. 649, not only reaffirmed a former ruling that the state was liable for the costs involved in the oyster-bed suits, but had particularly specified the amount of fees which each officer was entitled to for his services; and the Legislature therefore could not stand in need of any recommendation from us as to its duty under the law; and the facts they had already passed upon. Counsel for the plaintiff took this view of their duty in con-

nection with their client's claim, knowing that there was no grave question of law involved, and went directly before the Legislature, as they should have done under the intimation of the court in the case of *Reeves v. State*, 93 N. C. 257, to have the facts ascertained, and an act passed making an appropriation to their client. We do not feel called upon, therefore, to make any recommendation to the General Assembly in the premises. If we should do so, the members of that body would have the right to feel justly offended that we should seek to point out their duty to them in a matter where there was no law question involved, and where they had already investigated and passed upon the facts.

Dismissed.

(134 N. C. 300)

DAVIS v. SEABOARD AIR LINE R. CO.

(Supreme Court of North Carolina. March 1, 1904.)

RAILROADS—KILLING CATTLE—TITLE—GIFTS—QUESTION FOR JURY—PRIMA FACIE CASE—REBUTTAL—NONSUIT.

1. Where, in an action against a railroad company for killing a cow, plaintiff testified that, though he purchased the cow with his own money, he gave her to his wife, and placed metal tags in the cow's ear, with his wife's name stamped on them; that the cow ran on the farm which belonged to the wife, with plaintiff's other cattle, and that, notwithstanding the wife accepted the gift, plaintiff regarded the cow as belonging to both him and his wife—whether there was a completed gift of the cow to the wife, so as to vest the title in her, was properly submitted to the jury.

2. Where, in an action against a railroad company for killing a cow, plaintiff brought his action within six months after the killing, and thereby established a prima facie case of negligence, as provided by Code, § 2326, and the only direct testimony as to the manner in which the cow was killed was given by defendant's engineer, testifying as defendant's witness, defendant was not entitled to a nonsuit on the ground that the engineer's evidence rebutted the prima facie case so made.

Montgomery, J., dissenting.

Appeal from Superior Court, Bertie County; Justice, Judge.

Action by H. C. Davis against the Seaboard Air Line Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This is an action for damages for killing a cow. As the action was brought within six months after the cow was killed, a prima facie case of negligence arose, under section 2326 of the Code. Both sides introduced testimony, and the issues and answers thereto were as follows: "(1) Was the plaintiff the owner of the cow in question? Yes. (2) Did the defendant company negligently and wrongfully kill said cow? Yes. (3) If so, what damage has the plaintiff sustained thereby? \$40."

All the exceptions before us relate to the refusal to nonsuit, the charge, and the refusal to charge. Upon these questions the

following proceedings appear from the record:

After the testimony was closed, the defendant renewed its motion to nonsuit upon the grounds, first, that the title to the cow was not in the plaintiff, but in his wife, Cora; second, because the defendant had rebutted the prima facie case of negligence made out by the statute. Motion refused, and defendant excepted. (Exception No. 2.)

The defendant in apt time requested the judge to charge the jury that, if they believed the evidence, they should answer the first issue, "No." Refused, and defendant excepted. (Exception No. 3.)

That, upon the whole evidence, they should answer the second issue, "No." Refused, and defendant excepted. (Exception No. 4.)

That, if they believed the evidence, the defendant had rebutted the prima facie case of negligence made out by the statute, and they should answer the second issue, "No." The court did not give the charge in the language requested, but charged the jury as herein-after stated, and the defendant excepted. (Exception No. 5.)

The court charged the jury that they should pass upon the title to the cow, and they should determine from the testimony as to whether the cow was the property of the plaintiff or of his wife.

The court charged the jury upon the second issue that the question of negligence would be left to them upon all of the testimony; that when the plaintiff showed to their satisfaction that the defendant had killed the cow in question, if they found the plaintiff owned her, that was prima facie evidence, under the statute, and, nothing else appearing, the plaintiff was entitled to recover, and they should answer the second issue, "Yes;" but if the defendant had satisfied them that the killing was without negligence, and unavoidable, as testified to by the defendant's witness, then they should answer the second issue, "No." To this charge the defendant excepted, and assigned as error, first, the refusal to charge as requested; and, second, for error in the charge as given.

The following testimony given by the plaintiff is the only evidence relating to the ownership of the cow: "The railroad runs across my land. The cow was killed on the 18th December, 1902. The defendant's train was two hours behind time. I went home from Lewiston, N. C., and saw my cow. She was dead, lying in a ditch. I saw tracks of the cow upon the defendant's road. Looked like it had struck and knocked her off. The cow was more gentle than my driving horse. I bought the cow, and gave her to my wife. I told my wife she could take her, and my wife accepted the gift." The witness was asked: "Why are you bringing suit for your wife's cow?" He replied: "The cow belonged to both of us. What is my wife's mine. I told my wife she could have the cow. There was no separation of the cow

from the other cattle. I bought the cow, and paid for her with my own money. My wife claimed her. The cow ran in the woods and on the farm. The farm belongs to my wife. I bought the land upon which we live, using part of the money received from the sale of my wife's land, and about \$200 of my own money, and took the title in her name. I placed metallic tags in the cow's ear. The name of my wife was stamped on the tags. I had the tags on hand. I did not wish to change the marks of cattle I had bought, and put the tags on most of the cattle. I listed the cattle in my name, including this cow, for taxation." The only direct testimony as to the manner in which the cow was killed was given by the engineman, a witness for the defendant.

Day & Bell and Murray Allen, for appellant. Francis D. Winston, for appellee.

DOUGLAS, J. (after stating the case). We see no error in the action of his honor. The questions raised by the defendant have been so recently decided and fully discussed that but little more can be said. The defendant insists that the court should have found, as matter of law, that the plaintiff was not the owner of the cow. It is clear that the plaintiff, having bought the cow with his own money, became the owner thereof, and remained such owner, unless there was a completed gift to his wife, which was a mixed question of law and fact, for the determination of the jury. This question is directly decided in *Gross v. Smith*, 132 N. C. 604, 44 S. E. 111, where the court says: "We think there was evidence sufficient to be submitted to the jury upon the question of the parol gift. There can be no doubt that delivery of possession is essential to constitute a valid gift. 'The necessity of delivery,' says Chancellor Kent, 'has been maintained in every period of English Law.' 2 Kent, Com. 438; 2 Blk. 441. But the question in this case is whether there was a delivery in fact. The declarations or admissions of the intestate and the other testimony are not conclusive upon that question, but the jury must find the fact of delivery from all of the evidence. * * * All courts hold that delivery is necessary to the validity of the gift, but the fact of delivery may be found by the jury from the acts, conduct, and declarations of the alleged donor, just as any other material fact may be found in the same way from the acts, conduct, and declarations of a party to be affected thereby. What is a gift is a question of law, but whether or not there was a gift in any particular case is a question for the consideration of the jury upon the testimony." The defendant further contends that the court should have held, as matter of law, that the prima facie case created by the statute had been rebutted by the testimony of the defendant's witness. This question is directly decided in *Baker v. Railroad*, 133 N.

C. 31, 45 S. E. 247, wherein the court says: "This was an action for negligently killing a horse. At the close of the evidence the defendant moved to nonsuit the plaintiff. The action was brought within six months, and, the killing having been shown, the statute raised a presumption of negligence; and, the burden to rebut such presumption being upon the defendant, the judge could not find affirmatively that the defendant's evidence had been sufficient to do this. This was a matter for the jury. The judge could instruct the jury, as he did in this case, that a certain state of facts, if believed by them, would rebut the presumption, but not that certain evidence, though uncontradicted, would do so. The burden is on the defendant to rebut the presumption, and the jury alone can pass on its credibility; otherwise, if the only eyewitness is witness for the defendant, the plaintiff will be at his mercy, and would be deprived altogether of the benefit of the statute, because he did not happen to see the killing. It would be a novelty to nonsuit the plaintiff on the defendant's evidence." We gave careful consideration to both of the above-cited cases, and see no reason now to reverse our ruling.

The wife of the plaintiff was permitted to become a party to the action after verdict. This was proper, to the extent of binding her by the verdict to the future exoneration of the defendant; but it would not relate back to the bringing of the action, so as to have the effect of raising in her favor the *prima facie* case created by the statute. As she disclaims any interest in the subject-matter of the action, we do not see how the defendant can be injured in any way, especially in the view we take of the case.

The judgment is affirmed.

MONTGOMERY, J. (dissenting). This action was brought in the name of H. C. Davis. On the trial he testified for himself that he had given the cow to his wife; that he had placed metallic tags in the cow's ears, with the name of his wife stamped on the tags; that the cow ran in the woods and on the farm, and that the farm belonged to his wife; and that there was no separation of the cow from the other cattle. That evidence, in my opinion, constituted a gift, and the court should have dismissed the action upon the motion of the defendant.

(134 N. C. 305)

SKINNER v. TERRY.

(Supreme Court of North Carolina. March 1, 1904.)

EJECTMENT—SPECIFIC PERFORMANCE—DEED—PROVISIONS—NONCOMPLIANCE—RECORD—EFFECT.

1. A decree in a suit for specific performance of a contract to convey land in favor of D., under whom plaintiff claimed, adjudging that D. was the equitable owner in fee of the land, describing it, and that he was entitled to present possession thereof and to a deed in fee from

defendants in such suit which they were thereby ordered to execute, and that such decree should effect a transfer to D. and his heirs of all the legal title to the land aforesaid, etc., was not a conveyance of the land, within Acts 1885, p. 233, c. 147, § 1, providing that no conveyance of land nor contract to convey shall be valid to pass any property as against creditors or purchasers for a valuable consideration, until after registration thereof in the county where the land lies.

2. Where a decree in a suit for specific performance adjudged that the purchaser was the equitable owner of the land in fee, and was entitled to present possession and a deed of conveyance, which it ordered to be executed, it was not necessary to a complete adjudication of the rights of the holder of the naked legal title that the decree should also provide that it should operate to transfer the title to the purchaser and his heirs.

3. The holder of an equitable title under a decree for specific performance is entitled to maintain ejectment or trespass for injury to his possession.

4. A decree in a suit for specific performance, which provided that the purchaser was the equitable owner of the land in fee and entitled to a conveyance, was binding against a subsequent purchaser of the land under an execution against the holder of the naked legal title, without regard to whether the decree contained a provision that it should operate as a conveyance, as authorized by Code, § 426, or whether the direction that the decree be recorded was complied with.

Appeal from Superior Court, Perquimans County; Council, Judge.

Action by T. G. Skinner against Harvey Terry. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The locus in quo, being a large tract of land situate in the counties of Perquimans and Pasquotank, known as the "Great Park Estate," was on April 1, 1884, the property of Timothy Ely. On the 24th day of April, 1884, said Ely and wife entered into a contract with John F. Davis whereby they bound themselves, upon the payment of a certain amount of money and the performance of certain stipulations, to convey the land to said Davis. At fall term, 1892, of the superior court of Pasquotank county, the said Davis instituted an action against Ely and wife and Harvey Terry and wife for the purpose of enforcing specific performance of said contract. In the complaint therein it was alleged that the plaintiff, Davis, had paid the amount of the purchase money, and in all other respects performed the stipulations in the contract. The plaintiff further alleged that since the execution of the contract the said Ely had conveyed said land to the defendant Terry, who had notice of the plaintiff's equities and rights. The defendant Terry, answering, denied the execution of a deed by Ely to him. The cause came on for trial at January special term of Pasquotank superior court, 1894, when, upon appropriate issues, the jury found that the defendants Ely and wife had executed the contract as alleged; that the plaintiff, Davis, had on his part complied with said contract; that Ely had not complied with his part thereof; that "the defendants Terry and wife were not

seised of any title or interest in said land"; that the plaintiff, Davis, was the equitable owner of the land, and entitled to a conveyance thereof from the defendants Ely and wife. Thereupon it was adjudged "that the plaintiff, John F. Davis, is the equitable owner in fee of the land [describing it], and that he is entitled to the present possession thereof, and to a deed of conveyance in fee therefor from the defendants Ely and wife, and that they are hereby ordered and commanded to execute, prove, and deliver to the said John F. Davis a good and sufficient deed of conveyance in fee; * * * and it is further ordered, adjudged, and decreed that the force and effect of this order, judgment, and decree is and shall be to transfer to the said John F. Davis and his heirs the legal title of the land aforesaid, and to that end it doth decree that from now and henceforth the said John F. Davis doth and shall have and hold that portion of the 'Great Park Estate' above described unto him and his heirs in fee simple." The court directed that the decree be recorded in the office of the register of deeds of Pasquotank county. The decree was recorded in Pasquotank county on January 23, 1900, and in Perquimans county on January 7, 1902. Thereafter the said John F. Davis died intestate, and his administrator duly filed a petition for the sale of said land for the purpose of making assets to pay debts. Pursuant to orders duly made in the cause, the said land was sold and purchased by the plaintiff, T. G. Skinner, and a deed therefor executed on December 11, 1900, and duly recorded in Pasquotank county on December 13, 1900, and in Perquimans county on January 7, 1902. On August 15, 1900, the defendant, pursuant to a purchase made by him at a sale made by the marshal of the Eastern District of North Carolina under an execution issued upon a judgment recovered by Harvey Terry against Timothy Ely, obtained a deed for said land from said marshal. It was duly recorded in Pasquotank county on December 10, 1900, and in Perquimans county on October 10, 1900. There was evidence tending to show that the land was situate in both Pasquotank and Perquimans counties. The plaintiff requested the court to instruct the jury that upon the entire evidence they should answer the first and second issues, involving title and possession of the plaintiff and trespass by the defendant, in the affirmative. The court so charged the jury, and the defendant excepted. The defendant submitted a number of prayers for instructions, all of which were declined. The defendant excepted and appealed.

Rodman & Rodman, G. W. Ward, and B. G. Watson, for appellant. W. M. Bond and E. F. Aydlett, for appellee.

CONNOR, J. The exception to the instruction given in response to the plaintiff's pray-

er presents the questions raised by the defendant's prayers. The defendant says that the plaintiff cannot maintain this action for a trespass committed upon that portion of the Great Park Estate lying in Perquimans county, for that the decree in the case of John F. Davis against Timothy Ely and others was not recorded in said county until January 7, 1902, whereas his deed from the marshal was recorded October 10, 1900. This contention is based upon the theory that the judgment of the superior court of Pasquotank county, of January, 1894, operated as a deed from Ely to Davis, and came within the provisions of chapter 147, p. 233, of the Acts of 1885, regarding registration of deeds. The act provided (section 1) that "no conveyance of land nor contract to convey, or lease of land for more than three years, shall be valid to pass any property as against creditors or purchasers for a valuable consideration. * * *" This language does not include a decree or judgment of the court which declares the rights of the parties, and adjudges that, by virtue of the facts found by the court, the prevailing party is the owner of the land. The effect of the decree was to declare Davis the equitable owner of the land, and leave in Ely the naked legal title. It was not necessary to a complete adjudication of Ely's rights that the further provision in regard to the operation of the decree, as a deed, should have been added. This court in *Farmer v. Daniel*, 82 N. C. 152, through Dillard, J., says: "In this case it appears as a fact in the case agreed that the purchaser specifically performed the contract on his part by paying into the office of the clerk and master the purchase money, and thereupon the right arose to have performance on the part of the heirs acting through the agency of the court. And the court of equity, on report of full payment by the master, in recognition of this right, ordered that the title of the heirs be conveyed by the master to the purchaser." It was further held in that case that the decree vested in the purchaser a perfect equitable title upon which he could defend against one holding the naked legal title. That the owner of the perfect equitable title may maintain ejectment or other possessory action, under our system of procedure, may be regarded as settled beyond controversy. *Taylor v. Eatman*, 92 N. C. 601; *Condry v. Cheshire*, 88 N. C. 375.

If, as we have seen, the effect of the decree was to vest a perfect equitable title in Davis, and that the defendant Terry was bound by said decree, it is immaterial whether the provision that it should operate as a deed, as provided by section 426 of the Code, be complied with. It will be observed that the provision of that section is that after the court shall have declared the rights of the parties "it shall have power also, to be used in its discretion, to declare in the order then made, or, in any, made in the progress of the cause, that the effect thereof shall be to

transfer to the party, to whom the conveyance is directed to be made, the legal title of the said property. * * * We think that the failure to insert this clause, or to comply with the directions that the decree be recorded, in no manner affects the equitable title which the plaintiff Davis acquired by the decree declaring him to be the equitable owner in fee.

We would not feel authorized to extend the language of chapter 147, p. 233, Acts 1885, to include a decree of the character before us in this record. But that point is not before us. The effect of this decree is to vest all of the equitable title in Davis, which was outstanding in Ely or in the defendant Terry. Certainly, the rights of Davis could not be affected by a deed executed thereafter by Ely to Terry, or, as in this case, by the marshal undertaking to sell the naked legal title outstanding in Ely to his codefendant Terry. Taken in the strongest light for the defendant, the decree of January, 1894, declared the equitable title in Davis, leaving a naked legal title outstanding in Ely. Terry could acquire no other or better title than was in Ely at the time of his purchase, and, as we have seen, Davis could have maintained an action against Ely for possession of the land or for trespass thereon; so, the plaintiff, who has succeeded to his title may maintain an action against Terry for injury to his possession. *Stith v. Lookabill*, 78 N. C. 465.

Whether we place the plaintiff's right to maintain the action upon the theory of an estoppel against Terry or upon the view above suggested, that Ely had but a naked legal title, and that the purchaser under such sale took subject to all outstanding equities, we would be brought to the same result. In either aspect of the case, his honor's charge to the jury was correct, and the judgment must be affirmed.

(134 N. C. 287)

AVERY v. STEWART.

(Supreme Court of North Carolina. March 1, 1904.)

WRITTEN INSTRUMENTS — SECONDARY EVIDENCE — LOSS OF WRITTEN INSTRUMENT — SEARCH — QUESTION OF LAW — APPEAL — REVIEW — ACTION ON CONTRACT — BREACH — PLEADING — SUFFICIENCY OF ANSWER.

1. Testimony of a witness that he received a certain letter, and that it was lost, and he could not find it, was not a sufficient predicate for the introduction of secondary evidence of the contents of the letter, as it is necessary that there should be evidence of a diligent search.

2. The question as to the existence of facts rendering secondary evidence of the contents of a written instrument admissible is a question of law for the court, unless, in deciding the question, he would, in effect, decide the very matter in issue.

3. The decision of the trial court as to whether the facts authorized the admission of secondary evidence as to the contents of a writ-

ten instrument is a question of law, reviewable on appeal.

4. Where the trial court rules that the facts are insufficient to warrant the introduction of secondary evidence of a written instrument, he must state such facts on request.

5. Findings of fact by the trial court cannot be reviewed on appeal.

6. Where on appeal nothing appears to the contrary, it will be presumed that the action of the trial court in admitting secondary evidence of the contents of a written instrument was based on proper proof of a diligent and fruitless search for the instrument.

7. A complaint alleged that plaintiff informed defendant of plaintiff's contract with a third person to purchase land from him, and requested defendant to buy the land for plaintiff, and allow him a specified time to pay the purchase money; that defendant agreed so to do, and purchased the land, but thereafter conveyed it to another, in violation of the agreement with plaintiff. On the trial the court submitted an issue as to whether defendant, prior to the conveyance of the land to him, contracted with plaintiff to buy the land for plaintiff. *Held*, that an issue as to whether defendant, knowing that the third person had contracted to sell the land to plaintiff, and before contracting with the third person agreed with plaintiff to buy the land for him, would have been more nearly conformable to the allegations of the complaint.

8. Code, § 243 (1), provides that an answer must consist of the general or specific denial of each material allegation controverted, or of information sufficient to form a belief. A complaint alleged that plaintiff informed defendant of plaintiff's contract with a third person for the purchase of land by plaintiff from the third person, and then contracted with defendant that the latter should buy the land from the third person for plaintiff, and allow plaintiff a specified time to pay for it. The answer merely stated that defendant was informed and believed that the allegations of the complaint were not true, and denied the same. *Held*, that the answer was insufficient to raise an issue, since whether defendant had been informed by plaintiff as to plaintiff's contract was a matter within defendant's knowledge, which should have been met by a direct denial.

9. The answer might be amended, in the discretion of the court, on proper application.

Appeal from Superior Court, Craven County; Moore, Judge.

Action by A. W. Avery against J. W. Stewart. From a judgment in favor of plaintiff, defendant appeals. Reversed.

O. H. Gulon, for appellant. D. L. Ward and W. D. McIver, for appellee.

WALKER, J. This action is brought to establish and enforce a parol trust. The plaintiff alleges that John Humphrey and his wife, being the owners of a tract of land in Craven county containing about 90 acres, contracted to sell the same to him at the price of \$500, and that he, not then being able to pay the stipulated price, informed the defendant, Stewart, of his contract with the Humphreys, and requested the defendant to buy the land for him, and allow him three years to pay him the purchase money; that the defendant agreed to this proposal, with the proviso that the plaintiff should pay him \$100 for the "accommodation," and the plaintiff assented to this proviso, and thereupon promised and agreed to pay to the defendant

the \$100 and the purchase money within three years, at 6 per cent. interest; that afterwards, on the 28th day of October, 1901, Humphrey and wife conveyed the land to the defendant, and on the 10th day of December of the same year the defendant, in violation of his agreement with the plaintiff, and of the trust assumed by him, conveyed the land to one W. J. Arnold, who has taken possession of the premises under his deed; that Arnold agreed to pay for the land much more than the defendant paid the Humphreys for the same, and more than the plaintiff was required to pay the defendant under their contract; and that Arnold has made certain payments upon the purchase money which he agreed to pay to the defendant, the amount of which payments is not set forth. The plaintiff prayed judgment that the defendant be required to account for the profit which he has realized from the sale to Arnold. The material allegations of the complaint were denied in the answer of the defendant. The court submitted to the jury two issues, as follows: "(1) Did John Humphrey and wife contract with the plaintiff to sell him the land, as alleged in the complaint? (2) Did the defendant, prior to the conveyance of the land to him by Humphrey and wife, contract with the plaintiff to buy the land described in the complaint for him?" There was evidence tending to sustain the plaintiff's allegations, and there was also evidence tending to show that the defendant bought the land from Humphrey without any understanding or agreement that the purchase was made for the plaintiff, though the allegation of the complaint, which is supported by proof, that the defendant bought the land from Humphrey with the knowledge of the latter's prior contract with the plaintiff, is not distinctly and positively denied by the defendant in his testimony. The jury, under the instructions of the court, returned a verdict in favor of the plaintiff, answering both issues "Yes," and upon the verdict judgment was rendered in favor of the plaintiff, to which the defendant excepted and appealed.

At the close of the testimony the defendant moved to nonsuit the plaintiff, and, the motion being denied, he excepted. He also excepted to the refusal of the court to submit certain issues which were tendered by him, and to certain instructions given by the court to the jury; but these exceptions we do not deem it necessary to consider.

In order to prove that he made a contract with Humphrey to buy the land before the latter conveyed it to the defendant, the plaintiff proposed to show by his own testimony the contents of a letter or postal card which he had received from Humphrey, and which he alleged had been lost. This letter or postal card contained evidence of the fact that the plaintiff had an agreement with Humphrey to buy the land. The defendant objected to this testimony upon the ground, among

others, that it had not been shown and did not appear that the plaintiff had made any search for the letter. In regard to the loss of the letter, the plaintiff testified: "I received a letter from Humphrey, which is lost. I cannot find it." This was all the testimony relating to the loss of the letter or postal card. The defendant's objection was overruled, and he excepted. This ruling was erroneous. There must be at least some evidence of a search for the paper alleged to be lost, before parol evidence of its contents can become competent. The rule of the law is: "If the instrument is lost, the party is required to give some evidence that such a paper once existed, though slight evidence is sufficient for this purpose, and that a bona fide and diligent search has been unsuccessfully made for it in the place where it was most likely to be found, if the nature of the case admits such proof. What degree of diligence in the search is necessary, it is not easy to define, as each case depends much on its peculiar circumstances; and the question whether the loss of the instrument is sufficiently proved to admit secondary evidence of its contents is to be determined by the court, and not by the jury. But it seems that, in general, the party is expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him." 1 Greenleaf, Ev. (16th Ed.) §§ 553, 563b. In Bradner on Evidence, p. 130, § 18, the rule is thus stated: "The burden of showing the loss of a written instrument is upon the party seeking to introduce secondary evidence. He must establish its loss by proof that he has made diligent but unavailing search for the paper in places where it would be most likely to be found, and the degree of diligence necessary to be shown must depend upon the value and importance of the lost document. But it is sufficient if he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest. If the instrument was executed in duplicate, due diligence must be shown to ascertain whether any counterpart exists, and, if so, to obtain it to be used upon the trial. Where it may be in either of two or more places, all the places should be searched; and, if it be in the custody of either of two or more persons, inquiry should be made of all of them. The search should have been made as recent as possible." Wharton says: "The production of proof satisfactory to the court that it is out of the power of the party to produce the document alleged to be lost, and of its prior existence and genuineness, is a prerequisite condition of the admission of secondary evidence of its contents. The question of such admissibility is for the court. Loss, like all evidential facts, can be only inferentially proved. In

one sense, no instrument can be spoken of as lost that is not destroyed, or irrevocably out of the power of the party desiring to produce it. A check or promissory note may be carefully put away in a book, and the place of deposit forgotten. Every effort may be honestly made to find it; it is all the time in the seeker's library, in the very place where he put it; yet, after all, it may be hopelessly lost. It is not necessary, therefore, to prove exhaustively that the paper exists nowhere. It is sufficient if the party offering parol proof shows such diligence as is usual with good business men under the circumstances." *Wharton on Evidence*, §§ 141, 142.

The principle upon which secondary evidence is admitted to prove the contents of a lost document, though stated by the textwriters with some difference in phraseology, is not substantially changed thereby, and it has frequently been recognized, approved, and applied by this court. In one of the earliest cases relating to the question, this court said: "It is a rule of evidence that the best which the nature of the case will admit of must be produced. When that cannot be produced, and the nonproduction of it is accounted for, the next best evidence in the party's power is required. It is that rule of evidence which required the production of the bond upon the trial. In order to dispense with the production of it, it was incumbent on the plaintiff to give all the evidence reasonably in his power to prove the loss of it." *Dumas v. Powell*, 14 N. C. 104. See, also, *Harven v. Hunter*, 30 N. C. 464; *Governor v. Barkley*, 11 N. C. 20; *McFarland v. Patterson*, 4 N. C. 421; *Harper v. Hancock*, 28 N. C. 124; *Smith v. Railroad*, 68 N. C. 107; *Gillis v. Railroad*, 108 N. C. 441, 13 S. E. 11, 1019; *Murphy v. McNiel*, 19 N. C. 244; *Threadgill v. White*, 33 N. C. 591; *McCracken v. McCrary*, 50 N. C. 399.

The difficulty is not so much in determining or stating what the rule is, as in deciding how it should be applied. It is undeniably true that questions as to the existence of facts rendering secondary evidence of the contents of written instruments admissible are to be decided in the first instance by the court, unless in deciding such a question the judge would, in effect, decide the very matter in issue. *Stephens' Dig. Ev. (May's Ed.)* 118; *Hendon v. Railroad*, 125 N. C. 124, 34 S. E. 227. But while it is a preliminary question for the judge to pass upon, it is not one for him to decide according to his discretion, but according to the law. Important legal rights may depend upon the correct decision of such a question, and it cannot be that the law has left it to the irreviewable discretion of the presiding judge to say when parol evidence shall be competent in such cases. We think the law is the other way, and it has been held to be so in numerous cases decided by this court. In those cases where the court must decide prelimi-

inary questions as to the admissibility of evidence, such as whether a confession was voluntary, or whether a conspiracy or combination has been shown sufficiently to let in the declarations of the alleged conspirators, or whether a witness is competent as an expert, or whether the loss of a written instrument has been sufficiently shown to render competent parol evidence of its contents, this court, by Pearson, C. J., in all cases like those just mentioned, has thus clearly stated the rule: "It is the duty of the judge to decide the facts upon which depends the admissibility of testimony. *State v. Dick*, 60 N. C. 440 [86 Am. Dec. 439]. What facts amount to such threats or promises as make confessions not voluntary and admissible in evidence is a question of law, and the decision of the judge in the court below can be reviewed by this court. So, what evidence the judge should allow to be offered to him to establish these facts is a question of law. So whether there be any evidence tending to show that confessions were not made voluntarily is a question of law. But whether the evidence is true and proves these facts, and whether the witnesses giving testimony to the court touching the facts are entitled to credit, or not, and, in case of a conflict of testimony, which witness should be believed by the court, are questions of fact to be decided by the judge; and his decision cannot be reviewed in this court, which is confined to questions of law." *State v. Andrew*, 61 N. C. 211; *State v. Dula*, Id.

It is the duty of the judge to state the facts found by him from the evidence, if requested to do so by the party excepting to his ruling (*Holden v. Purefoy*, 108 N. C. 163, 12 S. E. 848; *Millhiser v. Balsley*, 108 N. C. 433, 11 S. E. 314), and his findings of fact cannot be reviewed in this court; but, if he does state the facts, either of his own motion, or at the request of a party, this court can review his conclusion which is based upon the finding, for this presents necessarily a question of law. We are, of course, aware of the decision of this court in *Gillis v. Railroad*, 108 N. C. 441, 13 S. E. 11, 1019, that "it is within the sound discretion of the court to determine what is sufficient evidence of the loss or destruction of an original paper to make testimony as to its contents competent," but to this statement of the law we are unable to give our assent, as we think it is not correct on principle or authority. It is true, as stated by the court in that case, that we will always assume, when nothing appears to the contrary, that the court, in admitting secondary evidence of the contents of a document, acted upon plenary proof that a sufficiently diligent but fruitless search had been made. This is so, not because the law does not require sufficient or plenary proof of the loss of the document, nor because the court's decision upon the matter is not the subject of review, but because, as neither the evidence-

nor the finding of facts is stated in the record, this court must necessarily affirm the ruling, not for the reason that it is right, but because we are unable to see that it is wrong, and for the further reason (perhaps a correlative of the other) that error in the rulings of the court is never presumed, and he who alleges error must show it. The party excepting has the right to require the facts to be found by the court and stated in the record (*Holden v. Purefoy*, supra), and, if he fails to insist upon this right, he, of course, waives it, and must abide the consequences. For these reasons, we do not think, because it was decided in *Mauney v. Crowell*, 84 N. C. 314, cited by the court in *Gillis v. Railroad*, supra, that, where there is no finding of the facts, the ruling of the court is conclusive, it thereby recognized "the discretionary power of the court to pass finally upon the question as to whether proper search had been made." If there is sent with the record the evidence of the loss, instead of the judge's findings of fact, this court will consider the evidence in the most favorable light for the appellee (*Holden v. Purefoy*, supra), but will, of course, pass upon the sufficiency of the evidence to show that proper search has been made. While the court in *Gillis v. Railroad*, supra, says, "Where the facts upon which the *nisi prius* judge acted are found, it is competent for this court to review his ruling, and determine whether the testimony was sufficient, in law, to justify his conclusion," the general trend of the decision in that case is that the matter lies solely within the discretion of the presiding judge; and it was so understood and construed by one, at least, of the dissenting justices, whose view is sustained by the reference of the court to the case of *Bonds v. Smith*, 106 N. C. 565, 11 S. E. 326, in which it is said that "It is always within the sound discretion of the judge who tries a case to determine what is sufficient proof of the loss or destruction of an original paper to make evidence of its contents competent." There are some expressions in the opinion which we think may lead to misapprehension of what we conceive to be the true rule, unless they are limited somewhat in their scope and effect. If it was intended to decide that, when the facts are found by a judge and stated in the record, his ruling is the subject of review, but, when no evidence or finding of facts appears in the case, this court will assume either that sufficient facts were found, or that there was plenary evidence of the essential facts, we fully concur in the decision, and, thus restricted, we believe that it is correct and sustained by authority; but if it was intended to lay down the rule, as the dissenting justices seemed to understand that it did, that the question is one that is addressed solely to the discretion of the court, we are unable to adopt that view of the law, and to that extent the case is disapproved. It appears

in that case that the court actually passed upon the sufficiency of the testimony to establish the loss of the letters, as matter of law, and ruled that it was sufficient for the purpose of letting in parol evidence of their contents. There was evidence that the plaintiff generally kept the letters in his trunk, but sometimes in his wife's trunk. He had made search only in his own trunk, and it was held, as we have said, to be a sufficient search. We cannot assent to this ruling, as we think the law requires that search should have been made in both places, for the party who proposes to produce the parol evidence of the contents of the instrument alleged to be lost must have exhausted, in a reasonable degree, all sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him. 1 *Greenleaf*, Ev. § 558; *Blair v. Brown*, 116 N. C. 631, 21 S. E. 434; *Simpson v. Dail*, 3 Wall. 460, 18 L. Ed. 265; *Johnson v. Arnwine*, 42 N. J. Law, 451, 36 Am. Rep. 527; *Richards v. Lewis*, 5 Eng. Law & Eq. 400; *Cook v. Hunt*, 24 Ill. 550. Some of those cases are, in respect to their facts, like the case of *Gillis v. Railroad*, supra. We are of the opinion that the decision in the latter case, so far as the court held that the judge merely exercises his discretion in passing upon the sufficiency of the search for the lost paper, is opposed to the rule as stated and applied in the cases decided by this court, and which we have already cited. The case of *Gillis v. Railroad* cannot be distinguished in principle from the case of *Dumas v. Powell* and *Harven v. Hunter*, supra. See, also, *Bligh v. Wellesly*, 2 C. & P. 400 (12 E. C. L. 189).

In our case the witness testified that the paper was lost, and he could not find it. This was all the evidence, and we must pass upon its sufficiency, as matter of law, to show that a proper search was made for the original; and we have concluded, after a careful review of the authorities, that it was not sufficient for that purpose. The witness does not testify distinctly or positively that he ever made any search. If there was a search, the fact is not stated, but left merely to inference, and it does not, therefore, appear what kind of search was made. As to this important matter, we can do nothing but conjecture.

There is another objection to the proof of loss: The fact to be found by the court is that the paper is lost, and cannot be found or produced; and the witness, instead of testifying as to what kind of search he had made, so that the court could find the ultimate fact of loss, testified directly to the fact itself, and thereby substitutes his opinion or judgment upon the question for that of the court. This certainly is not a compliance with the rule. In order to show the loss of the paper, it was necessary that a diligent search should have been made for it where it was most likely to be found

(*Simpson v. Dall*, *supra*), and this must be shown by evidence, and not by the mere opinion of the witness, nor by his deduction from the facts as they may have appeared to him, but which were not disclosed to the court.

In *Parks v. Dunkle*, 3 Watts & S. 294, the court said: "It is indispensable that the legal proof required to warrant secondary evidence should be satisfactorily made out. Here all that the defendant produced afterwards was the oath of Dunkle that he received the letter spoken of by Messrs. Smith, and it was lost. This we think was not sufficient. The party relying on secondary evidence must go further, and show what became of the original, and that due diligence was made to find it, or, at all events, ought to furnish reasons for believing that the document is irretrievably lost, and not merely mislaid, and still within the power of the party to recover by an exertion of proper diligence. A thing is often, in common parlance, lost, and yet found on a search. More especially is this incumbent on the party when he has himself had the document in his custody, and is called on to show that it cannot be produced." In *Justice v. Luther*, 94 N. C. 793, the defendant proposed to prove the declaration of a party who was shown to have had the custody of the paper in question that it was lost, in order to introduce secondary evidence of its contents. The evidence was excluded, not only because it was hearsay, but for the further reason that it was not in its nature reasonably sufficient to account for the absence of the original. *Blair v. Brown*, *supra*. In *Harven v. Hunter*, *supra*, the court says: "The case does not profess to set forth the affidavit itself, but its contents. It states, not that he did not have the deeds in his possession, but simply that the affiant did not know where they were, and that he had made due inquiry for them, and was unable to procure them. It may be that his possession is substantially and sufficiently denied, but the affidavit ought to have set out what inquiries he had made, where, and of whom, that the court might judge whether they were sufficient." In *Lyon v. Washburn*, 3 Colo. 204, the court says: "To show, in general terms, that a writing is lost, without showing search or inquiry for it, has never been regarded as sufficient to admit secondary evidence of its contents." In *McFarland v. Patterson*, 4 N. C. 423, it is said: "The case now before the court stands upon the long-established rule that parol evidence cannot be admitted to prove the contents of the written contract, unless it shall be clearly made to appear that the written contract is lost by time or accident. The plaintiff not having shown that the written contract was lost in either of the above ways, he should not have been permitted to prove the same by parol."

The counsel for the plaintiff contended that the ruling upon this evidence was immaterial, as the finding upon the second issue was suffi-

cient to entitle the plaintiff to a judgment. This may, or not, be so; but, however it may be, the issue certainly does not embrace all of the facts upon which the plaintiff originally relied for a recovery, and we deem it best not to decide what the rights of plaintiff are, if he has any, until his case has been fully developed.

As the case must go back for a new trial, we would suggest that the second issue be amended so as to read substantially as follows: "Did the defendant, knowing that Humphrey and wife had contracted to sell the land to the plaintiff, and before contracting with Humphrey for the purchase of the land, and before receiving a deed therefor, agree with the plaintiff to buy the land for him, as alleged in the complaint?" This issue, it seems to us, more nearly conforms to the particular allegations of the complaint than the one submitted at the last trial, and there was evidence to support an affirmative finding upon it.

It may be well to call attention to the fact that the allegations of the third section of the complaint are not sufficiently denied in the answer. The plaintiff alleges in the third section of his complaint that he informed the defendant of his agreement with Humphrey to buy the land from him, and then contracted with the defendant that the latter should buy the land from Humphrey for the plaintiff, and allow him (the plaintiff) three years to pay for it, and also to pay the additional sum of \$100, which the defendant was to receive as the consideration for his undertaking. In the answer the defendant merely states that "he is informed and believes that the allegations of the third article are not true, and therefore denies the same." Whether he had been informed by the plaintiff of the Humphrey contract was a matter which was necessarily within his personal knowledge, and the allegation in regard to it should have been met by a direct denial, or at least the statement of a "want of recollection" of it, if he intended to raise an issue in regard to it. *Gas Co. v. Mfg. Co.*, 91 N. C. 74. The answer in this respect was not sufficient, under Code, § 243 (1), to raise an issue. It may be amended, in the discretion of the court, upon proper application, if the defendant wishes to contest the matters alleged by the plaintiff.

There was error in the ruling of the court below upon the evidence, for which there must be another trial. New trial.

(68 S. C. 96)

BOSSARD v. VAUGHN.

(Supreme Court of South Carolina. Jan. 18, 1904.)

CLAIM AND DELIVERY—VERDICT.

1. A verdict in claim and delivery is sufficient as to identity where there was a more particu-

lar description of the property in the pleadings to which the verdict will be referred.

2. A verdict in claim and delivery, fixing the right of the plaintiff to have the property, or its value, if he could not find it, and the right of defendant to deliver the property, rather than pay the value, if he chose to do it, is in full compliance with Code Civ. Proc. § 77.

Appeal from Common Pleas Circuit Court of Sumter County; Gage, Judge.

Action by Wesley Bossard against Edward Vaughn. From judgment of the circuit court sustaining the judgment for plaintiff of a magistrate's court, defendant appeals. Affirmed.

L. D. Jennings, for appellant. Lee & Moise, for respondent.

WOODS, J. This action of claim and delivery was instituted in a magistrate's court to recover possession of property described as one white and black cow and one red calf. The property remained in the possession of the defendant. The verdict was, "We find for the plaintiff for property in question, one cow and calf, or the value thereof, twenty dollars." The defendant appealed to the circuit court on the ground that the verdict was not in conformity to the statute, which provides: "The judgment for the plaintiff may be for the possession or for the recovery of the possession or the value thereof, in case a delivery cannot be had and of damages for the detention. If the property have been delivered to the plaintiff and the defendant claim a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had, and damages for taking and withholding the same. * * * In all actions for the recovery of the possession of personal property, as herein provided, if the property shall not have been delivered to plaintiff, or the defendant by answer shall claim a return thereof, the magistrate or jury shall assess the value thereof, and the injury sustained by the prevailing party by reason of the taking or detention thereof, and the magistrate shall render judgment accordingly with costs and disbursements." Code Civ. Proc. § 77. From an order of the circuit court adjudging the verdict to be sufficient, the defendant appeals to this court.

As to the first position—that the verdict does not sufficiently identify the property—it is sufficient to say there was no issue of identity, but, on the contrary, the property was very clearly identified by the pleadings, to which the verdict will be referred.

The section of the Code of Civil Procedure above quoted relates to actions of claim and delivery in magistrates' courts, but in the last clause almost the same language is used as in section 283 of the Code, which provides the form of verdicts in such actions in the court of common pleas. The verdict was in the alternative, and in it the jury assessed the value of the property. Thus was fixed the right of plaintiff to have the property, or

its value, if he could not find it, and the right of the defendant to deliver the property rather than pay the value, if he chose to do so. The verdict in this case therefore met all the ends of the legislation prescribing the form of the verdict as stated by Chief Justice McIver in construing section 283 in *Finley v. Cudd*, 42 S. C. 127, 20 S. E. 32. See, also, *Bardin v. Drafts*, 10 S. E. 493, and *Parish v. Smith*, 66 S. C. 432, 45 S. E. 16.

The judgment of the court is that the judgment of the circuit court be affirmed.

STATE v. STILL et al.

(68 S. C. 37)

(Supreme Court of South Carolina. Dec. 8, 1903.)

ADULTERY—PROOF OF MARRIAGE—INSTRUCTIONS.

1. In a prosecution for adultery, marriage may be proved by general repute or declarations of the parties.

2. Where a judge, in stating the issues to the jury, erroneously states that certain facts are admitted by the defendants, in order to make such error the basis of an exception his attention should be called to it at the time.

Appeal from General Sessions Circuit Court of Barnwell County; Gary, Judge.

Lavinia Still and J. M. Lewis were convicted of crime, and appeal. Affirmed.

J. O. Patterson and C. A. Best, for appellants. Asst. Atty. Gen. Townsend, for the State.

GARY, A. J. The defendants were convicted of adultery, and have appealed to this court upon exceptions, the first two of which raise the question whether it was competent for the state to prove the fact of marriage by general reputation and the declarations of the parties. The defendants contended that "marriage, in a criminal action, cannot be proved by hearsay evidence, but that the witnesses who were present are the proper parties to prove it by, if there was ever any marriage." The rule of evidence in cases of adultery is the same as that in bigamy, and, whatever may be the rule elsewhere, it is settled in this state that the fact of marriage may be proved by general reputation and the declarations of the parties. *State v. Briton*, 4 McCord, 256; *State v. Hilton*, 3 Rich. Law. 434, 45 Am. Dec. 783. This principle is also sustained by numerous other decisions, among which may be mentioned *Miles v. United States*, 103 U. S. 311, 26 L. Ed. 481, and *Wolverton v. State* (Ohio) 47 Am. Dec. 373.

The next assignment of error is: "Because his honor erred in charging the jury that 'the defendants at the bar admit they are married.' Whereas it is respectfully submitted that this was erroneous, as the defendants did not testify or make any admissions." This will be considered in connection

¶ 1. See *Adultery*, vol. 1, Cent. Dig. §§ 25, 27.

with the remaining assignment of error, which is as follows: "Because his honor erred in charging the jury: 'Was Lavinia Still lawfully married at the time that she and her codefendant married?' Whereas we respectfully submit that this was charging upon an assumed fact, which was erroneous, and calculated to mislead the jury, in that it indicated that the fact of the marriage was established by evidence." If, in stating to the jury the issues involved, the presiding judge erred in supposing that the defendants admitted they were married, it was their duty to have called the alleged error to his attention, and, having failed to do so, they cannot make his charge in this respect the basis of an appeal to this court. We reach this conclusion with less reluctance, as the jury might have found very properly from the testimony that the defendants were guilty of adultery, even if they were married, provided they also found that Lavinia Still and Bud Still were previously married. All the exceptions are overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(68 S. C. 55)

CARSON v. SOUTHERN RY. CO. et al.
(Supreme Court of South Carolina. Dec. 26, 1903.)

APPEAL—EXCEPTIONS—INJURY TO SERVANT—COMPLAINT—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE—OPINION EVIDENCE—NONSUIT—KNOWLEDGE OF DEFECTS—RAILROADS—AUTOMATIC COUPLERS—ASSUMPTION OF RISK—INSTRUCTIONS—JOINT TORT.

1. An exception that the court erred in overruling a demurrer to the complaint, as not stating a cause of action, is too general.

2. Where, in an action for injuries to a servant, the complaint alleges negligence in the master in furnishing appliances, and negligence in his servants in using them, it states a cause of action of joint and several negligence.

3. A servant who disobeys a rule of the master in compliance with the instruction of the representative of the master on the spot is not guilty of contributory negligence.

4. Where a complaint states several causes of injury, it was a matter for the jury to determine whether any or all of the acts of the defendant, viewed jointly or separately, was the proximate cause of plaintiff's injury.

5. In an action for injuries to a servant, the opinion of a witness as to whether the accident would have happened if plaintiff had reported a defect in the machinery to the master, is incompetent.

6. Where a complaint in an action for personal injuries alleges several acts of negligence, it is error to grant a nonsuit on failure to prove that one of them was the proximate cause of the injury.

7. In an action for injuries to a railroad employé, evidence held to show that a servant was not guilty of contributory negligence in going between the cars to couple them, under instructions of the conductor, in disobedience of the rules of the company.

8. Where an action is brought for a joint and several tort, and there is evidence as to the negligence of one defendant, a nonsuit cannot be granted.

9. In an action for injuries caused by defects in machinery, knowledge by the servant of the

defects is no defense, under Const. 1895, art. 9, § 15.

10. The circuit court, in the trial of a case, is bound by the decisions of the Supreme Court.

11. Under Act Cong. March 2, 1893, c. 198, § 1, 27 Stat. 53 [U. S. Comp. St. 1901, p. 8174], providing that carriers engaged in interstate commerce shall equip their cars with automatic couplers, if defendant railroad company was a common carrier engaged in interstate commerce, and the cars were not equipped with such couplers, whereby plaintiff was injured, defendant was liable.

12. A railroad company must furnish an employé with safe appliances, and see that they are kept in proper repair; and, where the duty is negligently performed, and the employé suffers injury thereby, the railroad company is liable.

13. The risk which a railway employé assumes when he enters the employment does not extend to risks by reason of defective machinery.

14. An instruction that, where a servant's work is done in the presence and under the direction of a conductor of a train, it is equivalent to an assurance by the master that the servant may safely do the work required of him, and is not bound to search for danger, is not erroneous, as a charge on the facts.

15. The granting of an instruction against arriving at a quotient verdict is in the discretion of the trial court.

16. Where, in an action by a railroad employé for personal injuries, the complaint alleges a joint and several tort, consisting of the defective appliances and negligence on the part of the servants, and the jury finds in favor of the servants, but against the master, the verdict should not be set aside.

Appeal from Common Pleas Circuit Court of Greenville County; Watts, Judge.

Action by J. L. Carson against the Southern Railway Company, J. C. Arwood, and J. D. Miller. From a judgment for plaintiff, defendant Southern Railway Company appeals. Affirmed.

T. P. Cothran, for appellant. McCullough & McSwain, for respondent.

POPE, C. J. This action was commenced in the court of common pleas for Greenville county, in this state, to recover damages on account of personal injuries received by the plaintiff at Converse, S. C., August 16th, in the year 1902, to wit, the plaintiff's arm was crushed between two cars (while in the service of the defendant) which he was attempting to couple, and was amputated. The defendant demurred to the complaint because it failed to state facts sufficient to constitute a cause of action. This was overruled. The defendant objected to testimony, which objection was overruled. The defendant moved for a nonsuit at the close of plaintiff's testimony in chief. This motion was overruled. The defendant objected to the charge of the circuit judge. The defendant moved for a new trial, which motion was denied. The defendant then moved in arrest of judgment, and this motion was refused. The defendant then, and lastly, made a motion for the circuit judge to direct a judgment in its favor on the verdict. This was denied. The verdict was in favor of the plaintiff for \$8,500. After entry of judgment, the defendant appealed, alleging error in all the matters or

¶ 1. See Master and Servant, vol. 24, Cent. Dig. § 721.

steps in the trial above enumerated. To understand these exceptions, it may be stated that the defendant has numbered its exceptions from 1 to 48, inclusive, and we will treat these exceptions in the same way. Inasmuch as the first eight exceptions complain of the order of the circuit judge overruling the demurrer, it will be proper to reproduce the complaint, which is as follows:

"(1) That the defendant Southern Railway Company is a railway corporation chartered under the laws of the state of Virginia, and as such is, and was at the times hereinafter mentioned, doing business in the counties of Spartanburg, Greenville, and other counties of the state of South Carolina, as a common carrier of passengers, and also of freight; running its railroad track and trains, both passenger and freight, in and through the said counties of Spartanburg, Greenville, and other counties in the said state.

"(2) That the defendants J. O. Arwood and J. D. Miller are now, and were at the dates hereafter mentioned, citizens and residents of Greenville county, state of South Carolina.

"(3) That the plaintiff is a resident of the county and state aforesaid, is thirty-five years of age, and has a wife and four children dependent upon his daily labor for support; his eldest child being twelve years of age.

"(4) That since December 8, 1901, plaintiff was in the employ of the defendant Southern Railway Company, and was on that day assigned the duties of flagman, and on the 15th day of August, 1902, was assigned by defendant to duty on a freight train belonging to the defendant Southern Railway Company, in charge of its agents and employees, known as second section of No. 43, and running between Spencer, North Carolina, and Greenville, South Carolina, and plaintiff was assigned the duty of flagman on said freight train.

"(5) That plaintiff entered upon and performed the duties of such position, and on the 16th day of August, 1902, was ordered by the conductor in charge of said freight train, and whose orders he was required to obey, to do the work of a brakeman on the said freight train; the regular brakeman on the said train having been assigned other duties.

"(6) That while the said freight car was at the station known as Converse, in Spartanburg county, state aforesaid, the right arm of plaintiff was crushed by a collision of two freight boxes, whereby plaintiff suffered great and excruciating pain and mental anguish, and, as a result, lost entirely the said right arm, which had to be amputated, and that said collision and injury which plaintiff sustained by reason thereof were due to the joint and concurrent negligence, carelessness, and fault of the defendants, and to their joint and concurrent recklessness, carelessness, willfulness, and wanton disregard of the plaintiff's rights and safety, in the follow-

ing manner, to wit: That between Charlotte, North Carolina, and Greenville, South Carolina, at the said station of Converse, said freight train of the said defendant Southern Railway Company stopped for the purpose of shifting to the side track of the said defendant Southern Railway Company, which side track was upon a steep grade, and near the main line of defendant company, five freight cars or boxes. That there were at that time standing upon the side track three other freight cars or boxes, and, in order to prevent the said cars or boxes from rolling down the said steep grade, it was necessary to couple the said three cars or boxes to be shifted and left upon the said side track, and this plaintiff was directed by the defendants to make the said coupling. That the defendant J. O. Arwood was conductor, and the defendant J. D. Miller was engineer, upon the said freight train. That the said freight boxes or cars were provided with what is commonly known as automatic couplers, and, when said couplers are in good condition, it is unnecessary for one, in order to make the said coupling, to go between the said cars; but the said couplers worked with a pin and iron crank, the handle of which iron crank projects to the side of the said boxes or cars, and the said pin by which the said cars are coupled is manipulated by using the said crank. That after having effectually made one coupling between the said cars, as directed by the defendants, plaintiff approached to make the other coupling, as directed by the defendants; and before doing so he warned the defendants to hold said car steady until he (the plaintiff) was ready to make such coupling, and until plaintiff should so signify. That, when plaintiff reached the said car, then to be coupled, he ascertained that the coupling pin was out of, and lying upon, the drawhead of the coupler, and thereby ascertained that the said coupler was out of order, in that when the said coupler is in proper condition there is what is known as a cotter pin running through the said coupling pin at the lower end, thereby preventing it from being drawn entirely out of the said drawhead, and the defendants knew, or ought to have known, that the said coupling pin was out of order; and this fact made it necessary for the plaintiff to go between the said cars for the purpose of adjusting the said pin with his hand, and to carry out the order of the defendants, since he could not, while it was in that position, adjust it with the iron crank above described; and this plaintiff went between the said cars for the purpose of adjusting the said pin in order to make the said coupling, and as he was directed by the said defendants, when he heard the cars of said train in motion and knocking together before he had effected the said coupling, or had sufficient time to do so, and, in order to save himself from being crushed between the said cars, the plaintiff attempted to get out from between the said cars on

which he was engaged in the work of coupling, and, as he did so, his right arm was caught between the dead blocks of the said freight cars, between which he was standing, and was horribly mangled. That, at the time plaintiff heard the cars in motion, he had only time to go between the cars, and had placed his left hand upon the iron crank, and his right hand upon the pin, for the purpose of placing it in the proper position, and had not had time to place the pin in proper position, or to couple the said cars. That the defendants, by their joint and concurrent negligence, and by their joint and concurrent carelessness, recklessness, wantonness, negligence, and willfulness, backed the said engine, to which was attached the said freight cars, without any signal or warning from this plaintiff, and without giving this plaintiff time to effect the coupling of the said cars, and without giving this plaintiff any notice or warning whatsoever that the said engine and cars were to be moved.

"(7) That, in consequence of the said injury, it was necessary to amputate plaintiff's right arm just below the elbow, and in consequence of the said injury and amputation plaintiff has suffered great mental anguish and pain, and has been deprived of the use of his strong right arm for the support of himself and family, all to his damage \$15,000."

The exceptions are as follows, as relating to the demurrer:

"(1) The error of the presiding judge in overruling the demurrer to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action.

"(2) Error of the presiding judge in not sustaining the first ground of demurrer to the complaint, which was as follows: 'The complaint does not show negligence on the part of the defendants, or either of them.'

"(3) Error of the presiding judge in not sustaining the second ground of demurrer to the complaint, which was as follows: 'The complaint shows contributory negligence on the part of plaintiff.'

"(4) Error of the presiding judge in not sustaining the third ground of demurrer to the complaint, which was as follows: 'So far as the allegation of negligence in regard to the absence of the cotter pin (defective machinery appliances) is concerned, the complaint does not show that the injury complained of resulted therefrom as a proximate cause thereof.'

"(5) Error of the presiding judge in not sustaining the fourth ground of demurrer to the complaint, which was as follows: 'So far as the allegation of negligence in regard to the backing of the engine without signal, warning, or notice is concerned, the complaint shows that this was the act of the engineer or conductor, or both. It was therefore the negligence (if any at all) of the servant or servants of the railway company, for which the railway company, in a proper ac-

tion, may be held responsible. This action, however, is based upon an allegation of joint and concurrent tort on the part of master and servant. To constitute such a tort, it must appear that the master and servant each had a direct share therein; that they each actually participated therein. The imputed liability of the master for the wrong of the servant, in which the master has not participated, and which he neither authorized nor ratified, does not, in connection with the personal liability of the servant for the wrong, present a case of joint and concurrent tort.'

"(6) Error of the presiding judge in not sustaining the fifth ground of demurrer to the complaint, which was as follows: 'The complaint alleges an act of negligence on the part of the master (failure to provide suitable appliances), and an act of negligence on the part of the servant or servants (backing the engine without notice, signal, or warning). It does not charge any participation by either in the negligence of the other, and therefore does not present a case of joint and concurrent tort.'

"(7) Error of the presiding judge in not sustaining the sixth ground of demurrer to the complaint, which was as follows: 'The principles contended for in specification 4 are particularly applicable to the charge of joint willful tort. The master cannot be held liable jointly with the servant for the willful tort of the servant unless the master authorized or ratified it.'

"(8) Error of the presiding judge in not sustaining the seventh ground of demurrer to the complaint, which was as follows: 'The complaint alleges that the acts of the defendants complained of were both negligent and willful. This is an impossibility. Negligence and willfulness are the opposites of each other.'

(1) This exception is too general. It is therefore overruled.

(2) It seems to us that the allegations of the complaint directly charge negligence to the defendants, both jointly and severally. It alleges directly that the master erred in keeping the plaintiff supplied with proper machinery, and in keeping such machinery in proper repair. The conductor was acting directly for the master when he failed to notice the want of any signal from the servant before ordering its train to move back. This exception is overruled.

(3) No doubt, the exception relies at this point upon the failure in the plaintiff to carry out the rule of defendant which forbids the servant from going between the cars to couple cars. But the allegations of the complaint cure this apparent difficulty, when the presence and directions of the conductor as vice principal are remembered. This exception is overruled.

(4) A little reflection will show that this exception cannot be sustained. The complaint in paragraph 6 is careful so to link

the causes of the injury that the absence of the cotter pin from its proper place is not made the causa causans of his injuries. It was a matter for the jury to determine whether any or all of the acts of the defendants, viewed jointly or separately, was the proximate cause of plaintiff's injuries. The quotations of authorities may include *Pickens v. S. C. & G. R. R.*, 54 S. C. 498, 32 S. E. 567; *Marsh v. Western Union Tel. Co.*, 65 S. C. 430, 43 S. E. 953.

The fifth, sixth, and seventh exceptions are conclusively answered by the recent decisions of *Schumpert v. R. R.*, 65 S. C. 332, 43 S. E. 813; *Gardner v. Southern Ry. Co.*, 65 S. C. 341, 43 S. E. 816. The appellant, in his argument, says: "They appear to be concluded, so far as this court is concerned. * * * We do not waive them." It declines to argue these exceptions, and we think very properly so. These exceptions are overruled.

(8) The appellant concedes that this exception is concluded by the case of *Schumpert v. R. Co.*, supra, and formally abandons the same. Hence we sustain the circuit judge in overruling the demurrer.

2. The single exception as to alleged error of the circuit judge in sustaining plaintiff's objection to the question asked plaintiff by defendant is in these words: "(9) Error of the presiding judge in sustaining plaintiff's objection to the following question asked the plaintiff by defendants' counsel: 'Don't you know that, if you had reported that [fact that the pin was out of order] to the conductor, this accident would not have occurred?' The question was competent and relevant. It was plaintiff's duty, under rule 12, to report said defect, and his knowledge of the rule and its purpose had material bearing upon defendants' plea of contributory negligence." This exception cannot be sustained. Appellant did not argue it. It was purely asking for an opinion. How did witness know what effect such a report by him to the conductor would produce? It is overruled.

3. We will next consider the group of exceptions relating to the nonsuit that was refused.

"(10) Error of presiding judge in overruling the first ground of defendant's motion for a nonsuit, as follows: 'The alleged negligence in regard to the absence of the cotter pin (defective machinery appliances) is not shown, but any testimony tending to establish that fact, to have been a proximate cause of the injury complained of.'

"(11) Error of the presiding judge in overruling the second ground of defendant's motion for a nonsuit, as follows: 'The testimony shows that the proximate cause of the injury was the plaintiff's voluntary and unnecessary exposure of his person to the moving cars.'

"(12) Error of the presiding judge in overruling the third ground of defendant's motion

for nonsuit, as follows: 'The complaint alleges the plaintiff's injuries were caused by the joint and concurrent tort of the defendants. The evidence does not tend to sustain this allegation. On the contrary, if it tends to show any actionable negligence, it is the negligence of either the engineer or conductor, for which, in a proper action, the defendant company may be held liable, but which does not make out a case of joint and concurrent tort.'

"(13) Error of the presiding judge in overruling the fourth ground of the defendants' motion for a nonsuit, as follows: 'The plaintiff having alleged a joint and concurrent tort of all the defendants, the defendant Southern Railway Company has been deprived of the privilege of removing this cause to the United States court. He should be required to prove the facts alleged. To allow him to proceed in the state court without some evidence of this fact would deprive the defendant of a substantial right guaranteed by the Constitution of the United States.'

"(14) Error of the presiding judge in overruling the fifth ground of defendants' motion for a nonsuit, as follows: 'To allow the plaintiff, after alleging a joint and concurrent tort by the railway company and its servants, to recover without evidence of such joint and concurrent tort, but simply on evidence of a negligent act of the servant, in which the master did not participate, and which he neither authorized nor ratified, would deprive the defendant railway company of its property without due process of law, contrary to amendment 14, Constitution of the United States, for this reason: It would deprive said company of the right of reimbursement from the defaulting servant, which would otherwise exist.'

"(15) Error of the presiding judge in overruling the sixth ground of defendants' motion for a nonsuit, as follows: 'The defendant company is not liable in punitive damages for a willful tort of one of its servants. To hold otherwise would deprive said company of its property without due process of law, contrary to the Constitution of South Carolina, and article 14 of the amendments to the Constitution of the United States.'

"(16) Error of the presiding judge in overruling the seventh ground of defendants' motion for a nonsuit, as follows: 'Even if the evidence tends to show an act of negligence on the part of the master (defective appliance), and an act of negligence on the part of the servant or servants (backing the train without notice, etc.), it does not tend to show any participation by either in the act of the other, and therefore does not present a case of joint and concurrent tort.'

"(17) Error of the presiding judge in overruling the eighth ground of the defendants' motion for a nonsuit, as follows: 'The testimony does not tend to show any negligence, as alleged, on the part of the engineer; and even if it shows negligence, as alleged, on

the part of the company, the action being based upon an alleged joint concurrent tort of the defendants, it must for this reason fail.'

"(18) Error of the presiding judge in overruling the ninth ground of the defendants' motion for a nonsuit, as follows: 'The testimony does not tend to show any negligence on the part of the engineer.'

"(19) Error of the presiding judge in overruling the tenth ground of the defendants' motion for a nonsuit, as follows: 'The evidence shows that the defect in the coupler was known by the plaintiff before he attempted to go in between the cars.'

"(20) Error of the presiding judge in holding: 'I am bound by the decision of the Supreme Court of this state, and I will overrule the motion for a nonsuit.'"

Before passing upon these exceptions, it might be well to state that the appellant considers that the exceptions numbered 12, 13, 14, 16, and 17, including, as they do, the question, in various phases, of the joint liability of master and servant for the single tort of the servant, are, or seem to be, concluded, so far as this court is concerned, by the recent decisions of *Schumpert v. Railway Co.*, supra, and *Gardner v. Railway Co.*, supra. The appellant does not waive them, but has declined to argue them. This is a wise step on its part, for we hold that these decisions, so recently made, are conclusive as to these exceptions. So, therefore, we overrule said exceptions numbered 12, 13, 14, 16, and 17. We will now examine the remaining exceptions, under the head of nonsuit:

(10) We have already held that, under the allegations of the complaint, the absence of the cotter pin was not alone, of itself, the proximate cause of plaintiff's injuries. It was to be taken by the jury, under the testimony here offered by the plaintiff, as one of the elements of the proximate cause of such injuries. There was testimony offered by the plaintiff in this matter. Hence the circuit judge was precluded, under many decisions of this court on the subject of nonsuits, from granting the nonsuit as here suggested. Exception overruled.

(11) We do not regard that the testimony shows that the proximate cause of plaintiff's injuries was the plaintiff's voluntary and unnecessary exposure of his person to the moving cars. We distinctly remember that the testimony tended to show that there were co-operating causes for these injuries. It was shown, or, rather, there was testimony offered tending to show, that the conductor ordered this servant (the plaintiff) to couple those cars; that such conductor, in this matter, represented the master; that the servant called to such conductor to hold fast the train until he signaled; that this servant did not signal the conductor to move the train; that it was under these circumstances that the train was moved so that the two cars bumped against each other, thus causing his in-

juries; that, when the cotter pin was out of its place, it would be necessary for a servant to go between the cars to arrange it; that it was necessary to go between the cars to open the instrument by which the coupling was to be made. This exception is overruled.

(15) We think the decisions of the state hold an opposing view. It has been held in this state that the master is liable for the willful torts of its servants, without the master authorizing or ratifying such torts. It ought to exist when these torts occur while such servants are carrying out the directions or plans of the master. *Cobb v. R. Co.*, 37 S. C. 194, 15 S. E. 878; *Skipper v. Clifton Manufacturing Co.*, 58 S. C. 143, 36 S. E. 509. And there are other cases to the same effect. This exception is overruled.

(18) It must be remembered that the complaint charged a joint and several tort. There was testimony as to what the engineer did. He certainly moved the engine. Being testimony in the case connecting the engineer with the wrong alleged by the plaintiff, it was not the circuit judge's duty to pass upon the sufficiency of such testimony. This exception is overruled.

(19) Suppose the plaintiff saw that the cotter pin was out of its place; the circuit judge was bound by the case of *Youngblood v. R. Co.*, 60 S. C., at page 22, 38 S. E. 236, 85 Am. St. Rep. 824, where it is said: "Furthermore, the only fact upon which the defendant relied to show that the plaintiff did not act with due care was that he voluntarily operated the appliances after the knowledge of their unsafe condition, and, as we have stated, this could not defeat his action." Besides, it is provided in the Constitution of 1895: "Knowledge by any employé injured of the defective or unsafe character or condition of any machinery, ways or appliances, shall be no defense to an action for injury caused thereby." Section 15, art. 9. Besides, a railroad employé may recover for injuries caused by the carelessness of a fellow servant directing him. *Bussey v. R. Co.*, 52 S. C. 438, 30 S. E. 477; *Wilson v. Ry. Co.*, 51 S. C. 79, 28 S. E. 91; *Bodie v. R. Co.*, 61 S. C. 468, 39 S. E. 715. This exception is overruled.

(20) The circuit judge was quite correct in declaring that he was bound by the decision of the Supreme Court. Being the court of last resort in this state, as is the Supreme Court, its decisions govern the members of that court, and all other persons in authority, as well as other people. This exception is overruled.

We have thus passed upon all the phases of nonsuit as here presented. We sustain the circuit judge in refusing such motion.

4. We will next consider the group of exceptions relating to the alleged errors of the circuit judge in his charge to the jury:

"(21) Error of the presiding judge in charging the jury as follows: 'The law requires them [railroads] to keep suitable appliances

for running such trains, and to keep them in good condition. I charge you that any railroad engaged in running trains from state to state, under the law, they are required to have automatic coupling; and I charge you, further, that they are required to keep these appliances in good order—that is, in safe and suitable order.' The error consisting in this: First. The duty of a master to a servant is to exercise ordinary care in keeping machinery and appliances in order. The charge of the judge imposes this duty absolutely upon the railway company, practically making it a guarantor of the safe and suitable condition of the coupling apparatus. Second. The car upon which the defective coupler was, is shown by the testimony to have been an empty car on the side track, not used to move interstate commerce. The act of Congress, therefore, did not apply to it. (This subdivision is an amendment to the exceptions, and was allowed by respondent upon condition that it be accompanied with the statement that the point was not raised before the circuit judge that the act of Congress did not apply to the cars on side track.)

"(22) Error of the presiding judge in charging the jury as follows (the same being No. 1 of the plaintiff's request): 'By an act of Congress it is provided [Act March 2, 1893, c. 196, § 1, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174)] that "on and after the first day of January, 1898, it shall be unlawful for any common carrier engaged in interstate commerce to haul, or to permit to be hauled or used, on its line any car used in moving interstate traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." I charge that if you believe the defendant railway company was a common carrier engaged in interstate commerce, and was using for the purpose of moving interstate traffic the cars mentioned in the complaint as causing the plaintiff's injury, and that said cars were not equipped with couplers coupling automatically by impact, so as to obviate the necessity of plaintiff going between them to effect the coupling, such failure to provide such automatic couplers was negligence on the part of the railway company, which negligence continued up to the very moment of the collision, if you believe there was such a collision, and injury in consequence thereof; and, if you believe that such negligence was the proximate cause of such injury, your verdict should be for the plaintiff. The rule of the defendant company forbidding employees going between cars for the purpose of coupling or uncoupling them may be waived by it. I charge you that the conductor is the representative of the railway company, and, if said company fails to furnish appliances to brakemen by means of which they may effect said coupling without going between the cars, or furnish them appliances which make it necessary for them to go between the cars

to perform the work required of them, and without objection, then it is for you to say whether or not such conduct on the part of the railway company amounts to a waiver of the said rule; and, if you do find that it amounts to waiver, then I charge you that in such a case the railway company cannot invoke the said rule in its behalf.' The errors consisting in: (a) The act of Congress applies only when the railway company fails to use cars equipped with automatic couplers. It does not apply where the railway company has equipped its cars with such couplers, one of which is temporarily out of repair. The complaint alleges, and the plaintiff's evidence shows, that the cars were equipped with automatic couplers, but that one of them was temporarily out of repair; that it could have been repaired in two minutes. The question, therefore, was whether the railway company had violated its duty to exercise ordinary care in keeping the coupler in repair, and not whether it had complied with the act of Congress. The latter had no application to the case. (b) It was error to charge that the failure to provide automatic couplers was negligence, which continued up to the very moment of the collision, for the reason that rule 12 made it the duty of the plaintiff to examine the coupler, and, if defective, report such fact immediately. The plaintiff admitted that he knew it was defective before he attempted to make the coupling. (c) The act of Congress requires that the cars be equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. It does not require that they be so arranged as to obviate the necessity of men going between the ends of the cars for the purpose of adjusting the knuckles for a coupling. The charge of the judge stamped it as negligence if the plaintiff, in order to make a coupling or to adjust the knuckles, had to go between the ends of the cars.

"(23) Error of the presiding judge in charging the jury as follows (the same being No. 2 of the plaintiff's requests): 'I charge you that it was the duty of the railway company in this case to furnish the plaintiff with safe and suitable appliances with which to perform the work required of him, and also see that the same were kept in proper repair, and if this duty was negligently performed, and the plaintiff sustained any injury thereby, the railway company is responsible in damages. I charge you that, provided the negligence of the railway company was the direct and proximate cause of the injury, and the plaintiff did not contribute to the direct and proximate cause of the injury.' The error consisting in this: The duty of a master to a servant is to exercise ordinary care in keeping machinery and appliances in repair. The charge imposes this duty absolutely upon the railway company, practically making it a guarantor of the safe and suitable condition of the coupling apparatus.

"(24) Error of the presiding judge in charging the jury as follows (the same being No. 3 of plaintiff's requests): 'I charge you that the risk which a railway employé assumes when he enters the employ of a railway company does not extend to such risks as he is exposed to by reason of defective machinery or appliances.' The error consisting in this: An employé assumes all risks except those which flow from the master's negligence in his duty in furnishing safe machinery, and in keeping the same in repair. The charge was erroneous in not so stating.

"(25) Error of the presiding judge in charging the jury as follows (the same being No. 6 of plaintiff's requests): 'I charge you that contributory negligence on the part of the servant, by using appliances obviously defective, furnished by a railway company, is no longer of force in South Carolina, under the Constitution of 1895.' The error consisting in this: The defendant contended that, under rule 12, it was the duty of the plaintiff to examine the coupler before attempting to effect the coupling, and to report any defect therein immediately. The charge eliminated this defense.

"(26) Error of the presiding judge in charging the jury as follows (the same being No. 7 of plaintiff's requests): 'The fact that the servant's work is done in the presence and under the immediate direction of the master's foreman, or the conductor in this case, is equivalent to the assurance by the master that the servant may safely proceed to do the work required of him, and he is therefore not bound in such a case to search for danger. He may rely for his safety upon the conduct of the conductor.' The error consisting in this: (a) It is a charge upon the facts, in violation of Const. art. 5, § 26. (b) It erroneously assumes that it was the conductor's duty to inspect the coupling. (c) It excludes from the jury inquiry as to the manner in which the plaintiff may have done the work. (d) Under rule 12, it was plaintiff's duty to examine the coupler and report defects immediately. (e) It relieves the plaintiff from the obligation to exercise ordinary care in avoiding danger. (f) It erroneously declares that, no matter what the conditions are—whether known to the conductor or not—the plaintiff may blindly go ahead and do what he is told to do. (g) It states an erroneous principle of law. (h) It destroys the defense of contributory negligence and of sole negligence of the plaintiff.

"(27) Error of the presiding judge in charging the jury as follows (the same being No. 8 of the plaintiff's requests): 'I charge you that a rule forbidding railway employes going between railway cars in motion, for the purpose of coupling or uncoupling them, or where attached to an engine, within itself, is a reasonable requirement; but such rule must be taken with the qualification that the company will provide other means for performing the necessary service, and, if it

fails to do this, the rule is no protection to the company against liability for damages for injury sustained in doing the work required to be done, and in the performance of which said rule is violated.' The error consisting in this: The rule prohibits the brakemen from going between the cars while coupling or uncoupling them, either (1) while the cars are in motion; or (2) while an engine is attached to them. The charge declares that when the brakeman is injured while violating this rule, in either particular, the company cannot invoke the rule in its defense unless it has provided other means for the service, which renders it unnecessary for the brakeman to go between the cars. In this, error is assigned. As applied to (1), it means either that the company must stop the cars, or that it must provide means for the brakemen to make the coupling without going between the cars while they are in motion. If the former, the means were at hand. All that was necessary was a word from the brakeman. If the latter, it presents the anomaly of requiring the company to furnish the means of performing the service in a way prohibited by it. As applied to (2), the same objections apply mutatis mutandis. The charge is erroneous for another reason: The plaintiff had stipulated in form 607 that he would not violate this rule, and would not obey any order to that effect. And for the further reason: The conditions which made it apparently necessary for the plaintiff to violate the rule may have been brought about by the negligence of a fellow servant of the plaintiff.

"(28) Error of the presiding judge in charging the jury as follows (the same being No. 11 of the plaintiff's requests): 'I charge you that the rule of the railway company with reference to coupling or uncoupling cars with a pin and stick while the cars are attached to an engine or in motion has no application to a case where the master fails to furnish to the servant a pin and stick sufficient to effect the said coupling.' The error consisting in this: It should have been left to the jury to say whether or not the plaintiff had obligated himself, under rule 10 and form 607, to supply himself with a stick, even if it was not the duty of the court to so construe the rule and form, which defendant claims.

"(29) Error of the presiding judge in charging the jury as follows (the same being No. 14 of the plaintiff's requests): 'If the jury find that the rule forbidding the going between the cars in motion or when attached to an engine, and forbidding the setting of pins and links except with a stick, was adopted by defendant railway company when a method of coupling cars prevailed by the use of a pin and link, and if the jury find that the said method of coupling cars has been superseded by a method whereby no pins need be set, or pins and links need be used, then it is for the jury to say whether or not

said rule was at the time of the injury complained of in force, and whether or not plaintiff was then bound by the same.' The error consisting in this: No matter what system may have been adopted, the danger of going between the cars while making a coupling was great, and the company had the right to provide by rule and contract against it. The charge makes this right depend upon the continuance of the link and pin method of coupling.

"(30) Error of the presiding judge in charging the jury as follows (the same being No. 21 of the plaintiff's requests to charge): 'Notwithstanding plaintiff has alleged in his complaint joint and concurrent negligence on the part of all the defendants, I charge you that if the proof fails to show such joint and concurrent negligence on the part of all the defendants, yet shows negligence on the part of one or more of the defendants, which negligence resulted in injury to plaintiff, as the sole and proximate cause thereof, then you may find a verdict against such defendant or defendants as the proof shows was guilty of such negligence.' The error consisting in this: (a) By the simple allegation of joint and concurrent tort, the defendant Southern Railway Company, a foreign corporation, has been deprived of the right to remove the cause to the federal court. The plaintiff should prove the allegations of his complaint. To allow a recovery against one only of several alleged tort feasons put it in the power of the jury to do as they did—find against the railway company, and in favor of the servants whose negligence is alleged to have caused the injury. The defendant railway company is thus deprived of a substantial right—that of removal—guaranteed by the Constitution and laws of the United States. (b) A plaintiff has no right to come into court upon one alleged cause of action—for instance, a joint and concurrent tort—and recover upon proof of a several tort.

"(31) Error of the presiding judge in refusing the defendants' first request to charge, as follows: 'The plaintiff having alleged a joint and concurrent tort of the defendants, the defendant Southern Railway Company, a foreign corporation, has been deprived of the right, where the tort was not joint and concurrent, to remove this cause to the United States court. To sustain this action, the plaintiff must therefore prove that the acts complained of were the joint and concurrent negligence and tort of the railway company and at least one of the other defendants.' Said request contained a correct principle of law applicable to the case.

"(32) Error of the presiding judge in modifying the defendants' second request to charge, which was as follows: 'The negligence of a servant, for which, and on which account only, the master is liable, is not the joint and concurrent negligence of the master and servant.' The modification was as follows: 'I charge you that, with this modifi-

cation: Unless the servant represents the master so that his acts will bind him, and that you find that the servants of the company were negligent.' The error consisted in this: The request contained a correct principle of law applicable to the case. The modification emasculated the request. It was error to hold that where the servant represents the master, so that his acts will bind him, the negligence of the servant makes out a case of joint and concurrent negligence on the part of both master and servant.

"(33) Error of the presiding judge in refusing the defendants' third request to charge, which was as follows: 'To constitute a joint and concurrent tort on the part of master and servant, it must appear that each had a direct share in such tort; that each actively participated therein. The imputed liability of the master for the wrong of the servant, in which the master has not participated, and which he neither authorized nor ratified, does not, in connection with the personal liability of the servant for the wrong, present a case of joint and concurrent tort.' Said request contained a correct principle of law applicable to the case.

"(34) Error of the presiding judge in refusing defendants' fourth request to charge, which was as follows: 'To allow the plaintiff, after alleging a joint and concurrent tort by a foreign corporation and its servant or servants, to recover damages without proof of such joint and concurrent tort, would deprive such corporation of the right of removal to the United States court—a right guaranteed by the Constitution and laws of the United States, and which would exist were the tort several, and not joint and concurrent.' Said request contained a correct principle of law applicable to the case.

"(35) Error of the presiding judge in refusing the defendants' fifth request to charge, which was as follows: 'To allow the plaintiff, after alleging a joint and concurrent tort by a railway corporation and its servant or servants, to recover damages without proof of such joint and concurrent tort, but simply upon proof of a negligent act on the part of such servant or servants, would deprive the railway company of its property without due process of law, contrary to amendment 14, Constitution of United States, for this reason: It would deprive said company of the rights of reimbursement from the defaulting servant or servants, which would exist were the tort not joint and concurrent, but simply the wrong of the servant or servants, for which the company may be liable.' Such request contained a correct principle of law applicable to the case.

"(36) Error of the presiding judge in refusing the defendants' sixth request to charge, which was as follows: 'Even if the railway company was negligent in the matter of the alleged defective coupling, and the servant or servants were negligent in the matter of backing the train without signal,

etc., they could not be held jointly liable for the combined results of their acts, if they acted independently in producing the injury, and neither participated in the several act of the other.' Such request contained a correct principle of law applicable to the case.

"(37) Error of the presiding judge in modifying the defendants' seventh request to charge. The request was as follows: 'If the sole proximate cause of the plaintiff's injury was the negligence of the engineer, the jury must find for the defendant railway company, for an engineer or brakeman or flagman upon the same train, while employed in the duties usually pertaining to their respective positions, are fellow servants. A master is not liable to a servant for injuries received in consequence of the negligence of a fellow servant.' The modification was as follows: 'I charge you that, with this modification: If the plaintiff was not performing the ordinary duties for which he was employed, he does not assume the risk of negligence of fellow servants.' The error consisting in this: The request contained a correct proposition of law applicable to the case. Inasmuch as the evidence showed that the ordinary duties for which the plaintiff was employed were those of a flagman, and that he was pro tempore performing, not those duties, but those of a brakeman, the modification was calculated to mislead the jury. Although the plaintiff may have been employed as a flagman, yet, if he for the day had undertaken the duties of a brakeman, the rule of fellow servants would apply.

"(38) Error of the presiding judge in modifying the defendants' eighth request to charge. The request was as follows: 'If the railway company furnished the plaintiff a rulebook with the following rule: "Cars must not be coupled or uncoupled or pin set by hand. For this purpose brakemen will use sticks, which will be furnished them on application; and every brakeman is required to supply himself with one of these sticks, and see that it is long enough to prevent his going between the cars to couple or uncouple them or to set pins. Any employé going in between cars while such cars are coupled to the engine or being so coupled, for the purpose of coupling or uncoupling cars or to set pins or links, or for any other purpose while the train or cars are in motion, does so at his own risk." And if the plaintiff violated this rule, and such violation was a proximate cause of his injury, or contributed thereto, with the negligence of the defendants, as a proximate cause thereof, he is not entitled to any damage.' The modification was as follows: 'I charge you that, with this modification: Provided, the rule is not contrary to law, has not been waived by the defendants, and the violation of the same was negligence, and the proximate cause of the injury.' The error consists in this: (a) The court, not the jury, should have passed upon the question,

whether or not the rule was contrary to law. (b) The negligence of the plaintiff need not be the proximate cause of the injury. It will relieve the defendant if it be a proximate cause contributing with the negligence of the defendant.

"(39) Error of the presiding judge in modifying the defendants' ninth request to charge. The request was as follows: 'If the railway company furnished the plaintiff with a rulebook, containing a rule warning him that going between cars in motion to couple or uncouple them was dangerous, and violation of duty, and if they do so it will be at their own risk, and if the plaintiff violated this rule, and such violation was a proximate cause of his injury, or contributed thereto, with the negligence of the defendants, as a proximate cause thereof, the plaintiff is not entitled to any damage.' The modification was as follows: 'I charge you that, with the same modification as above.' The error consisted in this: (a) The court, not the jury, should have passed upon the question whether or not the rule was contrary to law. (b) The negligence of the plaintiff need not be the proximate cause of the injury. It will relieve the defendant if it be a proximate cause, contributing with the negligence of the defendant.

"(40) Error of the presiding judge in refusing the defendants' tenth request to charge, which was as follows: 'If the railway company furnished the plaintiff with a rulebook, containing a rule requiring him, before exposing himself in working with the cars, to examine for his own safety the condition of such cars, or whatever he may undertake to work on or with, and to promptly report to his immediate superior officer any defect therein affecting the safety of any one using or operating upon or with the same, and if the plaintiff violated such rule, and such violation was the proximate cause of the injury, or contributed thereto, with the negligence of the defendants, as the proximate cause thereof, the plaintiff is not entitled to any damage.' Such request contained a correct principle of law applicable to the case.

"(41) Error of the presiding judge in modifying the defendants' eleventh request to charge. The request was as follows: 'If the plaintiff executed the paper in evidence marked "Form 607," and violated the agreement on his part contained therein, and such violation was the proximate cause of his injury, or contributed thereto, with the negligence of the defendants, as a proximate cause thereof, the plaintiff is not entitled to any damage.' The modification was as follows: 'I charge you that, with this modification: Provided, under the circumstances, his violation thereof was negligence, and such negligence proximate cause of the injury.' The error consisted in this: The negligence of the plaintiff need not be the proximate

cause of the injury. It will relieve the defendant if it be a proximate cause, contributing with the negligence of the defendant.

"(42) Error of the presiding judge in refusing the defendants' sixteenth request to charge, which was as follows: 'A quotient verdict is illegal; that is, a verdict arrived at by agreement that each juror should name his estimate of the damages, and that the sum of all the several estimates, divided by twelve, shall be the verdict. This is an improper way to arrive at a verdict.' Such request contained a correct principle of law, and was an instruction proper to be given.

"(43) Error of the presiding judge in modifying the defendants' eighteenth request to charge. The request was as follows: 'If the plaintiff was not injured directly by the alleged defective coupling, but by a cause remotely, indirectly, connected therewith, and the plaintiff, before he was hurt, knew that it was out of repair, so that attempt to use it was dangerous, and he nevertheless attempted to use it after such knowledge, it is for the jury to say whether, under the circumstances, he failed to exercise ordinary care and prudence, and was thereby guilty of negligence. If so, he is not entitled to any damages.' The modification was as follows: 'I charge you that, with this modification: Provided, there can be no negligence by use of appliances obviously defective.' The error consisted in this: (a) The constitutional provision in reference to a servant's knowledge of defective machinery applies only to cases where the injury is caused directly by the defective condition of such machinery. Hence, when the injury is not so caused, the servant may be guilty of contributory negligence in the uses of machinery which he knew was defective. A servant may be guilty of contributory negligence in the use, or in the method of use, of appliances obviously defective.

"(44) Error of the presiding judge in refusing the defendants' nineteenth request to charge, which was as follows: 'If the jury believe from the evidence that the plaintiff has failed to prove any negligence on the part of either the railway company or either of the other two defendants, they must find for the defendants. The complaint being based upon a joint, concurrent tort, the plaintiff must stand or fall by this allegation. He cannot recover upon proof of negligence upon the part of any one or any two of the defendants.' Such request contained a correct proposition of law applicable to the case.

"(45) Error of the presiding judge in refusing defendants' twentieth request to charge, which was as follows: 'If the injury was caused directly by the act of the conductor or alone, and remotely by the negligent act of the railway company, the railway company is entitled to a verdict.' Such request contained a correct principle of law applicable to the case."

It is our duty to announce on the threshold

of our investigation of the exceptions that the appellant here, in his printed agreement, announces that its exceptions 30, 31, 32, 33, 34, 35, 36, 44, and 45 involve the question, in various phases, of the joint liability of master and servant for the single tort of the servant, and that such exceptions appear to be concluded, so far as this court is concerned, by the recent decisions of this court in the two cases of *Schumpert v. R. Co.*, supra, and *Gardner v. R. Co.*, supra. But they, while making this admission, do not waive their said exceptions. For the reasons set out in those two decisions, which are so recently made as to render it unnecessary to repeat the argument thus used, we overrule these said exceptions. We will now proceed to pass upon the remaining exceptions of this group.

(21) Our decisions of *Gunter v. Graniteville Manufacturing Co.*, 18 S. C. 262, 44 Am. Rep. 573; *Lasure v. Graniteville Manufacturing Co.*, 18 S. C. 275; *Bussey v. Charleston & Western Carolina Railway Co.*, 52 S. C. 438, 30 S. E. 477; *Youngblood v. South Carolina & Georgia R. Co.*, 60 S. C. 9, 38 S. E. 232, 85 Am. St. Rep. 824—and other cases in this state, all hold that it is the duty of the master to furnish safe machinery and appliances to its servants, and also to keep such machinery and appliances in good order. The master is not made a guarantor, strictly. But it is his duty to furnish safe machinery and appliances, and to preserve it in good order and repair. The circuit judge did not use the word "guarantor" as to the master. He correctly stated the rule in this state. The act of Congress in relation to couplings to cars engaged in interstate commerce peremptorily demands that carriers of interstate commerce shall use automatic couplings to the cars used by them. This defendant was a carrier of freight of interstate commerce, and, of course, it was bound by the act of Congress, no matter what rules they may have adopted for the government of their servants. The circuit judge properly stated the rule. It is well known that Congress took control of these matters for wise purposes, among which was the protection of railroad employes. This exception is overruled, especially as no specific requests were made for fuller instructions.

(22) We cannot sustain this exception, and it is overruled. The circuit judge had the act of Congress governing couplers in trains engaged in interstate commerce. It would be a want of wisdom and a disregard of law for this act of Congress to be emasculated. Courts and the people of this country are obliged to adhere to, and be governed by, acts of Congress. Of course, Congress intended, when they directed these automatic couplers should not only be provided and attached to cars, that such appliances should be kept in proper repair for constant use. It is the law of this state, even if the act of Congress in question had overlooked this

duty of keeping such appliances in good order, which includes proper repairs, that master shall keep all machinery and appliances in repair. This exception is overruled.

(23) We do not see that the judge's charge was improper. He charged the law of this state. He did not use language which made the master a guarantor of the machinery and appliances, especially as the circuit judge was careful to say, "Provided, the negligence of the master was the direct and proximate cause of the injury," etc. This exception is overruled.

(24) There was no error here. The servant does not assume the risks of the master, and, as we have seen it, it is the master's duty to furnish safe machinery and appliances, and keep the same in proper repair. Confine your criticism to what the judge actually charged. If a party wishes a fuller charge, he must ask for it. Then, if the circuit judge is in error, there is just ground of complaint. This exception is overruled.

(25) The Constitution is a full protection of the servant as to defective machinery and appliances. See section 15 of article 9, which has been construed in the case of *Rutherford v. Southern Ry.*, 56 S. C. 446, 35 S. E. 136, especially at pages 454 and 455, 56 S. C., and pages 138, 139, 35 S. E. This exception is overruled.

(26) We do not regard the charge of the judge as a charge upon the facts. He is only laying down the law to govern the jury. He nowhere refers to the testimony itself; he nowhere tells the jury that the testimony in this case is such; and it has been frequently held by this court that a master may waive the most stringent rules. Take the policies of life insurance companies. How often is there found to be a waiver of the most stringent rule by their agent! Why may not a conductor or a vice principal, in the absence of the master, but in the discharge of his responsible duties, waive the performance of a duty required of a servant under a particular rule? This exception is overruled.

(27) It is said that this charge is taken bodily from *Boswell's Law of Personal Injuries*, at page 279. Be that as it may, it is well-known law that the master, or his personal representative, the conductor, may waive rules which have been formulated for the general conduct of its business. Exigencies arise when instant action must be taken. "Red tape" cannot be obtained. Prompt action must be taken. Rules must give way. This can be done, and is done, whenever the necessity arises which makes it either necessary or expedient. This exception is overruled.

(28) This exception cannot be sustained. Coupling or uncoupling cars with a stick, when the servant has never had a stick furnished him by the master, of course, is not law. Let this exception be overruled.

(29) Of course, it should have been left to the jury to say whether any change had been

made. This was all the circuit judge held. This exception is overruled.

(37) The circuit judge left it to the jury to say whether the plaintiff was performing his ordinary duties. It will be recalled that the duties of the plaintiff were those of a flagman on this train, and not of those of a coupler of cars or a brakeman. Having to obey the orders of the masters, on that day he was required to couple cars. The latter was not his ordinary or usual duty. The servant only assumes the risk of negligence of fellow servants. *State v. Telephone Co.*, 61 S. C. 96, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870; 20 A. & E., 132; 12 A. & E., 989. This exception is overruled.

(38) The modification of a request as made by the circuit judge was properly made to meet the issues here presented. It was his duty to do so. This exception is overruled.

(39) This exception must be overruled upon the same ground set out in 38.

(40) We think the circuit judge fairly presented the issue, and it would have been improper to have made this charge. The request assumed that the violation of the rule by the servant would be negligence. This exception is overruled.

(41) The modification of the request made by the circuit judge was proper. This exception is overruled.

(42) We think the circuit judge very properly refused to charge the quotient verdict would be illegal. Never suggest evil to a jury. Let them understand that 12 jurors must agree to a verdict, and that such verdict must be based upon the law and the evidence. It was within the judge's discretion, at any rate. This exception is overruled.

(43) The modification of the request to charge was in strict conformity to the rule set up in our Constitution of 1895. See section 15, art. 9. This exception is overruled.

5. Having overruled all the exceptions in this group, we will now dispose of the appeal relating to new trial:

"(46) Error of the presiding judge in refusing the defendants' motion for a new trial upon the following grounds: (a) The verdict in favor of the conductor and the engineer settled in the railway company's favor the question of its liability by reason of the alleged negligence of those servants. There was nothing left in the case then, except the alleged negligence regarding the defective coupler. The evidence as to that showed that it was not the proximate cause of the injury. (b) The plaintiff knew of the defective coupler before he went in between the cars, and, that defect not having been the proximate cause of the injury, he assumed the risk, and was guilty of negligence which caused or contributed to the injury. (c) The plaintiff, by stipulation, agreed not to go in between cars, while in motion or attached to an engine, for the purpose of coupling. He did so, was injured, and is now precluded from recovering damages. (4) The rules likewise for-

bld this action. He violated them, was injured, and is now precluded from recovering damages. (f) The verdict shows that there was no joint and concurrent negligence, as alleged." We should state that the appellant admitted that our recent cases of Schumpert v. R. Co., supra, and Gardner v. R. R., supra, seem to conclude these questions of appeal. We hold that they do. Accordingly we overrule these exceptions.

6. We will next consider the exceptions relating to motion in arrest of judgment. The following is the exception: "(47) Error of the presiding judge in overruling the defendants' motion in arrest of judgment upon the following grounds: (a) The alleged cause of action was the joint and concurrent negligence of the defendants. The verdict in favor of the conductor and engineer conclusively settles this question against the plaintiff. (b) The verdict is inconsistent with the plaintiff's cause of action." We remark that the appellant did not argue this exception. He alleged that it appeared to be governed by the two late decisions of this court—Schumpert v. R. Co., supra; Gardner v. R. Co., supra. He does not abandon these grounds, but still he does not argue them. We think these points are ruled by the principle upheld by those two cases just cited, and, for the reasons therein given, we overrule these exceptions.

7. Lastly, we will pass upon the questions made in the exceptions under the head, "Motion for Judgment." The exceptions are as follows: "(48) Error of the presiding judge in refusing the defendant's motion to direct judgment to be entered in its favor on the verdict upon the following grounds: (a) The alleged cause of action was the joint and concurrent negligence of the defendants. The verdict in favor of the conductor and engineer conclusively determines that the injury was not so caused. (b) The complaint and the testimony both showing that the alleged negligence of the railway company in the matter of defective coupling was not the proximate cause of the injury, there is nothing left in the case, except the alleged negligence in backing the train without signal, notice, or warning. This is shown in like manner to have been the act of the conductor or engineer, or both. The jury having found that neither of these servants was negligent in that or any other particular, no responsibility attaches to the railway company, their employer, for any act committed by them, or by either of them. When the act of the servants is determined not to have been negligence, the same act, treated as the act of the master, through the instrumentality of the servant, cannot be so. (c) In an action against master and servant for an injury caused by the alleged negligence of the servants, and a verdict is rendered in favor of the servants and against the master, the verdict in favor of the servants precludes a recovery against the master, and judgment should be rendered in favor of the master."

This exception must be overruled for these reasons: The master is responsible for the tort of his servants, committed by them during the administration of the duties of their offices, respectively. That the servants are not held responsible personally is because such torts were committed in the master's service. "One may be taken, and the other left." (b) We do not except the doctrine that the defective coupler was to be considered as the proximate cause of plaintiff's injuries. It was a compound made of several things or parts which made up the proximate cause of injury. This we have hereinbefore announced. (c) We do not hold with the plaintiff in this subdivision of his exception. We do not think that a verdict in favor of the servants turns the master loose thereby. This exception is overruled.

It is the judgment of this court that the judgment of the circuit court be, and it is hereby, affirmed.

WOODS, J., concurs in the result.

(88 S. C. 39)

MARION v. BARNWELL.

(Supreme Court of South Carolina. Dec. 8, 1903.)

APPEAL—MOTION TO REINSTATE—DELAY.

1. Where an appeal was dismissed, a motion to reinstate it on the ground that a motion for further time to perfect the appeal was dismissed on default on account of illness of counsel for appellant will be denied where the delay of more than a year in making the motion is unexplained.

2. A motion to reinstate an appeal from an order refusing a temporary injunction against a sale which has since actually occurred will be denied, the appeal being of no practical value.

Action by Sophia S. F. Marion against Joseph W. Barnwell. Judgment for defendant, and plaintiff appeals. Appeal dismissed. Motion to reinstate dismissed.

Julian Fishburne, for the motion. Burke & Erckemann, opposed.

PER CURIAM. After the order of sale was made in this case, the plaintiff appealed to Hon. D. A. Townsend, Circuit Judge, for an order enjoining the sale. The motion was refused, and the sale was made. Notice of appeal was given, and the plaintiff gave notice that she would move before this court at the November term, 1902, for an order extending time to perfect this appeal. This motion was dismissed for failure of plaintiff to appear. Nothing further was done in the cause, although the April term of the court intervened, until November 20, 1903, when notice was given of this motion "for an order to reinstate the appeal taken in this cause from the order of his honor Judge D. A. Townsend, made March 24, 1902, said appeal having been dismissed for default of appearance." The ground upon which the motion is based is the illness of the plaintiff's attorney at the

November term, when the former motion was dismissed. This is, of course, ordinarily good ground for relief; but we do not think it should be granted where there has been such long delay, especially when, in the meantime, the rights of the third parties who purchased at the sale would be disturbed. It is no answer to this to say no notice of the former order of the court was given, for the plaintiff was the moving party, and is charged with notice of disposition of her motion at a time and place fixed by herself. Rule 20 has no application, for the order made at the November term, 1902, only refused further time to perfect the appeal, and was not an affirmance of a decree or order, or dismissal of an appeal.

Aside from the foregoing considerations, this being an appeal from an order refusing a temporary injunction against a sale which has since actually occurred, the review of the order appealed from by this court could have no practical effect.

The motion is therefore dismissed.

(68 S. C. 41)

MUCKENFUSS v. FISHBURNE et al.
(Supreme Court of South Carolina. Aug. 3, 1903.)

FORECLOSURE—JUDGMENT—MOTION TO OPEN—DELAY—APPEAL—STAY.

1. Where, on foreclosure, an application to open the judgment was based on the same ground which had been presented to another judge on an application to continue the case, which application was denied, and the application to open the judgment was not made until after a sale of the property, and no excuse was given for the delay, a refusal to open the sale was proper.

2. Unless a bond is given on appeal from an order of sale in foreclosure, as required by Code Civ. Proc. § 352, the sale is not stayed.

3. Where an appeal from an order is dismissed, it is conclusive on all questions raised thereunder.

4. An appeal from a nonappealable order does not stay further proceedings below.

Appeal from Common Pleas Circuit Court of Dorchester County; Gary, Judge.

Foreclosure by Harriet E. Muckenfuss against Helen M. Fishburne and Sophie F. S. Marion. Defendants appeal from order refusing to set aside judgment of foreclosure. Affirmed.

Julian Fishburne, for appellants. Burke & Erckemann and Simons, Siegling & Cappelmann, for respondent.

WOODS, J. This action was instituted January 3, 1901, for the foreclosure of a mortgage on two lots situated in the town of Summerville, S. C., given by Helen M. Fishburne, March 3, 1894, to secure the payment of a bond executed to the plaintiff by Helen M. Fishburne and Sophie F. S. Marion. Plaintiff also demanded judgment against the defendants for the amount due on the bond. Mrs. Fishburne, in her answer, denies all liability under the bond and mortgage, al-

leging that she signed the same, at the request of her husband, as guarantor or surety of her codefendant, Mrs. Marion; that the money borrowed on said security was borrowed and used for the payment of the individual debts and liabilities of Mrs. Marion, and that no part thereof went into her hands, or was used for her individual benefit or that of her separate property; that at the time of signing the bond and mortgage she was a married woman, and that under the law then in force she could not bind or make herself liable on any contract or obligation except those relating to and for the benefit of her separate estate. The answer of Mrs. Marion, as far as it goes, is to the same effect. By consent of the parties, it was referred to the master of Dorchester county to take the testimony in the cause and report the same to the court. The master's report was filed February 1, 1902. Mr. D. H. Behre, who was defendants' counsel at that time, filed exceptions to this report. The cause came on for trial at the February term, 1902, of the court of common pleas for Dorchester county, Judge Townsend presiding. Messrs. Izlar Bros., who originally represented the defendants, had withdrawn from the case, and had been succeeded by Mr. D. H. Behre. An accident had recently befallen Mr. Behre, which prevented his attendance, and no counsel appeared for defendants. In view of the circumstances the case was continued, and, to speed the hearing of the cause upon its merits, the court ordered that, besides the testimony already taken and filed, the master take and report such additional testimony as might be offered, and file his report of same at least 10 days before the next term of court. The defendants appealed from this order, and upon the hearing in this court the judgment below was affirmed. See *Muckenfuss v. Fishburne*, 65 S. C. 573, 44 S. E. 77.

While this appeal was pending at the May term of court, 1902, Judge Gage presiding, the case was again called for trial. Mr. Julian Fishburne, agent of the defendants, appeared in their behalf, and asked for a continuance, stating that he had employed Maj. Jas. F. Hart as counsel, and as explanatory of his absence exhibited a telegram from him, of which the following is a copy: "Yorkville, S. C., May 17th, 1902. To Julian Fishburne, Summerville, S. C. Cannot go to Georges, been sick all week. Sorry. [Signed] Jas. F. Hart." The presiding judge refused the motion on the ground that he was satisfied it was for delay, and without merit, and proceeded to a trial of the cause on the pleadings and testimony, holding that the appeal from the order of Judge Townsend did not arrest the further progress of the action. In a decree filed May 19, 1902, the exceptions to the master's report were overruled, and it was ordered, that judgment be entered against the defend-

ants for the amount found due on the bond and mortgage, and that the mortgaged property be sold by the master on sales day in July, 1902. The defendants gave notice of appeal from this order and decree, but failed to perfect their appeal within the required time. Notice was afterwards given of a motion in this court to extend the time in which to serve the case and exceptions, but, the defendants failing to appear, the motion was dismissed November 25, 1902.

Pursuant to the order of Judge Gage, the master sold the mortgaged property on July 7, 1902, and executed a deed for the same to the purchaser. His report of sale and disbursements was filed August 16, 1902. The defendants thereupon gave notice that they would object to the confirmation of the report, setting out a number of exceptions thereto. Prior to the sale, Julian Fishburne, husband of the defendant Helen M. Fishburne, gave notice to the master that, as the head of a family, he was entitled to a homestead in the lands and buildings advertised to be sold, and that the same should be set off and assigned to him.

At the October term of court, 1902, Judge Gary presiding, the cause came on for a hearing on a motion by plaintiff to confirm the report of sale and a motion by defendants upon exceptions that the same be not confirmed. Defendants also moved to be relieved from the judgment, order, and decree taken in the cause, and that the master's deed be canceled, setting up in an affidavit that the said order and decree was taken through their surprise and excusable neglect by reason of the illness and nonappearance of their counsel, Maj. Hart, and that at the times the decree and the sale were made an appeal from a previous order was pending in the Supreme Court. The defendants' motions were overruled, and the master's report of sale confirmed in an order filed November 3, 1902, the presiding judge holding that there were no facts which would justify him in refusing to confirm the report; that the matters and things referred to in defendants' exceptions were before Judge Gage on the hearing of the main cause, and therefore were not subject to review by him; and that the judgment, order, and decree was not taken against the defendants by reason of their mistake, inadvertence, surprise, or excusable neglect. From this order defendants appeal.

The first, second, third, fourth, fifth, and eighth exceptions charge abuse of discretion and error of law by Judge Gary in refusing to open the judgment of foreclosure and sale made by Judge Gage on the ground of inadvertence, surprise, and excusable neglect. The record disclosing this application to Judge Gary was based on practically the same grounds which had been presented to Judge Gage on the application to continue the cause. In addition to this, the application to open the judgment was not made till after

the master had sold the property, and no excuse was given for the delay. It is quite clear it would have been very improper in Judge Gary to attempt to open the judgment under these circumstances.

No reason is stated, and we can discern none, why Judge Gage did not have jurisdiction of the cause when he ordered the sale. Besides, no question of this sort could be considered except under appeal from the decree of Judge Gage, and that appeal was dismissed. The sixth exception is therefore overruled.

When the court orders property to be sold to satisfy a mortgage, notice of appeal from the order does not stay the sale, unless an undertaking is given as required by Code Civ. Proc. § 352. No undertaking was given, and hence the seventh exception must fail.

The right of homestead, and the question whether Mrs. Fishburne was bound by the mortgage, being a married woman, claiming the mortgage was given for the exclusive benefit of Mrs. Marlon, her codefendant, were necessarily adjudged by Judge Gage's decree, and could not be reconsidered by Judge Gary. When the appeal from the decree of Judge Gage was dismissed, all the questions which appellants attempt to make in the ninth and tenth exceptions were finally determined.

The judgment of this court is that the judgment of the circuit court be affirmed.

On Rehearing.

(Dec. 8, 1903.)

PER CURIAM. We are unable to find that any exception taken by defendants, or any material fact or principle of law, has been overlooked in the decision of the above-stated case. It seems hardly necessary to say the appeal from the order of reference made by Judge Townsend did not operate to stay further proceedings in the circuit court, or effect its jurisdiction to hear the cause, for the reason that such order of reference was not appealable. *Muckenfuss v. Fishburne*, 65 S. C. 573, 44 S. E. 77; 2 Cyc. 889. The petition for a rehearing is therefore refused, and the order heretofore granted staying the remittitur is revoked.

(68 S. C. 53)

STATE v. JACKSON.

(Supreme Court of South Carolina. Jan. 18, 1904.)

CRIMINAL LAW—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE—APPEAL.

1. An instruction that circumstantial evidence, if it convinces the mind of the guilt of defendant beyond a reasonable doubt, is just as satisfactory evidence as any other evidence, and that, when one seeks to convict on circumstantial evidence, the jury must be satisfied of defendant's guilt beyond a reasonable doubt, and

¶ 1. See Criminal Law, vol. 14. Cent. Dig. §§ 1287, 1288.

the circumstances must point to his guilt to the exclusion of any other reasonable hypothesis, is not error.

2. Where there is any evidence to sustain a conviction, a refusal of a new trial will not be disturbed.

Appeal from General Sessions Circuit Court of Hampton County; Purdy, Judge.

Henry Jackson was convicted of stealing sheep, and appeals. Affirmed.

W. S. Smith and Jno. S. Reynolds, for appellant. Asst. Atty. Gen. Townsend, for the State.

WOODS, J. At the fall term, 1902, of the court of general sessions for Hampton county, the defendant was convicted of stealing a sheep. In charging the jury the presiding judge said: "So far as circumstantial evidence is concerned, if it convinces your minds of the guilt of the defendant beyond a reasonable doubt, it is just as satisfactory evidence as any other evidence. I charge you in reference to that, however, that when one seeks to convict on circumstantial evidence, you must be satisfied of the guilt of the defendant beyond a reasonable doubt, and the circumstances must point to his guilt to the exclusion of any other reasonable hypothesis. That means no more than this: Having carefully considered all the facts and circumstances, does your mind lead you, as reasonable men, to the conclusion that this defendant is guilty of the offense? If it does, and your minds come to that conclusion from the surroundings in which he was placed, in reference to this matter, then it would be your duty to write a verdict of 'Guilty.' But if, after having calmly and carefully considered all the facts and circumstances of the case, you have a reasonable doubt—that is to say, if you can say, 'We ought not to find the defendant guilty because we have a reasonable doubt, from the evidence, of his guilt'—then you will say, 'Not guilty,' because he is entitled to the benefit of every reasonable doubt. The state makes out its case beyond a reasonable doubt, and then, on the whole case as made out by the state and the defendant, he is entitled to such doubt."

There are several exceptions to the charge, but the only question raised is whether, in the latter part of the passage quoted, the presiding judge withdrew from the jury the proposition that conviction should not be based on circumstantial evidence, unless it is strong enough to exclude every other reasonable hypothesis than guilt. Where circumstantial evidence is relied on, the absence of reasonable doubt implies impossibility of explaining the evidence on any reasonable hypothesis of innocence. The effect of evidence not being sufficient to exclude every other reasonable hypothesis than guilt is to leave doubt of guilt more or less strong, according to the circumstances of the particular case. Taking all the language here used together, the jury could not have failed to re-

ceive the impression that the accused could be convicted only in case they were convinced no theory of the testimony could be adopted which could produce reasonable doubt. It is manifest this is the true view of the law. If the defendant thought the statement not sufficiently clear, he should have asked from the court more specific instructions. *State v. Milling*, 35 S. C. 16, 14 S. E. 284; *State v. Davenport*, 38 S. C. 348, 17 S. E. 37.

A careful examination of the record does not lead to the conclusion that there was no evidence to sustain the verdict, and we cannot say there was an abuse of discretion in refusing a new trial.

The judgment of this court is that the judgment of the circuit court be affirmed.

(38 S. C. 26)

MILSTER et al. v. CITY OF SPARTANBURG et al.

(Supreme Court of South Carolina. Dec. 8, 1903.)

MANDAMUS—PARTIES—CITIES—COLLECTION OF TAXES—SURRENDER OF CHARTER—EFFECT—ESTOPPEL—EXEMPTIONS—LIMITATIONS.

1. In a petition for mandamus to enforce the right of a citizen, the state is not a necessary party, where it is not concerned in its sovereign capacity.

2. Where a city ought to have enforced the collection of taxes against a resident corporation, mandamus will lie to compel such enforcement, without previous demand.

3. The surrender of a city charter and the incorporation of a city under a general law do not destroy the right of the city to collect taxes and other debts due to it under the old charter, nor prevent the enforcement of debts due by the city.

4. A city cannot be compelled by mandamus to levy taxes for years previous to the Constitution of 1895, there having been no power given by statute prior thereto to assess property for past years, when it had for any cause been omitted from the assessment for those years.

5. Under the Constitution of 1895, which made the city assessment of property the same as that for the state and county as to the years since the adoption of the Constitution, mandamus will lie to compel the city to assess unpaid taxes for such years.

6. A city is not estopped to enforce omitted taxes for the reason that the council, without any authority or power so to do, exempted certain property from taxation.

7. Where a city has failed to enforce taxes against a corporation on the erroneous ground that it was exempt from taxation, and taxpayers seek by mandamus to compel the enforcement of such taxes, the analogy of the statute of limitations will be applied to the corporation required to pay back taxes for six years prior to the commencement of the proceeding.

Application of J. H. Milster and A. J. Abbott for writ of mandamus against the city of Spartanburg and Spartan Mills. Writ granted.

Sease & Hoke, for petitioners. Simpson & Bomar, Sanders & De Pass, and Ralph K. Carson, for respondents.

WOODS, J. J. H. Milster and A. J. Abbott, as residents and taxpayers of the city of Spartanburg, by their petitions filed in

this court, ask that a writ of mandamus be issued to compel the city of Spartanburg to assess unpaid taxes against Spartan Mills for 18 years, beginning with 1890 and including 1902, amounting to \$52,226.06, and to require Spartan Mills to pay the amount so assessed. The petitioners have been consolidated, and no separate discussion of them is necessary.

Jas. Y. Culbreath, Esq., was appointed referee to take the testimony and report on the issues of fact made by the return of the respondents, and his full and lucid report is sustained throughout by the overwhelming weight of the evidence. No detailed discussion of the petitioners' exceptions to the findings of fact will be necessary, because, whatever view may be taken of the exceptions, the undisputed facts are, we think, conclusive of the case.

In 1888 a number of the citizens of Spartanburg had established in the city a cotton mill, under the charter of the Spartanburg Manufacturing Company. The enterprise was not profitable. The opinion was entertained by many, if not all the business men of the city, that its prosperity would be greatly advanced if a large manufacturing enterprise should be established within the corporate limits. A mass meeting of citizens was held to consider the matter, at which the statement was made that a large enterprise would be undertaken on the foundation of the Spartanburg Manufacturing Company, on condition that the city council would exempt all the property of the corporation, except its land, from taxation for 10 years. In furtherance of the plan, the city council passed an ordinance, February 27, 1890, providing that for the period of 10 years a sum equal to the city taxes on all the cotton mill company's property, except the land owned and used by it, should be paid to the company from the city treasury, and that the ordinance should be taken and construed as a contract with the city of Spartanburg. The Spartan Mills was induced by this ordinance to acquire the property of the Spartanburg Manufacturing Company, and, with a capital stock of \$500,000, built a large cotton mill in the city, which, without this inducement, it would not have done. Instead of requiring a return of the property, making an assessment, and exacting payment of the taxes, and then paying to the mill company a like amount, as the letter of the ordinance directed, the city council omitted these formalities, treated the property as exempt from municipal taxation, and exacted no taxes for 10 years. Since the expiration of the period of 10 years, taxes have been regularly paid on all the property embraced in this intended exemption. In 1895 the directors of Spartan Mills determined to build another large mill, to be known as "No. 2," and were inclined to locate it some miles outside of the corporate limits, on account of some advantages claimed for mills operated away from towns and cities. To induce the company to build this

mill in the city, and prevent the supposed diversion of business which would result from placing it a few miles away, the city council passed another ordinance of the same import as that above recited, the exemption period being for the term of 20 years, and applicable to the proposed new mill. The terms of this ordinance were accepted, and the new factory went into operation in 1897, and has paid no taxes on the property the ordinance was intended to exempt.

The evidence must convince any candid mind that the highest hopes of the result of the construction of the mills were realized, and that their operation imparted a great impulse to the city's progress. There is no evidence that the city council or the Spartan Mills had notice of any objection to the exemptions when the second mill was built, or at any time until these petitions were filed. The first ordinance was duly published, and the exemption provided by it seems to have been generally known to the people of Spartanburg, but no vote of the people was ever taken as to either attempted exemption. Milster testified he had known of the exemption several years—he could not tell how many, but before he commenced paying city taxes in 1898. Abbott could not say how long he had known of it. He has been paying taxes since 1879. Both petitioners have been benefited by the erection of the mills more than the entire city taxes paid by them since the exemption has been in effect. In the petition it is alleged that the proceeding is instituted, not only for the benefit of the petitioners, but of other taxpayers of the city of Spartanburg, who have had an additional burden placed upon them by reason of the alleged unjust discrimination. Some taxpayers who appeared as witnesses for petitioners testified to their dissatisfaction with the exemption, but the referee finds that a great majority of the citizens of Spartanburg are in favor of carrying out the contract of exemption which the council attempted to make, and this conclusion is well supported by the testimony. The respondents do not, in their returns or arguments, take the position that the city council had the legal right to grant the exemption or rebate, but insist the writ should be refused, on the facts above stated, for several reasons, which will be separately considered.

That the state is not a necessary party to a petition for mandamus, presented by a citizen to enforce a right in which the state in its sovereign capacity is not concerned, is settled by the case of *Lord v. Bates*, 48 S. C. 95, 26 S. E. 213. The state as a sovereign has no direct interest in the collection of the municipal taxes of the city of Spartanburg; only that portion of the public is concerned which is represented by the residents and taxpayers of the city.

The petition cannot be dismissed for lack of demand and refusal. If the Spartan Mills ought to have paid the taxes, and if the city

of Spartanburg ought to have enforced their collection, the duty resting upon each was to the municipal public, and no one was specially charged to demand its performance; the obligation was imperative without demand. "The duty makes the demand, and the omission is the refusal." High on Extraordinary Remedies, § 41; Dillon on Municipal Corporations, § 867; Attorney General v. Boston, 123 Mass. 460.

The next position taken is that the present city of Spartanburg did not come into existence until December, 1901, when the charter of 1880 was surrendered and the city reincorporated under the general law enacted in 1901. The last section of this statute is: "The provisions of this act shall not affect the rights and liabilities acquired by any city under a charter heretofore granted and obtained." 23 St. at Large, p. 659. But, even without this section, the reincorporation would not have marked the destruction of the municipality, but its continuance with altered rights and powers as to the future, and hence would not have the effect of destroying the right of the city to collect taxes and other debts due to it under the old charter, nor prevent the enforcement of debts due by the city; nor would the right of a citizen to require the municipal authorities to collect or pay its debts have been impaired. "Accordingly, the substitution of a new municipal charter in the place of a previous charter, or a change in such a charter, in whole or in part, where substantially the same territory and the same inhabitants are concerned, will not be presumed or be held to be the creation of a new corporation, but the assumption by the old one of new powers and privileges." 1 Dillon on Municipal Corporations, § 172; Neely v. Yorkville, 10 S. C. 151.

The respondents next insist that the purposes for which municipal taxes were levied for the past 13 years have been accomplished, and for this reason the city council cannot lawfully require the payment of any taxes the Spartan Mills may owe for those years. It is not asked that a tax shall be ordained or created, that is, "levied," in the sense in which the word is used in article 10, § 8, of the Constitution of 1895. That was done by the city council for each current year. The charge is that the Spartan Mills was not required to pay its share of the taxes so levied. It is manifest that, if it failed to pay taxes due to the city, it cannot claim exemption on the ground that sufficient revenue was collected from others. When the general levy is within the charter limits, one who fails to pay cannot be discharged on the ground that there is no need for his portion. The fact that the payment will make an unexpended surplus in the treasury is of no importance. This frequently happens in the ordinary course of affairs, and the only effect should be to lessen the future burdens of the taxpayers.

It should be observed, however, in this connection, that a mandamus cannot be issued requiring the city to assess property in order to collect taxes for past years. Prior to the adoption of the Constitution of 1895, the city of Spartanburg, under its charter, made an annual valuation or assessment of property, for taxation, through its own tax machinery. No power is given by statute to the city to assess property for past years, when it had for any cause been omitted from the assessment of those years. No such power is to be implied, for even state tax officers make assessments for back taxes only in pursuance of express and very specific statutory direction. As separate municipal assessment or valuation was required for each current year as a basis of taxation for that year, and no such assessment of the mill property was made year by year, no valid assessment for back taxes can now be made for any year before the Constitution of 1895, which made the city assessment of property the same as that for the state and county, went into effect. The city has no machinery which it could legally put in motion to procure an assessment for these years, and the court has no power to provide it. 2 Dillon on Municipal Corporations, § 763; Id. § 81C, note; High on Extraordinary Remedies, §§ 140, 144; U. S. v. Clark Co., 95 U. S. 769, 24 L. Ed. 545; 1 Desty on Taxation, 466; Burroughs on Taxation, 197. Since assessment must precede payment and collection—for in no other way can the amount of the taxes be ascertained—the taxes for the years which passed before the Constitution of 1895 was adopted cannot be ascertained without legislative aid, and hence the court cannot order the Spartan Mills to pay them. This difficulty, of course, does not exist as to the municipal fiscal years in which the state and county assessment was the basis on which the city taxes should have been paid. As to these years, the mandamus requiring payment should issue, unless the other defenses are sufficient.

The next inquiry is whether the city of Spartanburg and the petitioners are estopped from asserting the liability of the Spartan Mills to pay taxes for the term for which the city council undertook to give the exemption or rebate. It is true, a city may be estopped to deny the validity of acts done by its city council for a public purpose by continuing to accept the benefits of such action, but this is where the act is merely an irregular or improper exercise of power conferred by law. Where there is an entire absence of power to do what it has undertaken because the contract or ordinance is forbidden by the Constitution or statute law of the state, the council in such action does not represent the municipality, and for this reason the city cannot be estopped to deny the validity of the contract or ordinance of the council, whatever may be the loss entailed on those who have acted on the faith of the supposed pow-

er, or the incidental benefit which accrues to the residents of the city. The effort to bind the city amounts to no more than if the council had undertaken to legislate or make contracts for another municipality or for the entire state. This conclusion is based on familiar legal principles, which apply with equal force whether the ordinances in this case be regarded attempts to exempt from taxation or donations by the council to the Spartan Mills. *Feldman v. City Council*, 23 S. C. 62, 55 Am. Rep. 6; *Garrison v. Laurens*, 54 S. C. 456, 32 S. E. 696; *Dillon on Municipal Corporations*, § 445; 4 *Thompson on Corporations*, § 5258. The numerous cases cited by respondents do not involve the distinction above stated, and hence are not applicable. The attempt to rebate the taxes, or exempt from taxation, were acts absolutely void of legal effect, because forbidden by section 8, art. 9, of the Constitution of 1868 (*Garrison v. Laurens*, *supra*), and because the attempted exemption or rebate was not for the public purposes of the municipality. *Feldman v. City Council*, *supra*. There is nothing in the testimony upon which the petitioners could be held estopped. If they had participated in the efforts made to induce the mill company to build in the city, and in any way assented to the exemption or rebate as a condition and consideration, they would be within the principle laid down in *Ross v. Gaffney City*, 57 S. C. 105, 35 S. E. 439, and their complaint should not now be regarded; but they are charged only with inaction and silence while the mill company was investing its money on the faith of the exemption from taxation. For conduct of one party to work an estoppel, it must be shown that without such conduct the other would not have acted. It is agreed on all hands that the city council and the directors of the Spartan Mills thought they were making a legal contract, binding upon all the citizens of Spartanburg. It is quite clear that the mills were built, not in reliance on the past or expected assent of any or all citizens as individuals, but, on the contrary, the reliance was on the contract with the city council being a protection against the future demands of individual citizens, as well as of the city itself. Besides, when the contracts were made and when the money was expended by the mill company in construction, the petitioners had no information, nor means of information, not possessed by the respondents. For these reasons, we think the mere inaction of the petitioners does not estop them. *Bigelow on Estoppel*, 570.

It is submitted by respondents the court should refuse to order the writ in the exercise of its discretion, in view of the great benefit received by the municipality and the petitioners themselves from the construction of the mills, the petitioners having for years accepted these benefits without complaint. The discretion of the court must be guided by law, and cannot be exercised in the denial

of a plain legal right. *Ex parte Mackey*, 15 S. C. 328. Whether gratitude for the incidental benefits accruing to the petitioners from the building of the mills, on the faith of the exemption, should suggest a waiver of their rights as citizens to require the payment of the taxes, is an inquiry for the consideration of the parties themselves. The court can exercise no discretion on that ground. The serious question for the court is, did the inaction and delay amount to such laches as will make the granting of the petition unjust and inequitable? *Myers v. Appleby*, 25 S. C. 104; *Gruber v. Knight*, 31 S. C. 84, 9 S. E. 692; *Cummings v. Kirby*, 17 S. C. 566. If so, whatever may have been the rights of the petitioners, they should not now be enforced. *Cummings v. Kirby*, 17 S. C. 563; *Spelling on Extraordinary Relief*, § 1382; *High on Extraordinary Remedies*, § 38. In solving this question the important inquiries are: (1) Was the delay unreasonable? and (2) would its natural result be injury to the party against whom the relief is sought? The action of the city council attempting to exempt the mills from taxation being absolutely void, and the city taxes having been assessed and collected for each year separately, the failure of the mills to pay became each year a separate default. We venture to think there will be no question that the delay in endeavoring to enforce the collection of taxes for the year 1890, 13 years after they accrued, would be unreasonable. On the other hand, it is quite certain that a proceeding instituted in 1903 to enforce collection of taxes of 1902 would be regarded within the rule of due diligence. Where should the line between these dates be drawn? It cannot be doubted, if this were an action by the city council to recover past-due taxes from the Spartan Mills, the statute of limitations would be a complete bar to the recovery of all taxes due more than six years before the commencement of the action, for the reason that a municipal tax is a liability created by statute, and falls within subdivision 2 of section 112 of the Code of Procedure. *Dillon on Municipal Corporations*, §§ 668, 674; *Bristol v. Washington Co.*, 177 U. S. 144, 20 Sup. Ct. 585, 44 L. Ed. 701; *State v. Certain Lands in Redwood Co. (Minn.)* 42 N. W. 478. We suppose the statute of limitations was not pleaded because it was not regarded applicable to a proceeding of this kind, under the authority of *State ex rel. Cummings v. Kirby*, 17 S. C. 566. Where, as in this case, however, an application is made for mandamus to require the payment of an aggregate amount arising from a distinct obligation accruing each year for a number of years, the safe and reasonable rule is to adopt the analogy of the statute in fixing the line of unreasonable delay amounting to laches. *High on Extraordinary Remedies*, § 30b; *People v. Chapin (N. Y.)* 10 N. E. 142. See, particularly, the well-considered case of *State v. Certain Lands in Redwood Co.*, *supra*. The

foundation of the statute of limitations is that the adjustments of business life would be unduly disturbed by allowing stale and perhaps forgotten demands to be pressed in the courts. The denial of relief on account of laches, even where there is a clear legal right, rests on the same ground. The petitioners are guilty of nothing tending to impair their legal rights except inaction; but during the time of their inactivity many shares of the Spartan Mills may have been acquired by the present stockholders without thought of this large aggregate of indebtedness to the city of Spartanburg. It seems, therefore, manifestly equitable to require the Spartan Mills to pay only such indebtedness for taxation as would not be barred by the policy of the law as expressed in the statute of limitations, if the city had brought a direct action for its recovery.

The petitioners are therefore entitled to the writ of mandamus to require Spartan Mills to pay all unpaid municipal taxes on its property in the city of Spartanburg which have fallen due within six years prior to the 12th day of March, 1903, when this proceeding was instituted, but not for such unpaid taxes as fell due more than six years before that date.

It is referred to Jas. Y. Culbreath, Esq., to ascertain the precise amount of municipal taxes of Spartan Mills unpaid, which have fallen due within six years prior to March 12, 1903. Upon the filing of his report, it is ordered that a writ of mandamus do issue commanding the Spartan Mills to pay the amount so ascertained into the treasury of the city of Spartanburg, unless exceptions shall be duly taken to the report within 20 days after filing.

(68 S. C. 89)

REEVES v. SOUTHERN RY. ATTAWAY
v. SAME. WILLIAMS v. SAME. CON-
NELLY v. SAME.

(Supreme Court of South Carolina. Jan. 20,
1904.)

TORTS OF SERVANT—LIABILITY OF MASTER—
RAILROADS—REFUSAL TO STOP TRAIN—EVI-
DENCE—INSTRUCTIONS—DAMAGES.

1. A master is liable in punitive damages for the willful tort of a servant.

2. In an action against a railroad company for willful and malicious refusal to stop its train, whereby plaintiff was obliged to walk many miles, sustaining physical injury and loss of time, statement by the engineer of the train that he had never disregarded a signal to stop is incompetent, as he was not a party to the suit, and there were no allegations in the complaint charging him with willful misconduct.

3. In an action for willful tort in refusing to stop a train at a station, an instruction that, if the act of defendant was done wrongfully and recklessly, plaintiff would be entitled to recover exemplary damages by way of punishment by adding to the compensatory damages a sufficient sum to prevent defendant from doing a like wrong to anybody else, is not erro-

neous as awarding compensatory damages on failure of plaintiff to prove the willful tort alleged.

4. A refusal to charge that a quotient verdict is illegal is not reversible error where there is nothing to show that appellant suffered prejudicial injury by such refusal.

Appeal from Common Pleas Circuit Court of Newberry County; Izlar, Special Judge.

Four actions tried together: (1) Thomas H. Reeves against Southern Railway, (2) James T. Attaway against same, (3) M. P. Williams against same, and (4) Willie Connelly against same. From judgments for plaintiffs, defendant appeals. Affirmed.

T. P. Cothran, for appellant. Cole L. Blease and Johnstone & Welch, for respondents.

GARY, A. J. The following statement appears in the record: "The four plaintiffs above named, with Quincy Williams, brought several actions in the court of common pleas for Newberry county March 11, 1902, for damages each in the sum of \$1,900, on account of the alleged 'willful, wanton, reckless, and malicious' failure and refusal of defendant to stop its passenger train at Old Town for plaintiffs on July 4, 1900, whereby they were forced to walk thirteen miles to Newberry, sustaining physical injury, personal discomfort, loss of time consequent thereon, etc. The case of Reeves was tried at Newberry, before Hon. J. F. Izlar, Special Judge, October 20, 1902. Verdict for plaintiff \$450, upon which judgment was duly entered. The other cases were tried the following day. They were tried together by agreement. Verdict, each case, for \$175, in favor of plaintiff. Verdict in the Quincy Williams case was set aside, and a new trial was ordered. Judgments in each of the other three cases were entered up upon the verdicts. Due notice of appeal in each case was served by defendant from said judgments. It is agreed by counsel that the appeals in the four cases be heard together in this court. The complaints, answers, testimony, motion for nonsuit, judge's charge, notice of appeal, and exceptions are practically the same in all four cases, and it is agreed that the four appeals be heard and considered upon one copy of each of said pleadings and proceedings, with this exception: Exception 4, under division 2, 'Evidence,' applies only to the Reeves case."

At the close of the plaintiff's testimony, the defendant made a motion for a nonsuit on the following grounds: "(1) The complaint charges a willful tort by the defendant. This is not sustained by evidence of a willful tort by one of the servants, for which it is claimed the defendant is answerable. (2) The defendant is not liable in exemplary or punitive damages for an illegal, wanton, or willful act by one of its servants, which it has in no way authorized or ratified. (3) There is no evidence at all tending to show that the defendant in any way authorized the alleged willful tort of its servants, or

¶ 1. See Master and Servant, vol. 24, Cent. Dig. § 1273.

ratified the same. (4) To hold the defendant liable in punitive damages for the willful tort of its servant, in the absence of authorization or ratification, would deprive the defendant of its property without due process of law, contrary to the fourteenth amendment, Constitution of the United States. (5) There is no evidence tending to show any willful tort by the defendant or its servants." The motion was refused.

The following are the appellant's exceptions:

"(1) Motion for Nonsuit. First. Error in not sustaining the first, second, and third grounds, which present the point that a master is not liable in punitive damages for the willful tort of his servant in the absence of authorization or ratification, of which there is no evidence.

"Second. Error in not sustaining the fourth ground, which presents the point that, to hold the defendant liable in punitive damages for the willful tort of his servant, in the absence of authorization or ratification, would deprive the defendant of its property without due process of law, contrary to the fourteenth amendment, Constitution of the United States.

"Third. Error in not sustaining the fifth ground, which presents the point that there is no evidence tending to show any willful tort by the defendant or its servants.

"(2) Evidence. Fourth. Defendant's attorney asked the witness D. M. Madden, 'Did you answer the signal that night?' to which he replied, 'Never answered none; none given.' Witness was then asked, 'Did you ever do such as not to answer?' Upon objection the question was ruled out; the witness was not allowed to answer. Error in ruling out the question and answer is assigned upon the ground that, this being an action for willful tort, the habit and custom of the engineer was admissible to show his good faith and motive, and to negative the charge of a willful wrong; just as evidence of previous similar acts would have been competent in favor of the plaintiff. It was competent upon the further ground to show that the company was not negligent in retaining in its employ a reckless servant, and did not participate directly in the alleged tort, which, if true, would naturally enhance amount of punitive damages.

"(3) The Judge's Charge. Error in charging the jury as follows: 'I know that between willful mischief and gross negligence there is a very narrow margin, as said by one of our English judges—chief justices, I think. He said he rather thought it was impossible to define it, and I am rather inclined to think so myself—to define the line of demarcation between gross negligence and willful mischief.' The error consisting in this: This was an action for a willful tort, sounding in punitive damages. Punitive damages are not allowed in this state for gross negligence. The charge authorized the jury upon

the allegation of a willful tort to award punitive damages for gross negligence. The distinction between gross negligence and willful tort is great.

"Sixth. Error in charging the jury as follows: 'Now, there are two kinds of damages. For instance, we have what is called "compensatory damages"; that is, to compensate the plaintiff for the injuries he has received by reason of the wrongs and injuries he has received. Now, compensatory damages do not amount necessarily to his physician bills or medicine bills, and all that sort of thing. You are to take into consideration the bodily pain, what he suffered, if he suffered anything at all, by reason of those injuries. You are to take into consideration his loss of time, if you come to the conclusion he lost any time, from the testimony in this case, and how much time did he lose. All these things come in by way of compensation for the injuries received. Sometimes impairment of health, present and future, come into this case; and you are to take these things into consideration. Now, as I said, the question of damages is particularly for you. You are to be the judge of it, and decide what damages, if any, the plaintiff has sustained by reason of that act—of the wrongful act of the defendant which he complained of. You are to decide that from the testimony. Now, if you come to the conclusion that the act of the defendant on this occasion was done wrongfully and recklessly, why find, in addition to compensatory damages such as I have named, the plaintiff would be entitled to recover what is called "exemplary" or "punitive" damages, sometimes called "smart money." That is, by way of punishment to the railroad company, by adding to the compensatory damages which you have found the plaintiff has suffered, and a sufficient sum to prevent them doing a like wrong to anybody else in the future.' The error consisted in this: The charge permitted the jury to award compensatory damages in the event the plaintiff failed to prove a willful tort. The action was based upon a willful tort. Upon proof of it the plaintiff might recover either or both kinds of damages; but if he failed to prove it as alleged, he could recover neither.

"Seventh. Error in charging the jury as follows: 'If you come to the conclusion that the plaintiff has suffered any damage at all, why, you will find what damages he has suffered. If from the testimony you come to the conclusion that it was the result of the willful, wanton, and reckless act or omission of the defendant, why then you can go on and add to that such damages by way of punishment—punitive, as it is called—such sum as you think just.' The error being the same as in preceding exception.

"Eighth. Error in charging the jury as follows: 'When there is evidence to establish the fact that the defendant or its agents and servants were guilty of willful negligence

or conscious indifference to the consequences, there can be no recovery for exemplary damages.' The error being that the defendant is not liable in punitive damages for the willful tort of one of its servants.

"Ninth. Error in refusing the defendant's sixth request to charge, which was as follows: 'The defendant is not liable in punitive damages for a willful tort by one of its servants in the absence of authorization or ratification.' The same containing a correct proposition of law applicable in the case.

"Tenth. Error in refusing the defendant's seventh request to charge, which was as follows: 'To hold the defendant liable in punitive damages for the willful tort of its servants, in the absence of authorization or ratification, would deprive the defendant of its property without due process of law, contrary to amendment 14, Constitution of the United States.' The same containing a correct proposition of law applicable to the case.

"Eleventh. Error in refusing the defendant's eighth request to charge, which was as follows: 'A quotient verdict is illegal.' The same containing a correct proposition of law, and intended to warn the jury from the illegal practice of adding up the several individual estimates and dividing such sum by 12, and by previous agreement adopting such quotient as the verdict."

The appellant's attorney, with his accustomed analytical arrangement, has classified the questions presented by the exceptions under five heads, which we will follow in considering the exceptions.

The first is: Is a master liable in punitive damages for the willful tort of a servant? This principle has been settled so long and recognized so often in this state contrary to the views for which the appellant contends, that we do not deem it necessary to add any authorities to those cited in the argument of the respondents' attorneys.

The second is: Was it competent evidence to show by the engineer that he had never done such a thing as run by a flag station when he was signaled to stop? In 1 Greenleaf on Evidence, § 54, the rule is thus stated: "In civil cases such evidence is not admitted unless the nature of the action involves the general character of the party, or goes directly to affect it. * * * And in all cases when evidence is admitted touching the general character of the party, it ought manifestly to bear reference to the nature of the charge against him." Again, in section 55, it is said: "It is not every allegation of fraud that may be said to put the character in issue; for, if it were so, the defendant's character would be put in issue in the ordinary form of declaring in assumpsit. This expression is technical, and confined to certain actions from the nature of which, as in the preceding instances, the character of the parties, or some of them, is of particular importance. This kind of evidence is there-

fore rejected whenever the general character is involved by the plea only, and not by the nature of the action." In 5 A. & E. Enc. of Law (2d Ed.) 863, it is said: "The fact that a party to a civil action, or some person concerned in the transaction out of which the action arose, is charged with fraud or moral delinquency, will not generally result in allowing evidence of character to be admitted." There are two reasons why this testimony was properly rejected: First, the nature of the action was not such as to render it admissible; and, second, the engineer was not sued as a party defendant, and there were no allegations in the complaint charging him with willful misconduct.

The third is: Did the circuit judge charge that the plaintiffs were entitled to recover upon proof of gross negligence? When that part of the charge set out in the exceptions is considered in connection with the other portions thereof, and in connection with the defendant's requests that were charged, it will be seen that the charge is not susceptible of the interpretation placed upon it by the appellant.

The fourth is: Did the circuit judge charge that the plaintiffs were entitled to recover upon proof of ordinary negligence? This question is disposed of by what was said in considering the third question.

The fifth is: Did the circuit judge err in refusing the request to charge concerning quotient verdicts? The request was as follows: "A quotient verdict is illegal." The request simply contained a warning to the jury, and, even conceding that it was a sound proposition, there is nothing in the record showing that the appellant suffered prejudicial injury by reason of the refusal to so charge.

It is the judgment of this court that the judgment of the circuit court in each of said cases be affirmed.

(68 S. C. 12)

FALES & JENKS MACH. CO. v. BROWNING.

(Supreme Court of South Carolina. Dec. 8, 1903.)

GUARANTY — DILIGENCE — EVIDENCE — BANKRUPTCY — DOCUMENTARY EVIDENCE — NONSUIT.

1. In a suit against a corporation and the guarantor of its debt, the record of a suit against the corporation containing an appointment of a receiver is admissible on the question of diligence in pursuing the principal debtor.

2. Duplicate original of a schedule in bankruptcy prepared under Bankr. Act July 1, 1898, c. 541, § 7, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424], is admissible in evidence as an admission of insolvency.

3. Under Bankr. Act July 1, 1898, c. 541, § 21, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430], a certified copy of the bankruptcy record is admissible in evidence as original evidence.

4. In determining the propriety of the refusal of a nonsuit, evidence offered by defendant after such refusal will be considered.

5. Where a guaranty was executed after the contract of sale of machinery, but before delivery, the original contract is a sufficient consideration.

6. Where a contract of guaranty is an absolute agreement to pay according to the original contract if the principal debtor fails to pay, no notice to the guarantor of nonpayment was necessary.

Appeal from Common Pleas Circuit Court of Laurens County; Carey, Special Judge.

Action by the Fales & Jenks Machine Company against J. S. Blalock, L. W. C. Blalock, and M. E. Browning. From judgment for plaintiff, defendant Browning appeals. Affirmed.

D. W. Robinson, Johnstone & Welch, and Ferguson & Featherstone, for appellant. N. B. Dial and F. P. McGowan, for respondent.

JONES, J. The Fales & Jenks Machine Company, a corporation of Rhode Island, on July 9, 1900, contracted in writing with the Goldville Manufacturing Company, of Goldville, S. O., to deliver by November 1, 1900, certain machinery for the erection of a yarn mill at the price of \$9,404.24, f. o. b. cars at Pawtucket, R. I. "Terms of payment, one-half net cash, New York exchange, thirty days from date of bill of lading; balance by two (2) notes of equal amounts at six (6) and twelve (12) months, respectively, said notes to bear interest at the rate of six per cent. (6) per annum and to be dated from date of bill of lading." On the 19th day of November, 1900, as further assurance, the defendants, J. S. Blalock, L. W. C. Blalock, and M. E. Browning, executed and delivered to plaintiff an instrument in writing, which, after reciting the terms of the contract as above stated, stipulated as follows: "We hereby agree to indorse the said notes, and should the Goldville Manufacturing Co. fail to pay for said machinery on terms of contract made between themselves and the Fales and Jenks Machine Co., dated July 9th, or shall fail to pay any notes when due, which are given in payment, we the undersigned do hereby bind and obligate ourselves, jointly and severally, each with the other, and with the Fales and Jenks Machine Co., to make good and pay to the Fales and Jenks Machine Co. the amounts which may be due them in accordance with the contract above mentioned." The machinery was shipped about December 1, 1900, was received and used for the purposes intended, and the cash payment of \$4,702.12 was made on January 28, 1901. The plaintiff did not require notes for the credit portion of the contract. This action was brought in January, 1902, for the balance due against James S. Blalock, L. W. C. Blalock, and Mrs. M. E. Browning individually and as partners under the firm name of Goldville Manufacturing Company; the complaint alleging that Mrs. Browning was a partner in the Goldville Manufacturing Company at the

time the machinery was purchased, and further sought to make her liable as guarantor under the instrument above stated. J. S. Blalock and L. W. C. Blalock having been adjudged bankrupt, each upon his own petition, the action was directed mainly against Mrs. Browning, and the issues arose upon her answer denying that she was a partner in the Goldville Manufacturing Company, and denying liability as guarantor upon the grounds (1) that the guaranty was without consideration; (2) that the contract of July 9, 1900, was so changed as to discharge her; (3) because of the negligence of plaintiff in prosecuting the claim against the principal debtor, and in failing to give timely notice of default to her as guarantor. The action resulted in a verdict and judgment against Mrs. M. E. Browning for the amount claimed, from which she appeals.

1. As to the exception of admissibility of evidence. We think there was no error, as claimed in the first exception, in admitting in evidence the complaint, answer, and order appointing a receiver in the case of Columbia, Newberry & Laurens Railroad Company against Goldville Manufacturing Co. et al., even though Mrs. Browning was not a party to such suit. The Goldville Manufacturing Company was a party to the present suit, and the evidence was competent and relevant to show the fact and date of the insolvency of the Goldville Manufacturing Company, as being upon the issue as to the plaintiff's negligence in pursuing the principal debtor. Nor, for the same reason, do we think there was any error, as claimed in the second exception, in admitting in evidence a duplicate of the bankrupt record in the matter of the bankruptcy of J. S. Blalock and L. W. C. Blalock. Section 7 of the bankrupt act of Congress approved July 1, 1898 (Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424]), provides that the bankrupt shall prepare and file a schedule of his property in triplicate, one for the use of the trustee. One of these triplicate schedules would be competent as a statement by the party making it touching his insolvency. If the paper proposed to be introduced was a certified copy of the bankrupt record, it was admissible under section 21 of said act of Congress approved July 1, 1898 (30 Stat. 552 [U. S. Comp. St. 1901, p. 3430]), relating to bankruptcy.

2. There was no error in the refusal of the motion for nonsuit. This motion was based upon several grounds: (1) Because there was no testimony tending to show that Mrs. Browning was a partner in the Goldville Manufacturing Company when the machinery was bought; (2) the guaranty was without consideration; (3) there was such change in the contract as discharged the guarantor, etc. It is manifest, however, if there was testimony tending to show that Mrs. Browning was partner in the firm of the Goldville Manufacturing Company, the nonsuit was

properly refused, without regard to the matter presented in reference to Mrs. Browning's liability as guarantor. We will therefore first inquire whether there was any testimony tending to show that Mrs. Browning was a partner in the Goldville Manufacturing Company. At folio 29 of the "case," in the testimony of L. W. C. Blalock, who is the brother of Mrs. M. E. Browning, both being children of J. S. Blalock, we find the following: "Q. Had you ever taken your sister into partnership in the firm before you went north? A. No, sir. (Objected to by defendant.) Q. Did she have any interest in it? A. Not at that time. Q. When did she have any interest in it? A. Just before we incorporated it. Q. How long before? A. I don't know; not a great while. Q. When you stated that she was a member in June, was that correct? A. I didn't state that she was a member in June. (Objected to by defendant.) By the Court. I don't think that is competent. Q. Well, was she a member of the firm at the time you wrote that letter? A. Yes, sir. (Objected to by counsel for the defendant.) By the Court: I will rule this letter out. Q. Well, I will ask if she was a member of the firm the 1st of June, 1900? Look at that paper (presenting paper to witness). A. No, sir; she was not a partner at that time, and she did not consent to come in at that time. I don't think she was in that early." There was testimony that J. S. Blalock and L. W. C. Blalock were partners under the name of the Goldville Manufacturing Company, and there was some testimony by one of the firm that Mrs. Browning had some interest in the partnership before it became incorporated. The testimony showed that a charter of incorporation was taken out October 23, 1900. At folio 215, "case," Mrs. Browning testified as follows: "I was at Goldville the summer and fall of 1900, at my brother's house, before the Goldville Manufacturing Company was chartered. Father and Bud were interested in it. Q. Did you convey your land to the Goldville Manufacturing Company, where the mill is built? (Objected to by Col. Ferguson as being secondary.) A. I don't know. I was never told that I was to get any stock in the company, but I supposed I would, as pa told me he wanted to make it a family affair. I suppose the correct time would be when Mr. L. W. C. Blalock says I was interested. I knew they were going to buy machinery for the mill, but I did not know that L. W. C. Blalock went north to buy the machinery some time during the summer of 1900. I don't know when the machinery was delivered relative to the signing of the contract. I was never asked for my consent to be director, nor was I notified that I had been elected. My father and brother never discussed the affairs of the mill with me except in an informal and social way. My brother looked after my interests in the mill."

J. S. Blalock testified, at folio 148, that

there was no partnership between him and Mrs. Browning, that he was not interested in the partnership, and that he became interested in the mill after it was incorporated. At folio 152 et seq. he testified, substantially, that before L. W. C. Blalock went north to buy machinery, he (J. S. Blalock) told him that he would help him if he would make it a 5,000-spindle mill, and when asked the question, "Was anything said about his taking his sister in? Did you tell him, if he would take her in that you would help him?" J. S. Blalock answered, "We talked about it afterwards, and I said I wanted her in if I took anything in it; that I was working for them." He further testified that they began the construction of a 5,000-spindle mill in August, 1900. Beginning at folio 155, this witness further testified as follows: "Q. You say she was not a partner at that time? A. No, sir; I never recognized her as a partner at all. Q. You looked after her interest in the mill, did you not? A. I have looked after all her interests ever since she was born. Q. When you decided to make this mill a 5,000 mill, you decided to put her interest in that mill? A. I expected to put part of it there. Q. Where did she live? A. At Greenville, but she stayed at my home part of that year, and she was in bad health, her and her baby both. Q. She stayed there all the fall? A. Yes, sir. Q. You expected her to have an interest in the mill? A. Yes, sir; but she had none in the land. Q. You built that mill with your own hands? A. Yes, sir. Q. Made your own brick? A. Yes, sir; all but a few." While the testimony of J. S. Blalock was not given until after the refusal of the motion for nonsuit, it is not improper to refer to the same in considering whether to set aside the order of nonsuit. *Hicks v. Southern Railway*, 63 S. C. 567, 41 S. E. 758. We do not think it can be said that there was no testimony whatever tending to show that Mrs. Browning was a partner in the Goldville Manufacturing Company, and it was proper to leave it to the jury to determine that issue.

The circuit court, however, did not rest the refusal of nonsuit upon this ground, but upon the ground that the evidence with reference to the guaranty was sufficient to carry the case to the jury. The exact language used by the court just previous to overruling the motion for nonsuit, was: "The question for me to decide is not whether that partnership existed between the parties; it is whether or not there was a sufficient consideration on which that guaranty was made." A strict guaranty "is a promise to answer for the payment of some debt or the performance of some duty in the case of the failure of another person who is himself in the first instance liable to such payment or performance." 14 Ency. Law (2d Ed.) 1128. "A consideration is essential to the validity of a guaranty not under seal." *McKinney v. Quilter*, 4 McCord, 409; Ency. Law (2d Ed.)

1133, cases cited. The instrument in question, signed by J. S. Blalock, L. W. C. Blalock, and M. E. Browning, was not a strict guaranty, in so far as it was signed by those who constituted the partnership of the Goldville Manufacturing Company, for in such case the undertaking is not an agreement to pay the debt of another, but an agreement to pay one's own debt, and is amply supported by the original consideration. Inasmuch as there was some testimony tending to show that Mrs. Browning was a partner in the firm of the Goldville Manufacturing Company, this was some evidence tending to show a consideration for the agreement called a guaranty.

But let us assume that Mrs. Browning was not a party to the original contract of July 9, 1900, between the Goldville Manufacturing Company and plaintiff for the purchase of the machinery, and that her contract of November 19, 1900, is one of guaranty for the performance of the contract of the firm of Goldville Manufacturing Company, composed of L. W. C. Blalock and J. S. Blalock, either or both. The rule applicable is thus stated in 14 Ency. Law (2d Ed.) 1133: "Where the guaranty is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal or direct debtor, there is not, or need not be, any other consideration than that moving between the creditor and the original debtor under the principal contract. In this class of cases a benefit to the debtor without any benefit to the guarantor is sufficient. The consideration need not pass directly from the party giving to the party receiving it. It is enough if a benefit arises to the party for whom the guaranty is given, or the party receiving the guaranty is or may be injured by it. Although the guaranty is executed subsequently to the drafting of the principal contract, they will nevertheless be deemed to have been executed contemporaneously within the rule stated, if delivered at the same time, and before any obligation or liability is incurred under the principal contract. And a guaranty for the payment of goods for which a contract of sale is made, though executed subsequently to the agreement of sale, is supported by a sufficient consideration if the goods are not delivered until after the guaranty. The contract of sale is not complete until delivery." In 2 Daniel, Neg. Inst. (3d Ed.) § 1759, it is stated that there are three classes of cases which should be discriminated: (1) When the guaranty is contemporaneous with the principal contract. (2) When the guaranty is made after the contract is completed, and is not for the benefit of the guarantor. (3) When the guaranty is made after the contract is completed, and is for the benefit of the guarantor. In the first class the consideration of the principal contract will support the guaranty. In the second class the original consideration being

exhausted, there must be some new and sufficient consideration to support it. In the third class the consideration moves directly to the guarantor for his own benefit, and is really his own debt. In the leading case of *Leonard v. Vredenburg*, 8 Johns. 29, 5 Am. Dec. 317, Kent, C. J., said: "There are three distinct classes of cases on this subject which require to be discriminated: (1) Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal or direct debtor. Here, as we have already seen, is not nor need be any other consideration than that moving between the creditor and original debtor. (2) Cases in which the collateral undertaking is subsequent to the debt, and was not the inducement of it, though the subsisting liability is the ground of the promise without any distinct and unconnected inducement. Here must be some further consideration shown having an immediate respect to such liability, for the consideration for the original debt will not attach to this subsequent promise. (3) A third class of cases, and to which I have already alluded, is when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties." We think there was evidence tending to place the agreement of November 19, 1900, within the first class. The contract for the sale of the machinery made on July 9, 1900, was executory, and not complete until the delivery of the machinery, at which time the liability of the principal debtor attached. The contract called the guaranty was executed November 19, 1900, and the machinery was not delivered until about December 1, 1900. At the time of the guaranty there was no subsisting debt or liability in favor of plaintiff by the principal debtor, as the machinery had not been delivered. When the liability of the principal debtor arose, the contract of guaranty instantly attached; so that it may fairly be said that the guaranty was not subsequent to, but was contemporaneous with, the debt of the principal debtor. Independent of the testimony excluded by the circuit court, there was some evidence tending to show that the delivery of the machinery was induced by the guaranty. And we may further state that there was some evidence tending to show that Mrs. Browning received a benefit from the delivery of the machinery. When the machinery was delivered, and when the guaranty was executed, the partnership, Goldville Manufacturing Company, had merged into the corporation of that name, of which Mrs. Browning was a large stockholder and a director, J. S. Blalock being president, L. W. C. Blalock being treasurer, these being the only stockholders and directors. The machinery, upon its arrival at Goldville, S. C., consigned to the Goldville Manufacturing Company,

was taken by the manager of the corporation and placed in its mill, and the circumstances are such as to make it extremely probable, to say the least of it, that at the time of the guaranty the Blalocks and Mrs. Browning were aware that such use would be made of the machinery when delivered.

The remaining grounds upon which the nonsuit was sought need not be particularly noticed in this connection, as the foregoing is sufficient to sustain the refusal of nonsuit. We may remark generally that we find nothing in the testimony which would have authorized the court to determine as matter of law that the contract of guaranty had been changed or altered so as to discharge the guarantor, or that there was such want of diligence on the part of the plaintiff in pursuing the principal debtor as would discharge the guarantor.

3. The fifth exception alleges that the circuit court erred in constructing the contract of November 19th to be a guaranty of payment instead of a guaranty of the collectibility of the debt. We think the court properly construed the contract. By it the parties agreed (1) to indorse the said notes to be given for deferred payments under the contract of July 9th; (2) to make good and pay the amounts which may be due plaintiff in accordance with said contract should the Goldville Manufacturing Company fail to pay for the machinery on the terms of the contract; (3) to make good and pay the amounts which may be due plaintiff in accordance with said contract in case the Goldville Manufacturing Company shall fail to pay any notes when due which are given in payment. It did not appear that any notes were ever received by plaintiff pursuant to the contract. While it is true L. W. C. Blalock testified that he mailed notes to plaintiff's company, Pawtucket, R. I., Mr. Jenks, president of the plaintiff company, testified that no notes were ever tendered to or received by the company. But this is immaterial, for, as we construe the contract, plaintiff's right to collect of Mrs. Browning the amount due for the machinery under the second stipulation of her contract cannot be affected by the failure to take the notes for deferred payments. And if any notes had in fact been received by plaintiff not indorsed as agreed in the first stipulation, still, in default of payment of such notes, Mrs. Browning, under the third stipulation, was obligated to pay the amounts due plaintiff, in accordance with the original contract. The guaranty was absolute, not conditional. "If A. guarantees expressly or by implication to pay the note of B. to C. provided B. does not pay it, he becomes absolutely liable for its payment immediately upon B.'s default, and is therefore deemed an absolute guarantor of the due payment of the note of B. to C. But if A. guarantees the collectibility or goodness of B.'s note to C., he does not absolutely guaranty its payment,

but only that he will pay it in the event that C. shall test the collectibility or goodness of the note by regular prosecution of suit against B., and shall be unable by due and reasonable diligence to enforce its payment. And accordingly he is only deemed a conditional guarantor of payment." 2 Daniel, Neg. Inst. § 1769.

The construction of the contract practically disposes of the remaining exceptions by appellant, which are based upon the view that the guaranty was of collectibility merely. The contract of guaranty being an absolute engagement to pay according to the contract of July 19th if the principal debtor failed to pay, no notice to the guarantor of nonpayment was necessary. *Carson v. Hill*, 1 McMul. 76; *Bank v. Hammond*, 1 Rich. Law, 285. Whether such notice would be necessary in the case of a guaranty of a negotiable instrument need not be considered here, as the instrument or contract guaranteed in this case was not negotiable, in which case, certainly, there was no necessity to give notice of nonpayment to the guarantor. *Savings Bank v. Strother*, 28 S. C. 504, 6 S. E. 313.

The court declined to charge that it was the duty of plaintiff, under failure of the principal debtor to pay the debt, to pursue the principal debtor by legal process, and make diligent effort to collect the debt from the principal, but, on the contrary, charged: "Mere nonaction, passivity, or indulgence on the part of the plaintiff would not, as matter of law, discharge any of the guarantors from obligations under the guaranty to pay the debt, and nothing short of a valid contract upon sufficient legal consideration extending the time of payment of the contract or changing the terms of the contract would have the effect in law of releasing any of the guarantors, or unless the plaintiff had refused to take some legal step to collect the debt after positive request from the guarantor to do so." The refusal to charge as requested was proper under the principle stated in *Savings Bank v. Strother*, supra, and the charge is supported by numerous cases. *Parnell v. Price*, 3 Rich. Law, 121; *Lang v. Brevard*, 3 Strpb. Eq. 64; *Hampton v. Levy*, 1 McCord, Eq. 107; *Jackson v. Patrick*, 10 S. C. 200. Under the foregoing conclusions, the fifth, seventh, eighth, ninth, tenth, and twelfth exceptions must be overruled.

This leaves to be noticed the sixth and eleventh exceptions—the thirteenth exception being a duplication of the eleventh. These exceptions are as follows: "(6) Because he erred in charging the jury as follows: 'If you find in this case, as a matter of fact, there was a contract for the purchase of machinery, and after the time the contract was entered into by Mrs. Browning, that the machinery was not delivered at that time, but after that, that would be sufficient consideration; but, if not delivered, it would not.'" "(11) He erred in charging the jury,

as requested by defendant, as follows: 'If the jury believes from the evidence that at the time of the execution of the guaranty of November 19, 1900, there was no valuable consideration for the execution of said guaranty, then such guaranty would be null and void;' and then modifying the same as follows: 'I charge you that, gentlemen, unless you should find from the testimony in this case that the guaranty was signed after the contract was made, and before the delivery of the machinery, that would constitute a sufficient consideration.' Under these it is argued that the charge complained of was, in effect, a charge with respect to the facts, in violation of the Constitution, but it is manifest that the exceptions do not specifically raise any such question. As we understand the charge, the court instructed the jury in accordance with the principle announced in considering the question of nonsuit above, viz., "that a guaranty for the payment of goods for which a contract of sale is made, though executed subsequently to the agreement of sale, is supported by a sufficient consideration if the goods are not delivered until after the guaranty."

The judgment of the circuit court is affirmed.

(68 S. C. 1)

PROVIDENCE MACH. CO. v. BROWNING et al.

(Supreme Court of South Carolina. Dec. 8, 1903.)

PARTNERSHIP QUESTION FOR JURY—ACTION ON GUARANTY—ALTERATION—NONSUIT—CONSIDERATION—RELEASE.

1. Where the question of partnership was in issue, and there was some evidence that the alleged partners had combined labor and capital for the common benefit, the issue should have been submitted to the jury, though all the defendants allege that one was not a partner.

2. Where, in an action on a guaranty, there was some evidence that the contract had been materially altered so as to discharge the guarantor, it was a matter of defense for the jury, and was no ground for a nonsuit.

3. A guaranty of payment for machinery after execution of the contract of sale, but before delivery, is based on a sufficient consideration.

4. Where a firm buys machinery, and it is shipped to a corporation of the same name, formed by the partners to carry on the same business at the same place, the question of the release of the guarantor by such alteration is for the jury.

5. It is unnecessary that a creditor should make demand on the principal debtor in order to hold a guarantor of payment, or give notice to the guarantor of nonpayment.

Appeal from Common Pleas Circuit Court of Laurens County; Carey, Special Judge.

Action by the Providence Machine Company against J. S. Blalock, L. W. C. Blalock, and M. E. Browning. From order of nonsuit, plaintiff appeals. Reversed.

N. B. Dial and F. P. McGowan, for appellant. D. W. Robinson, Ferguson & Featherstone, and Johnstone & Welch, for respondents.

JONES, J. This is an appeal from an order of nonsuit. The action was against James S. Blalock, L. W. C. Blalock, and Mrs. M. E. Browning individually and as partners under the firm name of Goldville Manufacturing Company, and against the Goldville Manufacturing Company, a corporation of this state, being based: (1) Upon a contract in writing, dated July 30, 1900, for the purchase of machinery to the amount of \$9,104.52, to be delivered by plaintiff to the firm of Goldville Manufacturing Company, about December 15, 1900, terms, one-half cash, one-fourth in six months, one-fourth in twelve months, deferred payments secured by bankable notes, bearing interest at 6 per cent. per annum, this corporation being signed "Goldville Mfg. Co. L. W. C. Blalock." (2) Upon an instrument in writing dated September 7, 1900, signed "Goldville Mfg. Co., per J. S. Blalock," and by J. S. Blalock, L. W. C. Blalock, and M. E. Browning, which, after reciting the terms of the contract of July 30th, above, contained these stipulations: "We hereby agree to indorse the said notes, and should the Goldville Mfg. Co. fail to pay for the said machinery on terms of contract made between themselves and Providence Machine Co., dated July 30th, 1900, or shall fail to pay any notes when due, which are given in payment, we the undersigned do hereby bind and obligate ourselves, jointly and severally, each with the other, and with the Providence Machine Co. to make good and pay the Providence Machine Co. the amounts which may be due them in accordance with the contract above mentioned." (3) Upon a note dated May 1, 1901, executed by Goldville Manufacturing Company, J. S. Blalock, president, L. W. C. Blalock, secretary and treasurer, and indorsed by J. S. Blalock and L. W. C. Blalock, promising to pay to the order of Providence Machine Company, six months after date, \$2,317.10, with interest at 6 per cent. per annum. The complaint demanded judgment for \$2,317.10, with interest at 6 per cent. per annum from May 1, 1901.

The Goldville Manufacturing Company was incorporated on October 22 or 23, 1900, but thereafter, becoming insolvent, was placed in the hands of a receiver in December, 1901, before the commencement of this action. The machinery was duly shipped to the Goldville Manufacturing Company about the 10th or 13th of December, 1900, was received, and was placed in the mill being in process of construction by the corporation, Goldville Manufacturing Company, which had been begun by the partnership, Goldville Manufacturing Company, at Goldville, S. C., in July or August, 1900. The cash payment was made 31st January, 1901, but notes for deferred payments were not taken upon the de-

livery of the machinery. But on May 1, 1901, two notes, one of which is set forth in the complaint, were received by the plaintiff. Neither note was indorsed by M. E. Browning, and, so far as appears, they were not presented to her for indorsement. The issues in the case arose upon the contest of Mrs. M. E. Browning that she was not a partner in the Goldville Manufacturing Company firm, and that she was not liable upon guaranty.

The motion for nonsuit was made upon the following grounds: "(1) Because there is no evidence that Mrs. Browning was a partner at the time this debt sued on herein was contracted, and there is no evidence that she was to become at any time liable for the debt sued on herein. (2) Because the contract sued on herein is without any valuable consideration, and is therefore void. (3) Because the undisputed evidence offered by the defendants shows that the guaranty sued on herein is for and of the performance of the contract of date July 30, 1900, in accordance with the terms thereof, and that the guarantor, Mrs. Browning, has been released and discharged from liability on the guaranty: First. In that it appears from plaintiff's undisputed evidence that the contract was made by the partnership firm of J. S. and L. W. C. Blalock, under the firm name of Goldville Manufacturing Co., prior to the creation or existence of the corporation hereinafter named, and the said contract was for the delivery of the machinery therein mentioned to said partnership, while in fact, and subsequent to the contract and guaranty, the machinery was delivered by the plaintiff to the corporation, Goldville Manufacturing Co., of Goldville, South Carolina, and this change in the said contract was made without the knowledge or approval of Mrs. M. E. Browning, the guarantor sued herein. (4) In that the plaintiff failed to require the cash payment provided for in the said contract of July 30, 1900, and failed to require the execution of the notes, as provided in said contract or within a reasonable time thereafter, but, on the contrary, waived and assented to a change in time for such cash payment, and assented and agreed to waive the execution of the notes as provided for in the contract, and agreed to accept the bonds of the company in lieu of the notes and in payment of the debt, all without the knowledge or assent of Mrs. M. E. Browning, the guarantor, sued herein. (5) Because the plaintiff had failed to allege and show that it used diligence: First. On making demand of the principal debtors at the time of the delivery of the machinery, or within a reasonable time thereafter, for the first cash payment, and for the execution and indorsement of the notes for the balance, in accordance with the terms of the contract of July 30, 1900. Second. In failing to prosecute the principal debtors promptly, and in a reasonable time after their failure to comply with the said contract of July 30, 1900, for such failure and to collect

its said debts. Third. In giving notice to Mrs. M. E. Browning, the guarantor sued therein, promptly, and within a reasonable time after it happened, that the principal debtors had failed to keep and comply with their contract of July 30, 1900, as to cash payment and as to the giving and indorsements of the notes. Fourth. Because the evidence shows that the breach after the contract guaranty occurred in December, 1900, or January, 1901, and the only and first notice that was given this guarantor was the paper signed by O. A. Robbins, of date November 7, 1901. (6) The evidence shows that the plaintiff has failed to use due diligence: First. In making demand on the principal debtor at the time of the delivery of the machinery, or within a reasonable time thereafter, for the first cash payment, and for the execution and indorsement of the notes for the balance, in accordance with the terms of the contract of July 30, 1900. Second. In failing to prosecute the principal debtors promptly, and within a reasonable time after their failure to comply with said contract, for such failure, and to collect its said debt. Third. In giving notice to Mrs. M. E. Browning, the guarantor sued herein, promptly, and within a reasonable time after it happened, that the principal debtors had failed to keep and comply with their said contract of July 30, 1900, as to the cash payment and as to the giving and indorsement of the said notes. (7) Because there is no evidence that Mrs. Browning guaranteed the payment of the notes sued on herein, but, on the contrary, the plaintiffs' evidence shows that it is a different note from the guaranty. (8) Because the undisputed evidence shows that the plaintiff accepted the note sued on herein, and waived those provided for in the contract of guaranty by accepting the notes of the principal debtor, and there is no evidence that Mrs. Browning consented to such change, and that the plaintiffs waived their right to proceed against loss on the guaranty."

Hon. J. P. Carey, Special Judge, presiding, granted the following order of nonsuit:

"This is an action brought by the plaintiff against the defendant on a contract made with L. W. C. Blalock, as Goldville Manufacturing Co., and on a contract of guaranty afterwards made by the defendants Mrs. M. E. Browning and others, guarantying the payment of the purchase money of said machinery according to the terms of said contract of purchase. Plaintiff also claims that Mrs. Browning and others are liable as partners. At the close of plaintiff's testimony, the defendant Mrs. Browning moved for a nonsuit on various grounds, which are set out in the record. I think the nonsuit should be granted for two reasons:

"First. There is no testimony showing or tending to show that Mrs. Browning was ever a partner in firm of Goldville Manufacturing Co. Her only connection with the company was as a stockholder in the cor-

poration, which corporation was chartered after the contract was made.

"Second. Plaintiff's own testimony shows the following state of facts: That the contract for the purchase of the machinery provided for the delivery some time in December, 1900; that it was delivered in December, 1900; that one-half of the purchase money was to be paid upon the delivery, one-fourth of balance in six months thereafter, and the other fourth in twelve months thereafter; that bankable notes were to be taken for the deferred payments, and that the guarantors were to indorse said notes; that the cash payment provided for in the contract was made in the early part of the year 1901, but that no notes as provided for in the contract were given at that time; that on May 1, 1901, the notes of Goldville Manufacturing Co., signed on back 'J. S. and L. W. C. Blalock,' were given for deferred payments; that the said notes matured in six months and twelve months from May 1, 1901; that said notes were accepted by plaintiff in 'settlement' of the account for said machinery, and plaintiff sent Goldville Manufacturing Co. a statement showing the acceptance of the notes in 'settlement'; that Mrs. Browning had no knowledge of, nor did she acquiesce in, said change of contract.

"I hold that these facts show a change in, and material alteration of, the contract of guaranty, on the strict terms of which the guarantor had a right to stand, and that such change of contract operated in law as a release of the guarantor. It is therefore ordered that the nonsuit be granted, and the complaint be dismissed."

We think the court erred in granting the nonsuit. While it is true that J. S. Blalock testified that Mrs. Browning was never interested in the cotton mill before the incorporation of the Goldville Manufacturing Company, he also testified that her teams were used without compensation in the erection of the mill. Mrs. Browning also testified that she was not a partner in the Goldville Manufacturing Company, but, beginning at folio 172, she further testified: "My father is J. S. Blalock, and L. W. C. Blalock is my brother. I was at Goldville, at my brother's, most of the summer of 1900. I had what interest my father chose to give me in the Goldville Manufacturing Company. Q. Did you deed your interest in the oil mill and ginnery at Goldville to the Goldville Manufacturing Company, and also to some land to the Goldville Manufacturing Company? (Objected to by Col. Ferguson as secondary, as the papers will show better.) A. If it was necessary, I did, but I don't remember now. Before the Goldville Manufacturing Company was chartered, I consented to sign a guaranty. Q. In July, 1900, were you not interested in building a cotton mill at Goldville? (Objected to by Col. Ferguson on the ground that it is incompetent and irrelevant, being before this action was com-

menced.) A. Well, in a manner I was. Father and brother were the prime movers in the transaction. J. S. Blalock, my father, was anxious to get my consent, as he wanted to use the proceeds of some of my property. I acquiesced in so far as to sign some papers. I knew my brother, L. W. C. Blalock, went on to buy machinery. I was very much opposed to the whole transaction. I did not take any stock in the mill. I was never asked to take any. I was led to believe that I would have some stock, but I did not know how much or how little. No script was ever issued to me. My father had the management of my plantation for years. My brother, L. W. C. Blalock, looked after my interest in the mill. Before the mill was chartered, I think they were to borrow the money, and make a family affair of it. My father was to secure my consent about the time they contemplated building the mill, some time during the summer of 1900. I never was in favor of the mill, but after the machinery was bought I was asked to sign the contract, and I did. I did not know that my brother was using any name in regard to building the mill, but I suppose it would be natural to speak of it in this way, as we were the only persons interested. Q. Why was the mill incorporated? A. I do not know, but I thought it was better. I did not acquiesce, in so many words, but after it was done I thought it was best." If J. S. Blalock, L. W. C. Blalock, and Mrs. M. E. Browning combined capital, labor, or skill for the purpose of business for common benefit, they were partners, notwithstanding their mere declarations to the contrary. The foregoing certainly afforded some testimony that they were partners, which should have been submitted to the jury to determine its sufficiency to establish the issue raised.

With reference to the second ground of nonsuit. On the cross-examination of plaintiff's witness, defendant proved and introduced in evidence a letter dated May 6, 1901, addressed to Goldville Manufacturing Company, in which receipt of the two notes of May 1, 1901, was acknowledged, and which contained these words, "Inclosed please find statement in settlement." This accompanying statement of account, after crediting account with the two notes, concluded with these words: "Settled as above, May 6th, 1901. [Signed] Providence Machine Company, F. Pierce;" the letter being signed, "W. C. Pierce, Treas." These facts the circuit judge considered as conclusively establishing that the contract of guaranty had been materially altered, so as to discharge the guarantor. This was a matter of defense, and for the jury to determine. In the case of Wallingford & Russell v. Railroad Company, 28 S. C. 258, 2 S. E. 19, the court held that the defendant is not entitled to a nonsuit upon the strength of a written contract introduced by him upon the cross-examination of one of the plaintiff's witnesses. The same principle has

been frequently applied in insurance cases, in which the court held nonsuit improper, even though matter of defense, as forfeiture of policy, be brought out during the examination of plaintiff's witness. *Sample v. Insurance Co.*, 42 S. C. 14, 19 S. E. 1020; *Copeland v. Assurance Company*, 43 S. C. 23, 20 S. E. 754; *Carpenter v. Accident Co.*, 46 S. C. 546, 24 S. E. 500. At folio 141, Wm. O. Pierce, the president and treasurer of plaintiff company, testified that these notes "were given to secure payment of the balance due, and not in settlement of account or otherwise." The notes were signed by the Goldville Manufacturing Company as a corporation, of which Mrs. M. E. Browning was stockholder, if not also director, which corporation had taken and used the machinery for which the notes were given. So that, assuming that the acceptance of the notes by plaintiff would be evidence of an extension of the time of payment in alteration of the original contract, it should have been left to the jury to say whether Mrs. Browning had knowledge of and acquiesced in the extension of the time of payment and the substitution of the name of the corporation for that of the partnership as a maker of the notes.

Respondent has given notice in the record that, in case the court does not sustain the nonsuit on the grounds taken by the circuit court, she will ask that the nonsuit be sustained upon the other grounds urged in the motion and set out above. These grounds substantially are: (1) That there was no testimony to show any consideration for the contract of guaranty; (2) that the contract of guaranty was altered, in that the machinery was delivered by plaintiff to the corporation Goldville Manufacturing Company, when the contract provided for a delivery to the partnership Goldville Manufacturing Company; (3) the evidence showed want of diligence on part of plaintiff in notifying defendant of the default of the principal and in failing to prosecute the principal debtor promptly, etc.

The first ground has been considered in the recent case of *Fales & Jenks Machine Co. v. Mrs. M. E. Browning*, 46 S. E. 545, wherein the court held that "a guaranty for the payment of goods for which a contract of sale is made, though executed subsequently to the agreement of sale, is supported by a sufficient consideration if the goods are not delivered until after the guaranty." The contract of guaranty in this case was made September 7, 1900, and the goods were not delivered until in December, 1900.

The second question, in so far as it was material, was a question for the jury. The evidence tended to show that the machinery was shipped to the party ordering it, the Goldville Manufacturing Company, and that plaintiff at that time was not aware that the Goldville Manufacturing Company had become incorporated. The evidence further

tended to show that the corporation was formed for the purpose of carrying on the business begun by the partnership and to raise money for the purpose by floating the corporate bonds; that the partnership and the corporation had the same name, business, and location; that the stockholders of the corporation were J. S. Blalock, L. W. C. Blalock, and Mrs. M. E. Browning, and that J. S. Blalock was president and L. W. C. Blalock secretary and treasurer; that Mrs. Browning was present at some of the meetings of the stockholders; that her brother, L. W. C. Blalock, looked after the interest of Mrs. Browning in the mill; that her father, J. S. Blalock, looked after the management of her plantation adjoining the mill property; that before the mill was chartered they were to borrow the money, and make a family affair of it. Under these circumstances a court would hardly be justified in taking the question from the jury, and deciding as matter of law that the contract of guaranty was altered so as to discharge Mrs. Browning as guarantor, merely because the corporation took and used the machinery ordered by the partnership.

With reference to the third question, above—as to the discharge of the guarantor because of the alleged want of diligence in pursuing the principal debtor—in the case of *Fales & Jenks Machine Co. v. Mrs. M. E. Browning*, supra, this court construed a contract of guaranty in terms identical with the contract in this case. Under like construction, the contract in question is not a guaranty of collectibility, but a guaranty of payment, provided the Goldville Manufacturing Company failed to do so. It is not a conditional guaranty, but an absolute guaranty. Under such a contract it is not essential, to hold the guarantor, that the creditor should make demands for payment of the principal debtor, give notice of nonpayment to the guarantor, nor to use diligence in pursuing the principal debtor by the use of legal process. *Savings Bank v. Strother*, 23 S. C. 506, 6 S. E. 313.

Having reached the conclusion that the nonsuit must be set aside and a new trial granted, we do not deem it important to consider the remaining exceptions.

The judgment of nonsuit is reversed, and the case is remanded for a new trial.

(68 S. C. 106)

WILCOX et al. v. PRIESTER.

(Supreme Court of South Carolina. Jan. 8, 1904.)

EJECTMENT—EQUITABLE DEFENSE—DEED—CONSIDERATION—PAROL EVIDENCE.

1. In ejectment, a defense that the deed under which plaintiff claims was obtained by fraud, and should be canceled, can be set up to defeat the action.

2. Parol evidence as to true consideration of a deed under which plaintiff claims in eject-

ment, and the manner in which it was to be paid, is not inadmissible as contradicting the written instrument.

3. Parol evidence is admissible to contradict or explain a deed, if the facts alleged as to the manner of obtaining it show fraud.

Appeal from Common Pleas Circuit Court of Barnwell County.

Action by Mabel Wilcox and Eleanor Wilcox against D. R. Priester. Judgment for defendant, and plaintiffs appeal. Affirmed.

L. L. Tobin, for appellants. Bates & Sims, for respondent.

JONES, J. This action was brought for the recovery of real estate, and resulted in a verdict and judgment for the defendant. Plaintiffs' appeal involves the admissibility of certain parol testimony affecting the operation of the deed under which plaintiffs claimed. On the 18th day of January, 1895, the defendant executed a fee-simple warranty deed in the usual form, purporting to convey the land in dispute to W. P. Wilcox, under whom the plaintiffs claim as his heirs at law. The consideration expressed in the deed was \$500. After the death of Wilcox, which occurred on the 18th day of June, 1900, the deed was found among his papers, unprobated and unrecorded, and was probated and recorded about the 23d September, 1901. Ever since the signing of the deed the defendant retained the undisputed possession of the land covered by the deed, paying the taxes, attorning to no one, and otherwise exercising exclusive dominion over said land. Among other defenses, defendant alleged: "(1) That on the 16th day of November, A. D. 1891, the defendant executed and delivered to one W. P. Wilcox, lately of the said state and county, his certain bond and mortgage, bearing said date, and thereby promised to pay to the said Wilcox, his certain attorneys, executors, administrators, and assigns, the sum of \$336.68, the purpose being to secure at that time the balance due on all accounts by the said defendant to the said Wilcox. (2) That on the 18th day of January, 1895, the defendant agreed with the said Wilcox to convey to him the land covered by the said mortgage, the description of which is set forth in the complaint, for the sum and price of \$600, out of which sum the said mortgage was to be paid, and the balance turned over to this defendant. (3) That in pursuance of said agreement defendant signed the said deed presented to him by the said Wilcox, being informed that it provided as the consideration the said sum of \$600, and the same was retained in the possession of the said Wilcox. (4) That defendant demanded the said difference from the said Wilcox, but to his surprise the said Wilcox refused to comply with said demand, informing defendant that he could trade it out, and that he would hold the deed as security for future advances.

This defendant declined peremptorily to accede to, and demanded a return of the paper, which was refused. That the said deed was repudiated by the said defendant, and he retained possession of the land covered thereby, and still retains such possession undisturbed by the said Wilcox during the latter's life and until now."

It appears in the brief: "At the trial of this case on the circuit the plaintiffs introduced the deed above mentioned, the execution of which was admitted. The defendant admitted that he was in possession of the land, and that the plaintiffs were the heirs at law of Wilcox, and the plaintiffs rested their case, whereupon the defendant tendered the testimony of himself and E. H. Williams and Perry Jackson to prove an agreement between the defendant and the said Wilcox at the time of the execution of the said deed, together with the conditions upon which the same was executed, and which evidence was to the effect that out of the purchase price the said Wilcox was to satisfy a certain mortgage of the defendant to him, and pay the difference in cash to the said defendant, and which, after the execution of the said deed, the said Wilcox failed and refused to do, and, on the contrary, required the defendant to trade the balance out in his store, which, being in violation of the agreement of purchase, the defendant declined to agree to, and, upon Wilcox insisting, the defendant repudiated the transaction, and the difference in cash above stated was not paid to Priester, nor did Wilcox satisfy of record the mortgage. To this testimony the plaintiffs objected on the following grounds: That the consideration of this deed could not be impeached as a matter of defense in this action, there being no fraud alleged; that parol testimony was inadmissible in this action to establish a contemporaneous parol agreement between Wilcox and Priester, and a nonperformance of such agreement by Wilcox, or a breach by Wilcox of a parol promise made by him as the alleged consideration upon which the deed was executed to him by Priester, for the purpose of defeating the plaintiffs' right to recovery in this action. The court overruled these objections, and allowed the testimony to the above effect to go to the jury, except the testimony of the defendant, which was ruled out under section 400, Code. The defendant then rested his case, and, nothing being offered in reply, the judge charged the jury that it was for them to consider whether the defendant had satisfied them that at the time of the execution of the said deed there existed a parol agreement between the defendant and the said Wilcox which was the basis of the execution of the said deed, and whether the said Wilcox was to deliver the consideration of the said deed to the said defendant by the satisfaction of the mortgage and the payment in cash to him of the bal-

ance of the purchase money, as alleged in the answer, and whether Wilcox, upon the execution of the said deed, failed or refused to comply with such parol agreement; and if the jury should find that such agreement did exist at said time, and that said Wilcox had, in derogation of said agreement, failed or refused to comply therewith—that is, by the satisfaction of the said mortgage and the payment of the balance of the purchase price in cash to the defendant—then the above failure would be a good defense to the plaintiffs' recovery in this action."

The appellants' exceptions challenge the correctness of the above rulings and charge.

We think there was no error. Under the Code, "wherever equity confers a right, and the right avails to defeat a legal cause of action, that it shows that the plaintiff ought not to recover in his legal action, then the facts from which such right arises may be set up as an equitable defense in bar." Pom. Rem. § 92. In actions to recover possession of lands it is a common defense to set up a right to the cancellation of a conveyance on the ground of fraud, so as to defeat plaintiff's action. *Id.* § 94; *Watts v. Witt*, 39 S. C. 366, 17 S. E. 822. The answer in this case, while not specifically charging fraud in terms, states facts from which fraud is inferable. It alleged an agreement under which Priester was to convey the land to Wilcox in consideration of \$600, a part of which was to be paid by the satisfaction of a mortgage on said land held by Wilcox, and the remainder was to be paid in cash; that Wilcox represented that the deed expressed \$600 as the consideration, whereas the consideration named in the deed was only \$500; and that Wilcox, after receiving the deed, refused to pay the consideration. To deprive one of his land under such circumstances would operate as a fraud. Where the payment of the consideration upon which a deed of land is based is contemplated by the parties as a consideration of a completed transaction, the grantor in possession cannot be deprived of his possession by virtue of such deed at the suit of grantee or his heirs at law who refuse to comply with such condition. In such case the law will not compel the grantor to deliver possession and remand him to an action for the consideration or for specific performance. Where there is a charge of fraud in obtaining a deed of conveyance, parol testimony is admissible to contradict, vary, or explain it. *Lee v. Lee*, 11 Rich. Eq. 582. Furthermore, in so far as the testimony related to the true consideration of the deed, and the manner in which it was to be paid, it did not violate the rule which excludes parol testimony to contradict a written instrument. *Curry v. Lyles*, 2 Hill, 403; *Calvet v. Nickles*, 26 S. C. 310, 2 S. E. 116.

The judgment of the circuit court is affirmed.

(68 S. C. 102)

GLENN v. RUDD.

(Supreme Court of South Carolina. Jan. 18, 1904.)

PAROL CONTRACT—VALIDITY—SATISFACTION OF MORTGAGE—MERGER.

1. Where, on conveyance by the mortgagor to the mortgagee, it is agreed that such conveyance shall not constitute a merger and satisfaction of the mortgage, the contract is valid, though made in parol.

Appeal from Common Pleas Circuit Court of Saluda County.

Action by Lizzie Glenn against W. G. Rudd for dower. From circuit order sustaining judgment of probate court in sustaining demurrer to answer, defendant appeals. Reversed.

El. S. Blease and G. T. Graham, for appellant. B. W. Crouch and O. J. Ramage, for respondent.

WOODS, J. The defendant sets up as one of his defenses to the plaintiff's complaint for dower, filed in the probate court for Saluda county, that in 1891 S. H. Rudd, his grantor, who was the real owner of the land, and her husband, C. F. Rudd, made a deed of conveyance covering the land described in the complaint to Berry Glenn, Jr., plaintiff's husband, who contemporaneously executed a mortgage to S. H. Rudd and her husband for the purchase money, upon which plaintiff renounced her right of dower; that Berry Glenn, Jr., being unable to pay the mortgage, reconveyed the land to S. H. Rudd, and that "at the time Berry Glenn, Jr., conveyed said premises unto the said S. H. Rudd it was expressly stipulated and agreed by and between the said parties that the mortgage that was executed by Berry Glenn, Jr., to said S. H. Rudd and C. F. Rudd to secure the payment of the purchase money of said premises as aforesaid should stand open to protect S. H. Rudd from dower and other liens and incumbrances thereon, and the defendant avers that said mortgage was not extinguished, but still stands open, and, if plaintiff ever had any right of dower in said premises (which this defendant again specifically denies), the same is subordinate to the said mortgage." The plaintiff demurred to this defense "for the reason that it is not alleged that said agreement and stipulation was in writing, and contained in the deed from Berry Glenn, Jr., to Mrs. S. H. Rudd in the form of a covenant." The demurrer was sustained by the probate judge, and on appeal to the circuit judge his judgment was affirmed.

There are a number of exceptions, but the decisive question is whether an agreement that a mortgage shall not be merged in the title and be satisfied when the mortgagee takes title to the mortgaged property is without effect unless reduced to writing and incorporated in the deed of conveyance. In

the leading case of *Agnew v. R. R. Co.*, 24 S. C. 18, 58 Am. Rep. 237, it was held that an express agreement, which was inserted in the conveyance to the mortgagee, that the mortgage should remain open, prevented merger and satisfaction of the mortgage. It is true, the court said in *Bleckley v. Brannan*, 26 S. C. 424, 2 S. E. 319, "We cannot venture to go further in relieving a mortgagee who purchases the mortgage property than was indicated in the case of *Agnew v. R. R. Co.*, supra." And in *Agnew v. Renwick*, 27 S. C. 572, 4 S. E. 223, it is said the only exception to the rule recognized in this state that the purchase of the mortgaged property by the mortgagee will extinguish the mortgage is that established in *Agnew v. R. R. Co.* Both these cases, however, and *Navassa Guano Co. v. Richardson*, 26 S. C. 401, 2 S. E. 307, were decided on the ground that there was no evidence, either written or parol, of any agreement that the mortgage should remain open. The decision in *Agnew v. R. R. Co.* is based on the ground that there was an agreement that the mortgage should remain open. There is not the slightest intimation in the opinion that the fact that the agreement was evidenced by the insertion in the deed added anything to its efficacy. Taking the view adopted by our court, it cannot be doubted it is the contract between the parties that prevents the merger. All parol contracts are valid unless required by statute to be in writing, and in the absence of any statutory provision we can see no ground upon which a court can hold that a contract against merger must be in writing, or be inserted in a particular instrument.

The view taken in the cases above referred to, that an express contract is necessary under all circumstances to prevent satisfaction of the mortgage by conveyance to the mortgagee, seems to be at variance with that adopted in most other jurisdictions, and, indeed, not in accordance with the authorities cited with approval in the leading opinion in *Agnew v. R. R. Co.* Even in those states where, as in this state, the mortgagee has not title to the land, but merely a lien for the debt, it has been generally held that a merger will not result from conveyance of the land to the mortgagee where there is an intervening incumbrance, even where there is no evidence of any agreement to that effect, because, unless there is actual proof of an intention to satisfy the mortgage, it is presumed the mortgagee does not intend to release his security when it is necessary for his protection against such intervening incumbrance. *Scrivner v. Dietz* (Cal.) 24 Pac. 171; *Woodward v. Davis* (Iowa) 6 N. W. 74; *Gibbs v. Johnson* (Mich.) 62 N. W. 145; *Millsaugh v. McBride*, 34 Am. Dec. 360; *Hitchcock v. Nixon* (Wash.) 47 Pac. 412; *Insurance Co. v. Murphy*, 111 U. S. 745, 4 Sup. Ct. 679, 28 L. Ed. 582. This view of merger seems to receive support from the opinions of

this court in *Michalson v. Myrick*, 47 S. C. 297, 25 S. E. 162, and *Lipscomb v. Goode*, 57 S. C. 182, 35 S. E. 493, though the rights of purchasing mortgagee were not involved in these two cases. Upon this question of presumption, however, we express no opinion, because it is not involved in this case, but, in view of the adjudications in other jurisdictions and the apparent difficulty of reconciling the doctrine stated in *Michalson v. Myrick* and *Lipscomb v. Goode* with that held in *Agnew v. Renwick*, *Bleckley v. Brannan*, and *Navassa Guano Co. v. Richardson*, we are certainly unwilling to extend the rule laid down in the three cases last mentioned by holding that the contract against merger and satisfaction of a mortgage by conveyance to the mortgagee must necessarily be in writing, and inserted in the conveyance.

The judgment of this court is that the judgment of the circuit court be reversed.

(68 S. C. 98)

AARON v. SOUTHERN RY.

(Supreme Court of South Carolina. Jan. 18, 1904.)

CARRIERS — BREACH OF CONTRACT — COMPLAINT — EVIDENCE — PUNITIVE DAMAGES — BEST AND SECONDARY EVIDENCE.

1. Where a complaint charges that defendant railroad company "wrongfully and unlawfully" required plaintiff to alight from the train, such words did not assign specific legal character to the acts of defendants, and must be disregarded.

2. Evidence that on account of a wreck the engine was detached from the train and used to carry a Pullman car to another point, delaying the train for hours, does not support an allegation that the act was done wantonly and willfully.

3. Where allegations that an act was done willfully and wantonly were not sustained, there can be no recovery for punitive damages for mental suffering.

4. Where there has been no notice on the conductor of a train to produce a written order, parol evidence of its contents is inadmissible.

Appeal from Common Pleas Circuit Court of Barnwell County; J. C. McDonald, Special Judge.

Action by J. B. Aaron against the Southern Railway. Plaintiff appeals from order of nonsuit. Affirmed.

Davis & Best and Jno. S. Reynolds, for appellant. Joseph W. Barnwell, for respondent.

WOODS, J. This is an appeal from an order of nonsuit. The complaint alleged, in substance, that plaintiff, on January 17, 1903, purchased a ticket over the defendant's road from Augusta, Ga., to Barnwell, S. C., and took a train leaving Augusta at 6 o'clock p. m., relying on the assurance of the defendant's agent that it would arrive in Barnwell at about 9 o'clock on the same day; that the train, on reaching Blackville, only 10 miles from Barnwell, was held there six or seven hours, so that plaintiff, who was anxious to get to his home in Barnwell on account of

sickness in his family, did not reach his destination until 3 or 4 o'clock the next morning. It is charged that the defendant, at Blackville, "willfully, wantonly, wrongfully, and unlawfully" required plaintiff to alight from the train, and "willfully, wantonly, wrongfully, and unlawfully" refused to convey him to Barnwell according to its advertised schedule and the representations of its agents to the plaintiff. The plaintiff thus states his damages: "That on account of the foregoing facts the plaintiff was compelled to stay at Blackville, S. C., until the early part of the next morning, caused to suffer great mental anguish and anxiety in being kept away from his family, who were home sick, and in the manner in which he was treated, as aforesaid, he has been damaged in the sum of nineteen hundred and fifty dollars." The defense was a general denial, and that the delay was due to an "unexpected accident to one of the trains of defendant," which reasonable care could not have provided against.

1. The indefinite words "wrongfully and unlawfully" do not assign specific legal character to the acts of the defendants, and must be disregarded. *Tutt v. Ry. Co.*, 28 S. C. 388, 5 S. E. 831.

2. The alleged wrongful and unlawful acts being described as wanton and willful, if the plaintiff could recover at all, the verdict could only embrace punitive, and not compensatory, damages. There is no evidence that the defendant required the plaintiff to leave the car at Blackville or treated him with rudeness or disrespect. The plaintiff introduced evidence to the effect that when the train arrived at Blackville the conductor was notified of a wreck on another branch of the road, and, in pursuance of orders issued on account of the wreck, he left the Barnwell cars at Blackville, and used his engine to carry the Pullman car, which he brought from Augusta, on to Columbia. That an emergency had arisen affecting the management of the Barnwell cars and the Pullman car seems very manifest. The question is not whether the railroad authorities acted with the best judgment, or even reasonable discretion, in forwarding the Pullman car and delaying the Barnwell cars. If the delay was unreasonable, the plaintiff could have sustained an action for actual damages, such as expenses, loss of time, etc. *Fort v. Ry. Co.*, 64 S. C. 424, 42 S. E. 196. But the plaintiff staked his case on the charge that the action of the defendant indicated a willful or wanton disregard of the duty it owed the plaintiff to convey him to his destination with reasonable dispatch. We are unable to discover the slightest evidence of intentional or wanton disregard of this duty.

3. The judgment cannot be reversed on the ground that the plaintiff was subjected to mental suffering in being kept from his sick family, for there could be no recovery

of punitive damages for mental suffering when the plaintiff failed to sustain his charge of wanton and willful wrong. *Lewis v. Tel. Co.*, 57 S. C. 381, 35 S. E. 556.

4. The presiding judge held it to be incompetent for the plaintiff to state the contents of the written order received by the conductor. No notice had been given to produce the order itself, which was the best evidence, and it was therefore proper to exclude a parol statement of its contents. But aside from this, the plaintiff seems to have told all he knew of the order, as the following question and answer show: "Q. Well, what was on the order? A. Well, I did not read the order myself, but I knew it was the order. Capt. Murry said, 'There is the order to get off to Columbia, and come here and sign it.'"

The plaintiff further insists that there was error in refusing to allow him to tell the reason the conductor gave for sending the engine to Columbia. It appears from the following questions and answers that the plaintiff also told all he knew on this subject: "Q. What did Capt. Murry tell you that he had to go to Columbia for? A. Well, after he got this order, he did not tell me why. Q. Did you hear him say? A. Well, I may have. I don't know whether I did or not. I heard him call in his engineer and make him sign this train order, and stated that the order was for Columbia."

The judgment of this court is that the judgment of the circuit court be affirmed.

(64 W. Va. 559)

SPRINKLE v. DUTY et al.

(Supreme Court of Appeals of West Virginia.
Feb. 2, 1904.)

EQUITY—DISMISSAL OF BILL—JURISDICTION—ESTOPPEL TO DENY.

1. A decree, upon a full hearing upon the merits, dismissing a bill in which two distinct causes of action between the same parties are united, one purely legal and the other purely equitable, containing no clause saving to the complainant her remedies as to the former cause of action, and failing to state, or in any way make it appear, that as to it the dismissal was for want of jurisdiction, is erroneous.

2. In such case the complainant is not estopped from denying the jurisdiction of the court below on appeal, but costs in the appellate court will be decreed to the appellee, as the party substantially prevailing, if the appellant has failed to ask for the insertion of such saving clause in the trial court.

(Syllabus by the Court.)

Appeal from Circuit Court, Ritchie County; M. H. Wilks, Judge.

Bill by M. K. Sprinkle against M. K. Duty and others. Decree for defendants, and plaintiff appeals. Modified.

J. Newman, for appellant. Duty & Ireland, J. W. Fidler, and Sherman Robinson, for appellees.

POFFENBARGER, P. M. K. Sprinkle, a married woman, appeals from a decree of the

circuit court of Ritchie county dismissing, upon a full hearing upon the merits, her bill in equity against M. K. Duty, in a suit brought to set aside a sale of a lot of land, containing 33 square rods, made under a deed of trust executed by her May 4, 1895, to secure the payment of a note for \$334.95, executed by her and her husband to said Duty, and another sale of another lot, containing something more than an acre of land, made under an order of attachment in an action of debt brought by Duty to obtain satisfaction of a balance due on his debt after applying thereon the proceeds of the sale made under the deed of trust. They were adjoining lots, lying in or near the town of Pennsboro, in said county, and were the separate property of Mrs. Sprinkle.

The correctness of so much of the decree as disposes of the matters alleged against the soundness of the sale under the deed of trust is not questioned on this appeal. Failure to except to it, however, does not preclude the court from making inquiry respecting it, and an examination of the pleadings and evidence relating to that sale has been made, without finding anything for which it is believed the sale ought to be set aside. The complaint against the decree is that the court failed to insert in it a clause saving to the plaintiff her right to appear in the attachment suit and have the same reheard, as, by the provisions of section 25 of chapter 106 of the Code of 1899, she may do within the time and in the manner therein specified, she having been proceeded against as a non-resident, without service of process upon her.

The bill presents two distinct matters, one of which is the alleged ground of relief against the sale under the deed of trust, and the other the ground for relief against the sale under the order of attachment. That the former is a matter cognizable by courts of equity is too well known and settled to require any citation of authority. It is conceded by counsel on both sides. As to whether so much of the bill as relates to the attachment sale presents a cause of action of which equity can take jurisdiction, and, if not, whether, by her conduct in submitting it to such court and inducing it to act upon it, the appellant is precluded from prosecuting this appeal, counsel differ, it being insisted upon the one side that, as equity had jurisdiction of part of the subject-matter of the bill, the court could properly go on and determine all questions presented by it, although one of the matters involved was purely legal, and that, if this be not true, the appellant cannot complain of errors which she has induced the court to commit; while, on the other hand, it is said the court could not take jurisdiction of the attachment proceeding, even by consent of the parties.

The two subjects of the bill are so far separate that either may be disposed of without in any way affecting the other. Relief in the one neither depends upon nor ne-

cessitates relief in the other. The trust sale could be set aside on sufficient grounds and the trust property resold for the debt, less the amount realized from the attachment, or the attachment sale could be set aside and the attached property resold for the debt, less the amount realized from the trust sale. It is true Mrs. Sprinkle held both pieces of land under the same deed as a single tract, and both were sold for parts of the same debt, and to the same man; but, for the purposes of sale, she had separated them by her deed of trust, and the sales and proceedings relating thereto are the things complained of, and, as to each sale, the pleadings and evidence differ, and present separate and divers issues. Hence they are wholly distinct and separate causes of action, if both could be treated as equitable causes. But as to jurisdiction they are also foreign to each other, the one belonging to exclusive equity jurisdiction, and the other being an action prosecuted to judgment and execution on the law side of the court, and in which further proceedings, by way of review, may be had by express statutory provision. It is a cause of action of which the law court has not only potential, but actual, jurisdiction. Moreover, it is one for which there is a full and adequate remedy at law, specifically prescribed by statute, and it is elementary law that in such case equity has no jurisdiction. *Miller v. Miller*, 25 W. Va. 495; *Bier v. Smith*, 25 W. Va. 830; *Coombs v. Shisler*, 47 W. Va. 373, 34 S. E. 763; *Meze v. Mayse*, 6 Rand. 660.

Conceding this proposition, counsel for appellee say jurisdiction to pass upon the trust sale proceeding gave the right to pass upon the other, although purely legal in its nature, upon the principle enunciated in *Hickman v. Painter*, 11 W. Va. 386, and numerous other cases. This is clearly an effort to apply that principle where it has no application. Where there is ground for equitable interposition as to a single cause of action, in respect to which strict equity jurisdiction stops short of final relief and full determination of all questions involved in that cause, it will go on and complete it, passing upon purely legal questions. The language of the rule, as stated by the courts, confines it to the merits of the cause and matters involved in it. *Hotchkiss v. Fitzgerald Co.*, 41 W. Va. 357, 23 S. E. 576; *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536; *Yates v. Stuart's Adm'r*, 39 W. Va. 124, 19 S. E. 423; *Hall v. Wilkinson*, 35 W. Va. 167, 12 S. E. 1118; *Handy v. Scott*, 26 W. Va. 710. To give the principle wider application would contravene one of the most rigid and ancient rules of equity procedure. A bill setting up two or more equitable causes of action between the same parties is multifarious and fatally bad. *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611; *Petty v. Fogle*, 16 W. Va. 497; *Orickard v. Crouch's Adm'r*, 41 W. Va. 503, 23 S. E. 727. A bill uniting a purely legal

demand with an equitable demand is not multifarious, because the allegations as to the former confer no jurisdiction, and are treated as surplusage or statements of impertinent matter, and wholly disregarded. *Smith v. Patton*, 12 W. Va. 541; *Smith v. McLain*, 11 W. Va. 654. As a court of equity can entertain but one cause at a time, the fallacy of the argument that its jurisdiction of one matter in the bill gave power to decide another, the allegations as to which the court was bound to disregard and treat as mere surplusage, is quite apparent.

The remaining contention of counsel for appellees is settled adversely to them in *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164, 94 Am. St. Rep. 895, holding that an adjudication in equity against a plaintiff does not estop him from denying the jurisdiction of the court on appeal. The wisdom of that rule is well illustrated here, where it is insisted that a judgment of a common-law court has been reheard in a court of equity.

For the reasons stated, the decree complained of is to be amended so as to save to the appellant her right to have the attachment proceeding mentioned and described in the bill reheard in the manner and upon the conditions prescribed in section 25 of chapter 106 of the Code of 1899, and then affirmed and certified to the court below; but, in conformity with the rule announced in *Van Dorn v. County Court*, 38 W. Va. 267, 18 S. E. 579; *Christian v. Vance*, 41 W. Va. 754, 24 S. E. 596; *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164, 94 Am. St. Rep. 895; and *Frye v. Miley* (decided at the last term), 46 S. E. 135—costs in this court are to be decreed to the appellees as the parties substantially prevailing, the appellant having failed to demand the insertion of the saving clause in the court below.

(54 W. Va. 530)

RYMER v. SOUTH PENN OIL CO. et al.
(Supreme Court of Appeals of West Virginia.
Feb. 2, 1904.)

OIL LEASE—PAYMENT OF ROYALTY—PAROL EVIDENCE.

1. Where several owners in fee of contiguous tracts of land lease the whole as one tract for oil and gas purposes, and the one-eighth royalty oil is to be paid by the lessee in the usual way by running the same into the pipe lines to the credit of "the parties of the first part" (the lessors), and the lease is silent as to the division of the royalty between the lessors, and where the development is all on one tract owned in severalty by one of the lessors, who claims to be entitled to all the royalty, upon interpleader of the lessee for determination as to whom to pay the royalty as between the lessors, parol evidence is admissible to prove a contemporaneous agreement between the lessors that the royalty should be paid and delivered to the owner of the particular tract from which the oil is produced.

(Syllabus by the Court.)

Appeal from Circuit Court, Tyler County;
M. H. Willis, Judge.

Bill by Frank L. Rymer against the South Penn Oil Company and others. Decree for plaintiff, and certain defendants appeal. Affirmed.

R. F. Fleming, T. N. Parks, D. F. Pugh, and O. W. O. Hardman, for appellants. J. H. Strickling and T. S. Engle, for appellees.

McWHORTER, J. Henry A. Rymer and Frank L. Rymer and Edith, his wife, executed to the South Penn Oil Company the following lease: "Agreement, made and entered into the 24th day of August A. D. 1897, by and between H. A. Rymer, Frank L. Rymer and Edith Rymer his wife of Middlebourne, County of Tyler and State of West Va. parties of the first part and the South Penn Oil Company, a Pennsylvania Corporation party of the second part. Witnesseth:—That the said parties of the first part for and in consideration of the sum of one dollar to them in hand well and truly paid by the said party of the second part, the receipt of which is hereby acknowledged and of the covenants and agreements hereinafter contained on the part of the said party of the second part to be paid, kept and performed, have granted, demised, leased and let and by these presents do grant, demise, lease and let unto the said party of the second part, its successors or assigns for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines and of building tanks, stations and structures thereon to take care of the said products, all that certain tract of land situate in Elsworth District, Tyler County and State of West Va. on waters of Middle Island, bounded substantially as follows: On the North by the lands of J. I. Gregg and J. W. Crumrine. On the East by the lands of J. W. Crumrine, H. A. Rymer & F. L. Rymer. On the South by lands of E. J. Baker & S. Addlesberger. On the West Geo. Mason heirs. Containing three hundred and sixty (360) acres, more or less, reserving however, therefrom ten (10) acres around the buildings on which no wells shall be drilled by either party except by mutual consent. It is agreed that this lease shall remain in force for the term of five years from this date, and as long after the commencement of operations as said premises are operated for the production of oil or gas. In consideration of the premises, the said party of the second part covenants and agrees: 1st, to deliver to the credit of the parties their heirs or assigns free of cost in the pipe line to which it may connect its wells the equal one-eighth of all oil produced and saved from the leased premises; and 2nd to pay three hundred dollars per year for the gas from each and every gas well drilled on said premises, the product from which is marketed and used off the premises; said payment to be made on each well within thirty days after commencing to use the gas therefrom, and to be paid yearly thereafter while the gas from said well is so used. Second party

covenants and agrees to locate all wells so as to interfere as little as possible with the cultivated portions of the farm. Provided, however, that this lease shall become null and void, and all rights hereunder shall cease and determine unless a well shall be completed on the said premises within three months from the date hereof, or unless the lessee shall pay at the rate of one hundred & twenty five (125) dollars, quarterly, in advance, for each additional three months, such completion is delayed from the time above mentioned for the completion of such well until a well is completed. Such payment may be made direct to the lessors or deposited to their credit in the Post Office at Middlebourne, W. Va. First parties are to have gas for domestic purposes free of cost by making their own connections. It is agreed, That the second party is to have the privilege of using sufficient water from the premises to run all necessary machinery, and at any time to remove all machinery and fixtures placed on said premises, and, further shall have the right at any time to surrender this lease to the first part, for cancellation, after which all payments and liabilities to accrue under and by virtue of its terms shall cease and determine, and this lease become absolutely null and void. Witness the following signatures and seals: Henry A. Rymer [Seal.] Frank L. Rymer [Seal.] Edith C. Rymer [Seal.] South Penn Oil Company [Seal.] By N. F. Clark, First Vice President. Witness: C. Y. Benedum"—which was duly acknowledged by the lessors and recorded. The South Penn Oil Company subleased a part of the land so leased to it to Treat and Crawford, who took possession under their sublease, and drilled two wells which produced oil in paying quantities. The South Penn Company afterwards took possession of the residue, and bored seven wells near to those bored by Treat and Crawford, producing large quantities of oil. The tract of 360 acres so first leased was composed of a tract of 90 acres, another of 25 acres, both of which were vested in fee at the time of making the lease in Frank L. Rymer; the residue, of 245 acres, was owned in fee by Henry A. Rymer. The two wells bored by Treat and Crawford, as well as those bored by the South Penn Company, were all on the 90-acre tract which was the property of Frank L. Rymer. Treat and Crawford delivered to Frank the one-eighth of the oil produced from the two wells, who also demanded from the South Penn Oil Company an accounting and delivery to him of the full one-eighth royalty from the wells bored by it, which it refused to do, claiming that the lease of the 360 acres was a joint lease, and that the royalties were payable to the lessors, the said Frank L. Rymer and the heirs at law of Henry A. Rymer, who had deceased early in the year 1898, soon after the making of the lease. The said Henry A. Rymer executed his will, whereby he devised to his daughter

Susan Smith during her life, remainder to her children in fee, 100 acres of the said leased premises, and to the plaintiff, Frank L. Rymer, 100 acres, and the residue of said leased premises to his daughter Lizzie Boyers, wife of Dr. F. C. Boyers.

Frank L. Rymer filed his bill in the circuit court of Tyler county against the South Penn Oil Company and the Eureka Pipe Line Company, alleging that all of the wells bored by the said South Penn Oil Company were located on his tract of 90 acres of land, which, being vested in him in fee simple, entitled him to the whole of the one-eighth royalty oil therefrom and the gas rentals, and praying that the defendant companies be made parties to the bill, and be required to answer the same and make a full account and discovery of dates that any oil had been run into the pipe lines from the said wells so drilled by the South Penn Oil Company upon the said 90-acre tract of land, and amount of oil so run into the lines of the Eureka Pipe Line Company each time, and the total amount of oil so run into the lines from said wells, and that the said companies be ordered to pay over to plaintiff any oils or money found due on such accounting, and for general relief. The defendant South Penn Oil Company filed its demurrer to plaintiff's bill for nonjoinder of parties, claiming that the heirs and devisees of Henry A. Rymer were necessary parties, the lease being a joint lease and the royalties and rentals payable to the lessors jointly. The demurrer was overruled by the court. The South Penn Oil Company then filed its answer in the nature of an interpleader and cross-bill, praying that plaintiff be required, by amended bill or otherwise, to make the heirs and devisees of Henry A. Rymer parties defendants in the suit, that respondent might be fully protected in the payment of royalties under the said lease, as well as to protect and preserve the rights of Treat and Crawford in carrying out the provisions of their lease in the delivery of royalty oil thereunder. By the cross-bill of the South Penn Oil Company all the heirs at law of Henry A. Rymer, the defendant Eureka Pipe Line Company, and Treat and Crawford were made parties defendants thereto. The defendants Susan Smith, David M. Smith, her husband, Elizabeth Boyers, and O. F. Boyers, her husband, filed their answers denying the right of plaintiff, F. L. Rymer, to recover and receive all the royalty oil produced from the 90-acre tract of land or any other particular part of the tract of 360 acres leased jointly by the said Frank L. Rymer and Henry A. Rymer to the South Penn Oil Company. Depositions were taken and filed in the cause by the plaintiff, F. L. Rymer, for the purpose of proving an oral contract between the lessors Frank L. Rymer and Henry A. Rymer, contemporaneous with the lease of August 24, 1897, whereby it was understood and agreed that the several lessors should receive the royalty oil pro-

duced from their respective tracts of land owned by them in severalty and comprising the 360-acre tract so leased, and to show how rentals paid before the completion of a well had been distributed under the lease. Other depositions were also filed by the plaintiff and by the defendants Susan Smith and Elizabeth Boyers. Objections and exceptions by the said defendants were made to the depositions of plaintiff taken and filed for the purpose of establishing such oral agreement because incompetent, being contradictory of the language and provisions of said lease. The cause was heard on the 9th day of December, 1902, when the court overruled said objections and exceptions to the depositions as to their competency to prove such parol agreement, and decreed all the royalty oil and the consideration for gas that may be produced from the 90 acres and the 25 acres of land under the said lease to the plaintiff, Frank L. Rymer, and that defendants Susan Smith and Elizabeth Boyers take nothing by their answers and cross-bills, and directing the South Penn Oil Company to run said royalty oil produced and saved from said two tracts, to the credit of Frank L. Rymer, into the pipe lines of the Eureka Pipe Line Company, which was directed to credit same to said Frank L. Rymer.

The errors complained of by appellants Elizabeth Boyers and Susan Smith are, first, the overruling of the demurrer of the South Penn Oil Company; and, second, overruling their objections and exceptions to the depositions and testimony of witnesses C. Y. Benedum, J. Traugh, and T. H. Harter, so far as the same tend to set up a new agreement between H. A. Rymer in his lifetime and the plaintiff touching the lease of the lands in controversy, and in so far as the same relate to statements and conversations between H. A. Rymer, since deceased, and Frank L. Rymer, and between either of said witnesses and H. A. Rymer and Frank L. Rymer, in so far as the same tend to prove declarations and statements made by H. A. Rymer in his lifetime, at the time of executing the lease in question or subsequent to the making and delivering of said lease; and that the court erred in decreeing that the appellants Elizabeth Boyers and Susan Smith were not entitled to any of the royalty which came from the 90 acres, and that Frank was entitled to all the royalty and the consideration for the gas produced from the 90 acres and the tract of 25 acres. It is claimed in the brief of the appellee that the defendants Susan Smith and Elizabeth Boyers, not being parties at the time of the overruling of the demurrer of the South Penn Oil Company by the court, were not affected by the ruling of the court, and, the South Penn Company not being an appellant, said Smith and Boyers could not be injured by it, and have no right to appeal from the decision, citing *Beard v. Arbuckle*, 19 W. Va. 135; *Long v. Perine*, 44 W. Va. 243, 28 S. E. 701, 46 S.E.—38

and other authorities; that if the court erred in overruling the demurrer the South Penn Company was the only party that could complain, and it makes no complaint, and does not join in the appeal. Susan Smith and her husband, David M. Smith, and Elizabeth Boyers and F. C. Boyers were made parties by the interpleader and cross-bill of the South Penn Oil Company, and by their own answers and cross-bills thus bring before the court the questions involved between the parties, and which the South Penn Oil Company had a right to have adjudicated upon a bill of interpleader in a court of equity. *Petroleum Co. v. Gale*, 6 W. Va. 525.

As to the alleged error of the court in overruling the objection of defendants Smith and Boyers to the oral testimony of C. Y. Benedum, the agent of the lessee, the South Penn Oil Company, who prepared and took the lease, and also the testimony of J. Traugh and T. K. Harter in construing the lease: It is claimed by appellants that the court could look only to the language of the lease itself for its construction, the same being unequivocal, clear, and unambiguous. As between the lessors upon the one side and the lessee upon the other side, this clearly appears to be true; there is no ambiguity, but is there any contract anywhere in the lease as between the individual lessors? Not a word to show the relation between them; they have individual rights as between themselves. The lease shows that the royalties and the consideration for the gas which might be sold from the premises was to be paid and delivered to "the parties of the first part," but it is not provided as to how it shall be divided between them when received. The case of *Harness v. Eastern Oil Company*, 49 W. Va. 232, 38 S. E. 662, is relied on by appellants as being a case in point. In that case the lease was very similar to that in question here, but the lease showed on its face that the land leased was in two separate tracts—152 acres owned by Thomas B. Harness, and 35½ acres owned by his wife, Anna K. Harness—but leased as one tract of 187½ acres. It was held, "as between the lessors and lessee, to be a joint lease of one tract of 187½ acres," being so treated by both the lessors and lessee from the time of its execution and until long after developments were made upon the 152 acres, the lessors having jointly received and receipted for the royalty and the consideration for the gas from the 152-acre tract. No question was raised as to the distribution of the royalty and gas consideration as between the lessors. It is a conceded fact that the only production of oil or gas upon the leased premises is produced from the 90-acre tract which is held in fee and in severalty by the plaintiff, Frank L. Rymer, and it is well settled in this state that oil in place is as much a part of the realty as timber, coal, iron ore, or salt water. *Williamson v. Jones*, 39 W. Va. 231, 19 S. E. 436, 25 L. R. A. 222; *Wilson*

v. Youst, 43 W. Va. 826, 28 S. E. 781, 39 L. R. A. 292; *Lawson v. Kirchner*, 50 W. Va. 344, 40 S. E. 344; *Ammons v. Ammons*, 50 W. Va. 390, 40 S. E. 490. See, also, *Gould on Waters*, § 291; *Stoughton's Appeal*, 88 Pa. 198; *Funk v. Haldeman*, 53 Pa. 229. And this ruling applies with equal force, and for the same reason, to gas as well as to oil. It is further said in the *Wilson v. Youst* Case, 43 W. Va. 834, 28 S. E. 784, 39 L. R. A. 292, quoting *Gould on Waters*: "A lease of land for the purpose of mining oil, coal, rock, or carbon oil passes a corporeal interest which is the proper subject of an action of ejectment; and a proportionate share of the oil to be produced by an oil well is an interest in land, a parol sale of which is void under the statute of frauds." The oil to be paid as royalty is the consideration paid for the oil sold and taken from the premises. Where it is not provided how the consideration is to be applied, or how it shall be divided between or among those entitled to receive it, parol evidence is admissible to explain that which is not expressed. *Brown on Parol Ev.* § 50, says: "Where the instrument does not express the entire agreement, and does not appear to express the entire agreement, or there is a collateral agreement not embraced therein, parol evidence is competent to show the omitted part, whether contemporaneous or antecedent, if it does not conflict with the instrument." See cases there cited; *Johnson v. Burns*, 39 W. Va. 658, 20 S. E. 686 (Syl., point 1). Again, at section 92: "Parol evidence is competent to contradict the recital of receipt of the consideration, or to show an additional or different consideration, but not to contradict the deed as to price or quality"—citing *O'Neale v. Lodge*, 3 Har. & McH. 433, 1 Am. Dec. 377, and many other cases. In *Hall v. Solomon*, 61 Conn. 476, 23 Atl. 876, 29 Am. St. Rep. 218, the court says: "It will be remembered that it is not the office of a deed to express the terms of the contract of sale, but to pass the title, pursuant to the contract. Therefore, a parol agreement, being a part of the consideration for the sale, restricting the use of the premises in one particular for a limited period, is not merged in the deed, and does not qualify or in any way affect the title to the land; and the admission of parol evidence to prove such an agreement is no infringement of the rule that parol evidence is not admissible to contradict, vary, or explain a written instrument"—citing *Collins v. Tillou's Adm'r*, 26 Conn. 368, 68 Am. Dec. 398; *Pierce v. Woodward*, 6 Pick. 206; *Willis v. Hulbert*, 117 Mass. 151; *Tallmadge v. Bank*, 26 N. Y. 105. And in section 92, *Brown on Parol Evidence*: "It is well settled that the consideration clause is open for explanation for any purpose except to defeat the conveyance"—citing *Murdock v. Gilchrist*, 52 N. Y. 247. And, quoting from *Goodspeed v. Fuller*, 46 Me. 141, 71 Am. Dec. 572, he says: "The entire weight of authority tends to

show that the acknowledgment of payment in a deed is open to unlimited explanation in any direction." Appellants rely upon the case of *Heatherly v. Bank*, 31 W. Va. 70, 5 S. E. 754 (Syl., point 1), where it is held that: "If the language of a written agreement is on its face ambiguous, the court will look at the surrounding circumstances, at the situation of the parties and the subject-matter of the contract, and at the acts done by the parties under it, for aid in giving a construction to its language, but not to the verbal declaration of the parties." In that case the issue was between the principal parties to the contract, and not between the individuals constituting one of the parties to the contract, as in the case at bar, where there is no contract or semblance of a contract contained in the lease as between themselves; but they bear certain relations to the contract and to each other which it is incumbent upon the court to ascertain and settle, and for that purpose "the court will look at the surrounding circumstances, at the situation of the parties and the subject-matter of controversy."

H. A. Rymer and Frank L. Rymer were the owners in severalty of contiguous tracts of land, the former 245 acres, the latter 115 acres, making together 360 acres. They executed together a lease of the whole 360 acres, whereby they sold seven-eighths of the oil underlying said land to the lessee in consideration of one-eighth of all the oil to be produced therefrom, to be delivered as produced, but their contract of lease or sale is entirely silent as to the division between them of the consideration so to be paid in oil. It is not disputed that the oil underlying the several tracts is the property of the respective owners of said tracts, a part of the realty itself; and when they receive, each that which is produced from his own land, he is but receiving his own. The subject-matter of the contract between the lessors and lessee, now in controversy between the plaintiff, Frank L. Rymer, and the heirs of H. A. Rymer, is the sole property of Frank L. Rymer. The contract of lease of August 24, 1897, having no provision as to the distribution of the royalty oil between the parties of the first part, parol testimony tending to show the intention of the lessors as to such distribution, as evidenced by the declaration of the parties at the time of executing the lease, as well as the subsequent declarations of H. A. Rymer, are competent evidence to aid in arriving at a proper conclusion as to such distribution. It is shown by the testimony of C. S. Stealey that the rental of \$125 per quarter paid prior to the completion of the first well was placed in his hands for distribution, and, when asked who placed the rental in his hands, answered, "Well, I think Mr. Frank L. Rymer did part of the time, and I know Frank Hix did once"—stating that Frank Hix was then working for South Penn Oil Company. "Frank Hix left money

once, and Mr. Rymer the balance of the time." Mr. Hix left \$125, and witness said: "I apportioned it among the three parties, Mrs. Smith—I am not sure whether I handed it to Mrs. Smith or not, but she got it all right—Mrs. Boyers, and Frank L. Rymer. Q. You may state what sum was paid to each out of the \$125. A. Frank L. Rymer \$74.65, Mrs. Smith \$34.73, and Mrs. Boyers \$15.62, less the fee of the money order and postage, which would amount to twelve cents for the money order, and stamped envelope, three cents." This was a proper distribution of the rentals accruing while cash rental was payable prior to the completion of the first well, when the cash rentals ceased, and tended to show how the parties understood the lease.

It is insisted by appellants that "the weakest of all human testimony is that of witnesses who testify to the declarations of the dead," and cite "Justice Manning in Succession of Piffet, 37 La. Ann. 873," and also cite 1 Greenleaf on Evidence, § 200, which treats of the uncertainty of such evidence, and says: "It frequently happens, also, that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say;" and adds, "But where the admission is deliberately made and precisely identified, the evidence it affords is often of the most satisfactory nature." The evidence in this case is of such a character that these uncertainties are not likely to exist, and it depends more upon the credibility of the witnesses than of their recollection as to certain and definite statements made by the parties, and no effort was made to impeach the witnesses, or otherwise discredit them, further than the criticism of their testimony by counsel in their briefs. When the contract of lease was drawn, according to the evidence of Benedum, he suggested that they make the lease in one, when he says they explained to him, as best they could, that each of them owned in fee land in the Jug; that these lands were adjacent to each other, and that they would lease them in a joint lease, providing that each party should secure his own royalty. The witness J. Traugh states that he and H. A. Rymer, in 1897, both lived in the town of Middlebourne; that he had a conversation with H. A. Rymer in front of the latter's house. "He met me right there and stopped me, and we were talking, and he said, 'I have just got a rental from my land at the Jug.' He said, 'I get \$125 quarterly.' When he told me he leased his land, I knew Frank Rymer had land in there, and I asked him what he did with that, and he said, 'We both leased together.' He said, 'Each one of us draws our own rental from the land, and also the oil.'" He states that this was in 1897, a short time before he died. T. K. Harter, a nephew, by marriage, of H. A. Rymer, says he had a conversation with Rymer in 1897, perhaps in November or December, sitting in Rymer's room, when he told witness

that "he and Frank had leased their land to the South Penn Oil Company for \$360, I believe, and \$125 quarterly rental;" and in answer to the question what else he said: "I asked him if he thought it was well to lease jointly, and he said that he thought it was all right; that Benedum had proposed it; that each one would get their own share of the rental, and, if there was any oil, his oil produced from his own land—that is, the royalty oil produced from their own land."

Appellants claim that their proposition is fully sustained by the decision in Higgins v. Petroleum Asphalt Company, 109 Cal. 304, 41 Pac. 1087. In that case Higgins and one Mary A. Ashley, owning contiguous tracts of land underlaid with a deposit of bituminous rock and also a deposit of liquid asphaltum, executed a lease to Joseph Scheerer for the term of 20 years. In consideration of the lease, among other things, the lessee promised to pay "to the parties of the first part," lessors, on the 1st day of each and every month thereafter during said term, "the sum of fifty cents per ton for each ton of bituminous rock and liquid asphalt which he may have mined, taken or removed from said premises during the calendar month then next preceding, and at the same time and place of such payment to deliver to the said parties of the first part a full and true statement in writing of the number of gross tons of bituminous rock and liquid asphalt mined, taken or removed from said premises during the calendar month for which such payment is then made," with right of ingress and egress to and from said deposits over the lands owned by the said lessors as might be agreed upon between the parties to the lease, with privilege to the lessee of erecting such building upon the land adjacent to such deposit as might be necessary for the accommodation of his workmen and the prosecution of his work. In December, 1891, the defendant company became the sole owner of the lease by assignment. The court said (at page 306, 109 Cal., and page 1087, 41 Pac.): "It appears and is undisputed that at the date of the lease [June 4, 1887] the lessors were not tenants in common of any part of the land described in the lease nor of any part of the 'deposit of bituminous rock' leased, but that each severally owned a definite part of both adjoining each other, and the 'deposit' leased extended horizontally through the contiguous lands of both lessors, as described in the lease." In June, 1892, Ashley conveyed all her part of the land described in the lease, which she severally owned, to the defendant, by a definite description, after which conveyance the tract had been known as the "Ashley Tract," and the remainder of the land described in the lease as the "Higgins Tract"; that, during the first seven or eight months immediately after the conveyance of the Ashley tract to the defendant, Higgins claimed, and was paid by the defendant, one-half the stipulated rent or royalty, 25

cents per ton, on statements regularly made by the defendant to plaintiff, as per lease, and during the same period and ever after Ashley treated the lease, so far as she was interested, as extinct, or merged in her deed of her land, and no rent had ever been demanded by or paid to her. Defendant continued to pay royalty on rock mined, estimated at 2,000 pounds for a ton until April, 1893, after which it refused to make further payment on rock not shipped from the mine or per ton of less than 2,240 pounds. Suit was brought by Higgins to recover 25 cents per ton for 1,000 tons mined from the deposit, whether reduced to asphalt or shipped from the mine or not, during the months of April, May, June, and July, 1893. Higgins recovered one-half the royalty, notwithstanding the lessee had elected to mine only on that part of the deposit lying within the Ashley tract, and the court say: "Had they been tenants in common, Higgins would still be entitled to a part of the rent proportionate to his undivided portion of the demised premises, but as they are not tenants in common he is entitled, in the absence of an express or presumed agreement to the contrary, to a portion of the royalty proportionate to the comparative value of his distinct part of the demised premises; and in this case the terms of the lease warrant the presumption that each lessor was to receive one-half of the royalty; and such presumption is in perfect accord with the practical construction of the lease by the parties thereto up to April, 1893." There being nothing in the lease to indicate that other than an equal division was to be made of the royalty between the lessors, of course the presumption would be that they received the royalty jointly and in equal shares, and, the lessors themselves having so construed the lease, and so received and divided the royalty, the court could give it no other construction. So, in the case of *Harness v. Eastern Oil Company*, cited, as the lessors had always so construed it and so acted upon it as between themselves, the court saw no reason for construing it otherwise; indeed, there was no contention in that case as between the lessors themselves. In case at bar lessee had full notice at the time of the execution of the lease that the lessors were to receive each the royalty oil produced from his tract; that the lease was so drawn and executed at the suggestion of C. Y. Benedum, agent of the lessee, and the lessors both said they would place the lands in a joint lease "providing that each party should receive his own royalty."

The appellants claim that the case of *Wetengel v. Gormley*, 160 Pa. 559, 28 Atl. 934, 40 Am. St. Rep. 733, settles the principles involved in this case in favor of the appellants. James Gormley owned three contiguous farms containing together about 600 acres. In July, 1888, he made an oil lease on the whole of the 600 acres as one tract, to run 15 years, and reserved the usual royal-

ty of one-eighth of all the oil produced under the lease. The lease gave the lessee the usual privilege upon the land, among which was the right to take water from any part of it and for any extent needed, a right of way into and over the land, a right to lay pipe lines, etc. The lease concluded with the following stipulation: "It is understood between the parties to this agreement that all conditions between the parties hereto shall extend to their heirs, executors, and assigns." The lessor died in 1890. By his will he gave one of the farms to each of his three children in fee, making no mention of the lease, which included them all. The devisees entered into possession of their respective farms as held in severalty. "The holder of the oil lease has, in the meantime, put down several oil wells, and is producing oil therefrom." It does not appear from the opinion clearly whether the wells were drilled before or after the devisees took possession of their respective farms under the will. The wells drilled happened to be all on the farm devised to James T. Gormley, the defendant, and he claimed the entire royalty. The court held that "where, during the term of an oil lease of three contiguous farms embracing 600 acres, the lessor dies, and devises the farms to different persons, the devisees are entitled to share alike in the royalty reserved, though the wells are all on one farm, as through such wells the oil may be drawn from all the farms." The same case, together with another case growing out of the same lease, was again appealed and again decided by the same court, the report of which will be found in 184 Pa. 354, 39 Atl. 57, one additional point being decided, as shown in point 2 of the syllabus. The decision as it appears in the syllabus is as follows:

"(1) During the term of an oil lease of three contiguous farms, embracing 600 acres, the lessor died, having devised the farms to three different persons. The lease provided that all its conditions should extend to the parties' heirs, executors, and assigns. Held, that each devisee was entitled to share in the royalties in the proportion that the land devised to him bears to the whole tract, though the wells were all on one farm.

"(2) In such case the loss of rental value of one of the farms, caused by operation of the wells, should be deducted from the three devisees in proportion to their ownership of the surface."

If the wells drilled under the lease in the case at bar had been upon the land of the testator, Henry A. Rymer, instead of the plaintiff, Frank L. Rymer, the cases would have been exactly parallel, as the appellants and plaintiff are all devisees of H. A. Rymer. As that precise question does not plainly arise in this case, it is not necessary to decide it here.

The case of *Natural Gas Company v. Ulery* (Ohio) 67 N. E. 494, where it is held,

"Where an oil and gas lease is made by one party to another covering two or more separate tracts of land, and is made to extend to the heirs and assigns of the parties, and different persons become the owners of such different tracts, each owner is entitled to the oil and gas produced on his tract, and to the royalty and rental arising from such tract," seems to be a case quite similar to the one at bar, and in harmony with the rulings of this court, and fully sustains the position hereinbefore taken. Chief Justice Burkett, in writing the opinion of the court and referring to said Pennsylvania case, states the matter so well that we quote from his opinion as follows (page 496): "We have several times had occasion to carefully examine and consider that case, and it has always failed to receive the approval of our judgment, and upon a reconsideration here it again fails to convince us of its soundness. And the reconsideration of the same principle in the same case in *Wettengel v. Gormley*, 184 Pa. 354, 39 Atl. 57, fails to strengthen the original case. Those cases were between devisees, and the question as between the lessee and purchasers from the lessor was not involved, and therefore the principle of those cases is not directly applicable here. But even if it were, we do not regard it sound. Oil in the rock adheres to the real estate, and is a part thereof until brought to the surface, when it becomes personalty, just as a tree, or stone, coal, or fire clay is a part of the realty until severed, when it becomes personalty. That which is a part of the land before severance belongs to the owner of the land after severance as well as before. The fact that oil and gas are vagrant and transitory in their nature does not prevent them from adhering to and becoming part of the land while passing from one tract to another, and while so in one tract they are a part of that tract, and belong to the owner thereof until they escape from such tract, and, if brought to the surface before such escape, they become personal property belonging to the owner of the land. It therefore irresistibly follows that the oil or gas taken from a well on a particular tract of land belongs to the owner of that tract, even though the contract under which the well was drilled included other tracts of land. Because the contract of production may have included two or more tracts of land, such contract cannot have the force of taking from the owner of one tract the oil or gas adhering to such tract for the time being, and bestowing it upon the owner of another tract, where it may never have been. As oil and gas are migratory in character, no one can tell from whence they came or whither they are going, and they must therefore belong to him upon whose lands they are captured. No one else can have any ownership in them, and a man can be awarded only that which he owns. *Kelley v. Ohio Oil Co.*, 57 Ohio St. 317, 49 N. E. 399, 39 L. R. A. 765, 63 Am. St.

Rep. 721. In that case this court said, on page 323, 57 Ohio St., and page 401, 49 N. E., 39 L. R. A. 765, 63 Am. St. Rep. 721: 'Petroleum oil is a mineral, and while in the earth it is part of the realty, and, should it move from place to place by percolation or otherwise, it forms part of that tract of land in which it tarries for the time being, and if it moves to the next adjoining tract it becomes part and parcel of that tract; and it forms part of some tract until it reaches a well and is raised to the surface, and then for the first time it becomes the subject of distinct ownership separate from the realty, and becomes personal property—the property of the person into whose well it came. And this is so whether the oil moves, percolates, or exists in pools or deposits. In either event it is property, and belongs to the person who reaches it by means of a well, and severs it from the realty and converts it into personalty.' The same rule applies to all property."

There is no error in the decree, and the same is affirmed.

(54 W. Va. 510)

O'HANLIN v. CARTER OIL CO.

(Supreme Court of Appeals of West Virginia.
Feb. 2, 1904.)

NUISANCE—IMPROPER USE OF SIDEWALKS—DAMAGES.

1. Streets and sidewalks are designed for the use of the public, and the use of them by an individual simply for his own convenience and accommodation, unaccompanied by any public use, as for drains, private crossings, sewers, vaults, cesspools, or other obstructions or excavations, is unauthorized, and essentially a nuisance, for which such individual is liable for all damages sustained in consequence of the improper appropriation of the street or sidewalk to his mere personal use.
(Syllabus by the Court.)

Error from Circuit Court, Tyler County;
M. H. Willis, Judge.

Action by John O'Hanlin against the Carter Oil Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Roberts & Carter and T. P. Jacobs, for plaintiff in error. McIntire & McIntire, for defendant in error.

MILLER, J. On the 17th day of May, 1900, John O'Hanlin, the defendant in error, commenced a civil action, before a justice of the peace of Tyler county, against the Carter Oil Company, a corporation, for damages for an alleged wrong. The summons, which contains the only description of the cause of action found in the record, alleges that on the — day of September, 1899, in the city of Sistersville, in the said county of Tyler, the defendant was the owner of a steam pipe or line used in conveying steam, which, among other points, was buried on Virginia street, in said city; that defendant willfully and negligently caused said steam pipe or line to remain on said street, and to be used

in conveying hot and scalding steam, while in a defective, unsafe, and dangerous condition, which defects were well known, at and before the time last mentioned, to said defendant; that at the time last mentioned, while plaintiff's daughter, Alice, aged five years, was passing over and along said Virginia street, in said city, the earth directly over said steam pipe or line, softened by escaping steam, from said defective steam pipe or line, gave way, precipitating his said daughter, Alice, into the orifice, which was filled with hot water and scalding steam, which was then and there escaping from said steam pipe or line, scalding and burning his said daughter, Alice, on the legs, arms, hands, and body, for which plaintiff claimed \$300 damages. There was a trial of the action by the said justice, and judgment rendered by him against the defendant for \$250, with costs. From this judgment the defendant was granted an appeal to the circuit court of said county, wherein the action was again tried upon the pleadings made up before the justice, and upon the plea by the defendant of "not guilty of the trespass in the declaration mentioned," and joinder therein by plaintiff filed in the circuit court. The latter trial was by a jury.

At the close of plaintiff's evidence in chief, the defendant moved to exclude the same from the jury, which the court refused to do, and the defendant excepted. The defendant then introduced its evidence, and demurred to the evidence adduced in the case, in which demurrer the plaintiff joined. Thereupon the jury found the usual conditional verdict, assessing the plaintiff's damages at \$165, if the law should be for him. Upon consideration thereof, the court overruled the said demurrer, and rendered judgment upon the verdict against the defendant for said \$165, and for the plaintiff's costs, both in court and before the justice. To the ruling and judgment of the court aforesaid, defendant excepted, and also moved the court to set aside said verdict and judgment and grant it a new trial of the action, which the court also refused to do, and the defendant again excepted. The several rulings of the court, the exceptions thereto by defendant, and all of the evidence introduced and considered on the trial are certified in bills of exception and made parts of the record. To the last-mentioned judgment the defendant was granted a writ of error, and assigns various errors in the record of the proceedings in the circuit court, not necessary to be here set out in detail.

The material statement of the alleged negligence of the defendant in the summons, treated as a declaration, is: That the defendant was the owner of a steam pipe or line used in conveying steam, which, among other points, was buried on Virginia street, in said city; that defendant willfully and negligently caused said steam pipe or line to remain on said street, and to be used in

conveying hot and scalding steam, while in a defective, unsafe, and dangerous condition, which defects were well known to said defendant at and before the time last mentioned.

The facts are: Prior to July, 1899, plaintiff in error, the Carter Oil Company, owned a certain oil well in Sistersville, near Virginia street. This street was then unpaved, and without curb lines or sidewalks. The company had a boiler house, from which a two-inch steam line, belonging to it, ran across the street to its said oil well. About the time last mentioned, the city of Sistersville gave notice to the said company to lower its steam line, so that pavement of the street, which had been determined upon by the city, could be laid over said line. The steam line was thereupon lowered by the company as directed. This work was done under the direction of the foreman of the company and the city engineer, and to the satisfaction of the latter. Not long before the paving was done, one O. P. Collins had built a dwelling house over the steam line. The distance between the house and the curb line of the street, after it was put in, was about 10 feet. Between the curb line and the house the ground was lower than the level of the paved street. After the steam line was lowered it passed through the curb line, but remained some distance above the surface of the ground, between the curb and the house. Under the pavement of the street, the steam line was encased in another iron pipe, but between the curb and the house it was inclosed in a wooden steam box, supported by what is called a "horse," made by nailing two legs on a board or other piece of timber. Some of the dirt excavated and taken from the street, preparatory to the paving of it, was used in bracing and holding the curb in place at the point where the steam line passed through it, and some of it was placed at the point where the line passed under the house. Some time after the curbing had been put in and the steam line covered in front of the house as aforesaid, other filling with dirt was done there by some one other than the Carter Oil Company, and without its knowledge. By whom it was done the evidence does not show, but it strongly tends to prove that the employees of the city did it. The dirt filling on the steam pipe where it left the curbing was about three feet in thickness. This filling along the curb was not paved, but was used and traveled as a sidewalk.

On the 1st day of September, 1899, while said Alice, who had gone to the Collins house on a visit the day before, was playing on the fill or dirt sidewalk over the steam line, her foot and leg went down in a hole or opening filled with hot mud and escaping steam, and they were burned. Miss Mollie Collins, the only witness for the plaintiff who testified as to the condition of the place where the accident occurred, says that she

came with Alice to Collins' the day before from New Martinsville, where they both resided; that Alice was playing, out where the pavement should have been; that she heard a scream, and went out to see what was the matter; that the ground had given away, and let the child in where the steam pipe was; that she did not live there (at the Collins house), but that the most of the time she was there; the place (where the accident occurred) seemed to be wet all the time; it seemed to be kind of sunk; there didn't seem to be any steam; but it seemed wet. "I suppose the steam was there. I looked in afterwards, and it was hot just like lime; like lime would boil; and it was hot, for I don't know how long, after the child was burned, till you couldn't put your hand in it at all; and the hole was large enough for the child to get her leg in." She testified that on other visits to Collins, who is her brother, she noticed this wet place, but saw no steam escaping; that she made no complaint to any one about seeing the wet place; that there was nothing in that to indicate that steam was under it; that it was just damp looking—that was all. The evidence further shows that after the accident, at the point where it occurred, the steam line was examined, and, as the witness states, "there under the ground it seemed to be a little bit steam-soaked for about twelve feet, and the line where it was joined had went out, pulled out about one thread; that was the extent. When we put the steam through we saw only a small seep in the line. * * * That was where the collar was connected on." Witness further stated that he had been in the oil business since 1881; that the union of the steam line made at the point where the accident occurred was a proper one; that the material used was such as is ordinarily used for a steam line throughout the oil country; that the joint was on when the steam line was lowered, and at the time of the examination there was a slight sag in the pipe, caused by the weight of the fill of dirt upon it, outside of the curbing; that this weight caused the pipe, where it was screwed into the back of the union, to pull out about one thread; and that steam seeped or leaked out around the threads. It further appears that the steam pipe was of good material, as good as new, A No. 1, and properly joined together, put down at the point of the accident in the usual manner, and that it had sufficient strength to withstand the weight of the first fill. It is also shown that the company had no notice, and, so far as the record discloses, no other person had any knowledge that the steam line was defective, or out of repair, until after the accident happened. Another witness testified that the quality of the steam line at the place of the accident was as good as is used in that class of business, and that with the weight which was upon it there, after the second lot of dirt was placed thereon, a pipe line of the best material would

have sagged. It is also proved that the company did not know who put the dirt or fill on the steam line the second time, but that it would have been the duty of the city to place it there.

Another witness says that he was superintendent of the streets of the city when the accident occurred; that he did the grading and paving of the street at that point; that, representing the city, he had the dirt from the street filled in between the curb and the Collins house. The foreman of the company says that his duty for some time called him twice a day to a well within 100 feet of the place of the accident, and in plain view of it, but that his attention was never called to any leak in the pipe, and that he saw nothing there that indicated a leak.

We must therefore conclude from the evidence that the steam line was lowered by direction of the city in a proper manner, and to its satisfaction; that the dirt fill placed over the steam line was necessary, as well to cover the line, as to brace and hold in place the curb; that it was used and traveled by the public as a sidewalk; that the material used in the steam line was of good quality, properly joined together, and of sufficient strength to have withstood the weight of the first fill; that other dirt was afterwards put on the sidewalk at the point where the steam line crossed under it; that this additional weight caused the threads of the pipe to break, and thereby a leak of the steam occurred; that the escaping steam, and hot mud, the result of the escaping steam, caused the injury to plaintiff's daughter; and that defendant had no knowledge of the defect in the steam line until after the accident. There is no conflict in the evidence, or dispute about the facts proved.

This full statement of the case has been made because the defendant seems to rest its defense upon the theory that it placed its steam pipe under the street and sidewalk by permission of the city authorities, and operated it in a lawful business with due care and skill; that it is not guilty of negligence; and is not liable to the plaintiff in damages for the alleged injury occasioned by the defect in its steam pipe, of which it had no notice, and could have had no knowledge, under the circumstances.

Sistersville is an incorporated city, and is given the authority by, and charged with the duty under, its charter, to lay off, vacate, close, open, alter, grade, and keep in good repair the roads, streets, alleys, pavements, sidewalks, crosswalks, drains, and gutters therein, for the use of the citizens and of the public; to improve and light the same, and to keep them free from obstructions of every kind; and it also has authority to raise the necessary revenues for its municipal purposes and expenses. Chapter 4, § 28, Acts, 1899. "It is a principle of nearly universal acceptance in this country that when a city or town is incorporated and is given control

over the streets and walks within its corporate limits, and is empowered to provide the means to make and repair them, the corporation not only assumes this duty, but by implication agrees, to perform it for the benefit and protection of all who may have occasion to make use of these public easements, and that for failure in the discharge of this duty the corporation is responsible to the party injured." *Wilson v. City of Wheeling*, 19 W. Va. 323, 324, 42 Am. Rep. 780. Section 53 of chapter 43 of the Code of 1899 provides that: "Any person who sustains an injury to his person or property by reason of a public road, or bridge, in a county, or by reason of a public road, bridge, street, sidewalk or alley in an incorporated city, village or town, being out of repair, may recover all damages sustained by him by reason of such injury, in an action on the case in any court of competent jurisdiction, against the county court, city, village or town in which such road, bridge, street, sidewalk or alley may be, except that such city, village or town shall not be subject to such action, unless it is required by its charter to keep the road, bridge, street, sidewalk or alley therein, at the place where such injury is sustained, in repair." Numerous cases have arisen under this statute, and been decided by this court, in which the liability of municipal corporations thereunder has been well considered, and the law upon that question settled in this state. *Chapman v. Town of Milton*, 31 W. Va. 384, 7 S. E. 22; *Gibson v. City of Huntington*, 38 W. Va. 177, 18 S. E. 447, 22 L. R. A. 561, 45 Am. St. Rep. 853; *Yeager v. City of Bluefield*, 40 W. Va. 484, 21 S. E. 752; *Van Pelt v. Town of Clarksburg*, 42 W. Va. 218, 24 S. E. 878. In *Biggs v. City of Huntington*, 32 W. Va. 55, 61, 9 S. E. 51, 53, the court says: "It will be observed that the statute in express terms makes the town liable for damages for injuries sustained by reason of a defect in a public street or sidewalk. The language is unqualified, and without exception or limitation; and therefore the question of notice or want of care on the part of the town is altogether immaterial. If the street or sidewalk was in fact defective, and such defect caused the injury to the plaintiff, it is no defense on the part of the town that it had exercised great care in repairing the street or sidewalk. It is only necessary in such suit to allege and prove the existence of the defect, and that the injury was occasioned thereby." In *Sheff v. City of Huntington*, 16 W. Va. 307 (Syl., point 1), it is held: "If a person is injured by reason of a public road being out of repair, the corporation whose legal duty it is to keep the road in good repair is liable to him for damages, whether it had notice of such defect or not." *Evans v. Huntington*, 37 W. Va. 601, 16 S. E. 801. The law is not more lenient to an individual who causes the streets or sidewalks of a city or town to be defective or dangerous than it is to the city or town itself which permits such acts to be done, or

allows dangerous agencies thereon or thereunder to remain unremoved or unabated. In some instances the law expressly confers upon corporations organized to construct and maintain works of public utility the right to occupy and use streams of water, water courses, streets, highways, roads, turnpikes, and canals, but upon condition that such corporations shall restore the stream, water course, street, highway, road, turnpike, or canal, intersected or touched, to its former state, or to such state as not unnecessarily to impair its usefulness, and to keep the part thereof so used in repair. But we find no authority in the charter of Sistersville, or in the general statute, allowing the occupation or use of the public streets of that city by individuals for their own benefit or mere personal convenience. In *Dygert v. Schenck*, 23 Wend. 446, 35 Am. Dec. 575, it is held that "where the owner of land over which a public highway passes digs a raceway across the road to conduct water to his mill, and builds a bridge over the raceway, and an injury is sustained by any one in consequence of the bridge being out of repair, such owner is liable in damages to the party aggrieved"; and in *Congreve v. Smith*, 18 N. Y. 79, 82, it is said that "the general doctrine is that the public are entitled to the street or highway in the condition in which they placed it; and whoever, without special authority, materially obstructs it, or renders its use hazardous by doing anything upon, above, or below the surface, is guilty of a nuisance; and, as in all other cases of public nuisance, individuals sustaining special damage from it, without any want of due care to avoid injury, have a remedy by action against the author or person continuing the nuisance. No question of negligence can arise, the act being wrongful. It is as much a wrong to impair the safety of a street by undermining it as by placing objects upon it. There can be no difference in regard to the nature of the act or the rule of liability, whether the fee of the land within the limits of the easement is in a municipal corporation, or in him by whom the act complained of was done; in either case, the act of injuring the easement is illegal." It is a general legal principle that there can be no rightful permanent use of a public highway by individuals for private purposes. *Elliott on Roads & Streets*, § 645. This court, in *Curry v. Town of Mannington*, 23 W. Va. 14, 17, said: "Streets and sidewalks are designed for the use of the public, and the use of them by an individual, simply for his own convenience and accommodation, unaccompanied by any public use, as for drains, private crossings, sewers, vaults, cesspools, or other obstructions, is unauthorized and essentially a nuisance, for which such individual is liable for all damages sustained in consequence of the improper appropriation of the street or sidewalk to a mere personal use."

In the light of the foregoing authorities,

we are of opinion that the circuit court did not err in overruling the defendant's demurrer to the evidence. The judgment complained of is fully sustained by the proof, and must therefore be affirmed.

(54 W. Va. 518)

GIEBELL v. COLLINS CO.

(Supreme Court of Appeals of West Virginia.
Feb. 2, 1904.)

INJURY TO EMPLOYE—PLACE TO WORK—APPLIANCES—INSTRUCTION—ASSUMPTION OF RISK.

1. It is the duty of the master to provide a suitable place in which, and suitable appliances with which, the employé, being himself in the exercise of due care, can perform his duty without being exposed to unnecessary dangers, that is, to dangers which do not of necessity attend the exercise of the employment; but the master is not bound to furnish for his workmen the safest and best machinery, nor to provide the best methods for the work in which he is engaged, in order to save himself from responsibility for injuries to his employé. If the machinery and appliances which he has been in common use, and are such as can, with reasonable care, be used without danger to the employé, it is all that can be required of the employer.

2. It is the duty of a master who sets a servant to work in a place of danger to give him such notice and instruction as is reasonably required by the youth, inexperience, or want of capacity of the servant, and, failing to do so, he is liable for the damage suffered through such neglect.

3. Where the servant has equal knowledge with the master of the danger incident to the work, he takes the risk upon himself, if he goes on with it; but this only applies where the servant is of sufficient discretion to appreciate the dangers incident to the work. Where there are latent defects or hazards incident to an occupation, of which the master knows, or ought to know, it is his duty to warn the servant of them fully, and, failing to do so, he is liable to him for any injury he may sustain in consequence of such neglect; and this rule applies even where the danger of hazard is patent, if through youth, inexperience, or other cause the servant is incompetent to fully understand and appreciate the nature and extent of the hazard. It is the master's duty to warn him of any danger incident to the business; and if, with such knowledge, he chooses to assume the risk, and is capable of appreciating the hazard, and of choosing and contracting for himself, the master is then absolved from liability for injuries from the ordinary hazards.

(Syllabus by the Court.)

Error to Circuit Court of Ritchie County;
M. H. Willis, Judge.

Action by Charles L. Giebell, a minor, by Florence Giebell, his next friend, against Creed Collins and C. W. Sprinkle, partners under the firm name of the Collins Company. Judgment for plaintiff, and defendants bring error. Affirmed.

Sherman Robinson and J. Newman, for plaintiffs in error. J. W. Fidler and Homer Adams, for defendant in error.

MILLER, J. Charles L. Giebell, a minor, by Florence Giebell, as his next friend, sued Creed Collins and C. W. Sprinkle, partners

in business under the firm name of the Collins Company, in an action of trespass on the case, in the circuit court of Ritchie county, and recovered a judgment against them as such company for \$500, with interest thereon from the 3d day of March, 1903, the date of the judgment, until paid, and his costs by him in the action expended. To this judgment a writ of error and supersedeas was granted to the defendants by this court.

The declaration contains two counts, each of which alleges that the said defendants were lawfully possessed of a certain large planing mill, or lumber manufacturing plant, situate in said county, and, being so possessed thereof as aforesaid, they were engaged in dressing, finishing, and manufacturing lumber; and, the said defendants being so engaged as aforesaid, they employed plaintiff to engage in said work of dressing, finishing, and manufacturing lumber as aforesaid, and it then and there became and was the duty of said defendants to use due and proper care and caution that the plaintiff should be provided with good, proper, safe, and suitable machinery and appliances to be used by him in said employment as aforesaid, and that said plaintiff should be secure and safe in all respects in his employment from any injury incident thereto, against which ordinary care could avail, while so engaged for said defendants in said work. The breaches of duty on the part of defendants, the injury to plaintiff, and the damages claimed by him are then averred. To the declaration and each count thereof defendants interposed a demurrer, which was overruled by the court.

Plaintiffs in error say that the demurrer was and is well taken and should have been sustained, because the declaration would compel defendant company to provide for plaintiff a kind and character of material, machinery, appliances, and a place in which to labor not required by law. Buswell on Pers. Inj. § 192, says: "The authorities are agreed that it is the duty of the master to provide a suitable place in which, and suitable appliances with which, the employé, being himself in the exercise of due care, can perform his duty without being exposed to unnecessary dangers; that is, to dangers which do not of necessity attend the exercise of the employment." 14 Am. & Eng. Enc. Law, 877. In *Berns v. Coal Co.*, 27 W. Va. 286, 55 Am. Rep. 304, it is held that "the master is not bound to furnish for his workmen the safest and best machinery, nor to provide the best methods, for the work in which he is engaged, in order to save himself from responsibility for injuries to his servant. If the machinery and appliances which he has been in common use, and are such as can with reasonable care be used without danger to the employé, it is all that can be required of the employer." The averments of the declaration are not insufficient, and, if redundant, they do not for that reason viti-

¶ 1. See *Master and Servant*, vol. 34, Cent. Dig. §§ 181, 182.

ate the pleading. The demurrer was properly overruled.

On the 18th day of July, 1900, the plaintiff, while in the employ of the defendants in their said planing mill, had all of his fingers cut from his left hand by an edger or jointing machine, a part of the machinery of said planing mill and operated therewith, at which he was at the time working. Plaintiff, at the time of the accident, was only 16 years old. Before he was put into the machinery room, where he was hurt, he had been working for the company in its lumber yards, carrying lumber and off bearing. It is stated in the evidence that he had worked for the company in its yards at different times from 1897 until about six weeks before he was injured as aforesaid.

The plaintiff testified that, at the time he was hurt, he was working under the direction of said C. W. Sprinkle, a member of the firm, and one of the defendants, who set him to work on the jointer; that he had been working in the machinery room a month or six weeks; that, during that time, he did not work the whole time on any particular machine; that he worked on the jointer, rip-saw and cut-off saw; that, prior to going to work for the Collins Company in that room, he had not had any experience whatever with machinery; that this was the first machinery he had ever worked with; that the company did not, nor did any person for it, in any way, explain to him the nature or workings of the machines, or either of them; that the company just put him up there to work upon them; and that no person ever explained to him how the machines should be worked. The knives or bits on the cylinder of the said jointer were about 12 inches in length, and about 8 or 10 inches of them were exposed. At the time of the accident the guard was not properly adjusted thereon, as he afterwards learned, and the machine had no fender upon it, although a fender which belonged to it was in the room, and was put on the jointer some time after the accident occurred. The said cylinder made about 4,700 revolutions per minute. A machine called a "moulder," in operation at the time, stood near the jointer. A piece of coffee sack about two feet square hung between the jointer and moulder. The shavings from the moulder would fly all over the jointer, the coffee sack not being sufficient to prevent them from so doing. At the time of the accident plaintiff was at the jointer, dressing or jointing a piece of oak timber, about 2 feet 9 inches long, 4 inches wide, and 1 $\frac{3}{4}$ inches thick, for a transom bar. Both of his hands were on the stick. His left hand was in front. A shaving from the moulder struck him in the eye. Plaintiff quickly took his right hand from the stick to remove the shaving from his eye, that hand being on the back end of the transom bar, when his left hand slipped from the bar and went into the bits, which cut off all of

the fingers of that hand. It also appears from the evidence that the jointer was and is the most dangerous of the machinery mentioned. The plaintiff further testifies that he doesn't think the accident would have occurred if the shaving had not struck him, and that if the machine had been in proper condition, and something on it to protect his hands from the bits, he would not have been hurt; that there was nothing on the machine to protect him from getting hurt while he was running it; that he knew nothing about adjusting the guard, and had been told nothing about it by any one, and knew nothing about a fender, or the use of it, until some time after he was hurt; that on a visit to the mill after the accident he saw that a fender had been put on the jointer. It is also shown that plaintiff's brother, at the time of the accident, was operating the moulder, and that, when running, the moulder would throw shavings all over the jointer.

A number of witnesses were examined on behalf of the plaintiff, who proved, in substance, that the operation of the jointer was dangerous without a fender, and still more dangerous with the guard unadjusted in the absence of the fender, as it was shown to be; while perhaps as many witnesses for the defendants testified that, with the guard properly arranged without the fender, the machine would be more convenient for its purposes, and not more dangerous to them; but they were workmen of experience in that kind of labor.

Defendant Sprinkle testified that plaintiff had worked at times for the company at odd jobs, around the lumber yard and mill, from September, 1897, until he was put in the machine room. He further stated: "We put him upstairs in the machine room to help his brother. I had general charge of the work of the business." Witness also testified that he did not direct plaintiff to work on the jointer; that he sent him to help his brother; that there were in that room a shaver, rip-saw, a cut-off saw, a moulder, a buzz-saw, planer, and jointer; and that two men generally worked in the room.

All the evidence, with the instructions hereinafter referred to, was submitted to the jury impaneled in the case, and a verdict found for the plaintiff, upon which the judgment aforesaid is predicated. The defendants moved the court to set aside the verdict and grant to them a new trial, upon the ground that said verdict was and is contrary to the law and evidence, but the motion was overruled, to which action of the court they excepted. All of the evidence heard by the jury, and the several instructions given, as well as those refused, are made parts of the record by bills of exception.

The evidence establishes, at the least, that plaintiff was a boy only 16 years of age; that, previous to his employment in said room, he had had no experience in operating machinery; that he was sent to the machinery

room by C. W. Sprinkle, a member of the defendant company, who had charge of the business, to labor, without any instructions from the company, or any other person, as to the nature or manner of operating the machinery, or the dangers thereof; that there were in the machinery room the said jointer, and the other machines above mentioned; that the jointer had upon it a guard, not properly adjusted, but no fender; and that plaintiff, as he testifies, knew nothing about the guard or fender, or the use of them, until after he was hurt. *Buswell, supra*, § 202, says: "Since it is the duty of the master to use due diligence to see that the servant is not exposed to unnecessary risks in the course of his employment, he is bound, before an employé is put in charge of dangerous machinery with which he is not acquainted, to instruct and qualify him for his duty." 14 Am. & Eng. Enc. Law, 897, thus states the rule: "It is the duty of a master who sets a servant to work in a place of danger to give him such notice and instruction as is reasonably required by the youth, inexperience, or want of capacity of the servant, and, failing to do so, is liable for the damages suffered through such neglect." These authorities are supported by numerous decisions of the highest courts of the different states of the Union, and correctly state the law.

The defendants contend that plaintiff accepted the risk incident to his employment, and cite *Berns v. Coal Co.*, *supra*: "When a servant enters into the employment of a master, he assumes all the ordinary risks incident to the employment, whether the employment is dangerous or otherwise. If a servant willfully encounters dangers which are known to him, or are notorious, the master is not responsible for the injury occasioned thereby." A recurrence to the evidence is a sufficient answer to this proposition. No such case as the one cited is here presented. In *Wood on Master and Servant*, § 349, it is said: "Where the servant has equal knowledge with the master of the danger incident to the work, he takes the risk upon himself, if he goes on with it; but this only applies where the servant is of sufficient discretion to appreciate the dangers incident to the work. Where there are latent defects or hazards, incident to an occupation, of which the master knows or ought to know, it is his duty to warn the servant of them fully, and, failing to do so, he is liable to him for any injury he may sustain in consequence of such neglect; and this rule applies even where the danger or hazard is patent, if through youth, inexperience, or other cause the servant is incompetent to fully understand and appreciate the nature and extent of the hazard. It is the master's duty to warn him of any danger incident to the business; and if, with such knowledge, he chooses to assume the risk, and is capable of appreciating the hazard, and of choosing and

contracting for himself, the master is then absolved from liability for injuries from the ordinary hazards." This rule is also sustained by many decisions of the courts of last resort, and is well-established law. All of these questions of fact were involved in the case, were fully and fairly submitted to the jury, and were ascertained and fixed, by their verdict, against the contention of the defendants. "The jury is the sole judge of the credibility of contradicting witnesses, and of the weight to be given to their testimony. The verdict of a jury will be held sacred by this court, unless there is a plain preponderance of credible evidence against it, evincing a miscarriage of justice from some cause, such as prejudice, bias, undue influence, misconduct, oversight, or misconception of the facts or law." *Young v. West Virginia & R. Co.*, 44 W. Va. 218, 28 S. E. 932.

We cannot say that the verdict of the jury is erroneous for any reason. The refusal of the court to set it aside was therefore proper, unless the instructions, or some of them, given to the jury were improper, or unless the proffered instructions rejected, or some of them, should have been given by the court.

At the instance of the plaintiff, the court gave to the jury the following instructions: "(1) The jury are instructed that it is direct, personal, and absolute obligation of the master to provide reasonably safe and suitable machinery and appliances for the business. This includes the exercise of reasonable care in furnishing such appliances. The master must furnish a safe place in which his servant is to work. And the jury are further instructed that the master is liable for any injury to his servants, due to the neglect or failure of the master to provide such safe and suitable machinery and appliances for the business, or to exercise such reasonable care in furnishing such appliances, or to furnish his servants a safe place in which to work. (2) The jury are further instructed that it is the duty of the master who sets a servant to work in a place of danger, or with dangerous machinery or appliances, to give him such notice and instructions as is reasonably required by the youth, inexperience, or want of capacity of the servant; and, failing to do so, the master is liable for the damage suffered through such failure." "(4) The jury are further instructed that, if they believe from the evidence that the plaintiff in his action is entitled to recover, he may recover the expenses of his cure, the value of his time lost during his cure, and a fair compensation for his physical and mental suffering caused by the injury, as well as any permanent reduction of his power to earn money. (5) The jury are further instructed that the duties of the master to provide safe and suitable machinery and appliances for the business, and to furnish a safe place in which his servant is to work, are duties which the master can either perform personally, or delegate their perform-

ance to some one else; but if both the master and the person to whom such duties are delegated fail in the performance of any of said duties, and injury results to the servant by reason of said failure, the master is liable for such injury. (6) The jury are further instructed that the right of the plaintiff, Charles L. Giebell, to recover in this action, if the jury believe from the evidence he is entitled to recover, is not affected by his having contributed to the injury complained of, if the jury believe from the evidence that he did contribute to his own injury, unless he was in fault in so doing. (7) The jury are further instructed that in determining whether the plaintiff, Charles L. Giebell, a boy sixteen years of age, was guilty of contributory negligence, the jury have the right to take into consideration his age, capacity, and experience, and although he may have been guilty of an act or acts which in an adult would have amounted to an assumption of the risk of injury and a waiver of the duty the master owes him, yet he cannot be held to have assumed any such risk or waived any such duty which one of his age, discretion, and experience could not fully comprehend and appreciate. (8) The jury are further instructed that, while it is a general rule that an employé accepts service subject to risks incidental to it, and when the appliances or means or methods of work are known to the employé he can make no claim upon the employer to change them, and, if injury results therefrom, can recover no damages, yet this does not relieve the employer from the obligation which makes it his imperative duty to warn the employé of danger and instruct him how to avoid the danger, even when the danger is visible and open to observation, if through youth, inexperience, or lack of ability the employé is incompetent to understand fully and appreciate the nature and extent of the danger." To the giving of all of which instructions, except instruction No. 4, the defendants objected.

The court also gave to the jury, at the instance of the defendants, the following instructions: "(1) The court instructs the jury that the defendant, the Collins Company, was not bound to furnish to the plaintiff, Charles L. Giebell, the safest and best appliances and machinery used with which to work, but the defendant, Collins Company, should be acquitted of fault in this respect, if the appliances and machinery which they did furnish the plaintiff, Charles L. Giebell, was reasonably safe and suitable. (2) The court instructs the jury that before the plaintiff, Charles L. Giebell, can recover from the defendant, the Collins Company, in this case, for the loss of his hand while in said company's employ, he, Charles L. Giebell, must overcome two presumptions: First, the presumption that the defendants did provide safe and suitable machinery, and a safe and suitable place in which to work; second, the presumption that the plaintiff assumed all

the usual and ordinary hazards of the business in which he is engaged; and that, unless the plaintiff does overcome the said presumptions by a preponderance of the evidence, you will find for the defendant." "(5) The court instructs the jury that if they believe, from the evidence in this case, that the plaintiff was guilty of contributory negligence, that then he cannot recover, and the jury will find for the defendant company." "(7) The court instructs the jury that if the said Charles L. Giebell knew, at the time of his entry upon his duties for the Collins Company, or if he afterwards found out or discovered, that the machinery or jointer that he was called upon to use was dangerous, and he continued his employment without objection or complaint, he has assumed the risk of the danger then known or discovered, and cannot recover in this suit. (8) The court instructs the jury that the minor cannot recover damages on account of the diminution of earning power or capacity during minority, unless emancipation be shown, but they may consider such diminution after he attains his majority."

But the court refused to give the following instructions: "(4) The jury are instructed that, if they believe from the evidence that the ground of the plaintiff's action is negligence, it rests upon the plaintiff, Charles L. Giebell, to trace the fault of the injury to the defendant, the Collins Company, and for this purpose he must show the circumstances under which the injury occurred; and if, from the circumstances so proven by the plaintiff, it appears that the fault was mutual, or, in other words, that contributory negligence is fairly imputable to the plaintiff, he has, by proving the circumstances, disproved his right to recover, and, on the plaintiff's evidence alone, the jury should find for the defendant." "(6) The court instructs the jury that the employé, Charles L. Giebell, accepted the service subject to the risks incidental to it, and, if the appliances or methods of work were known to him, he could make no claim upon his employer, the Collins Company, to have them changed. He accepted them as they were, and if the injury has resulted therefrom he cannot recover. (7) The court instructs the jury that if the said Charles L. Giebell knew, at the time of his entry upon his duties for the Collins Company, or if he afterwards found out or discovered, that the machinery or jointer that he was called upon to use was dangerous, and he continued his employment without objection or complaint, he has assumed the risk of the danger then known or discovered, and cannot recover in this suit." "(11) The jury are instructed that if they believe from the evidence in this case that the plaintiff, in the case of the jointer, knew of the knives and cutting edges, and that they were dangerous, then no instructions were necessary as to the dangerous character thereof, as an employé assumes all ordinary hazard of the business in which he

is engaged, and if injured thereby he cannot recover." To which refusal the defendants excepted.

Reading instruction No. 1 given for the plaintiff, and instructions Nos. 1 and 2, given for the defendants, together and as a whole, they state the law correctly.

It is urged by defendants that instruction No. 2, given for plaintiff, is erroneous, because it assumes the dangerous character of the employment and the inexperience of plaintiff. There is no conflict in the evidence about either of these propositions. They are undisputed. The instruction was not improper upon the proof. Instructions 5, 6, 7, and 8 are not subject to the objections thereto made by the defendants. We think said instructions were pertinent and properly given.

Defendants complain because their proffered instruction No. 4 was not given. As an abstract proposition, it is a correct principle of law, and governs in cases where the evidence of the plaintiff is demurred to by the defendant, where there is a motion to set aside the verdict of a jury in favor of a plaintiff, or may be given where there is some evidence tending to prove the facts upon which such instruction is based. There is no evidence in this case which proves, or tends to prove, that the fault which caused the accident to plaintiff was mutual, or that contributory negligence is fairly imputable to him. A verdict based upon that assumption would have been erroneous. It was not plaintiff's fault that the guard on the jointer was not properly adjusted, or that the machine had no fender upon it. Neither was it his fault that the shaving was thrown into his eye. He did at the time what almost every person would have done. Suffering from the sudden pain, he quickly disengaged his right hand and attempted to remove the shaving from his eye. The other hand then slipped from the transom bar, and was caught by the revolving machine, unguarded by the proper fender. He attempted to protect his eye, and thereby lost his fingers. It cannot be said with any degree of reason that plaintiff, under the circumstances, was guilty of negligence. The question of contributory negligence is fully covered by other instructions in the case, if there be any such question therein. The proposed instruction No. 4 was properly refused. *State v. Staley*, 45 W. Va. 793, 32 S. E. 198, and cases there cited.

Rejected instructions Nos. 6, 7, and 11 were and are improper, because they omit to say to the jury that, in their consideration of the questions propounded therein, they must also consider the age, capacity, experience, and discretion of the plaintiff. *Turner v. N. & W. R. R. Co.*, 40 W. Va. 676, 22 S. E. 83. In that case it is held that, "in determining whether a boy sixteen years of age was guilty of contributory negligence, the jury have the right to take into consideration his age, capacity, and experience, and, although he may have been guilty of an act

which in an adult would have amounted to an assumption of the risk of injury and a waiver of the duty the master owes him, yet he cannot be held to have assumed any such risk or waived any such duty which one of his age, discretion, and experience could not fully comprehend and appreciate."

There is no error in the record prejudicial to the defendants. The judgment complained of must therefore be affirmed.

(54 W. Va. 545)

FRANCIS et al. v. MARSH et al.

(Supreme Court of Appeals of West Virginia.
Feb. 2, 1904.)

WILL—REVOCATION—MARRIAGE—REVIVAL— CODICIL.

1. Under section 6 of chapter 77 of the Code of 1899, a will made by a man is revoked by his subsequent marriage, although made in contemplation of marriage, and containing clauses by which provision is made for a wife, in case he should have one living at the time of his death.

2. Said section was substituted for the common-law rules governing revocation by marriage, and marriage and birth of issue, for greater stability of titles and property rights; and, to effectuate the legislative intent, it must be enforced as written, without exception.

3. In adopting said section together with section 8 of said chapter, providing for revival by re-execution or codicil, the Legislature did not impair the right to dispose of property by will. It only prescribed a reasonable regulation for the exercise thereof.

4. A codicil, to effect the revival of a revoked will under section 8 of chapter 77 of the Code of 1899, must show an intent to revive; but any language therein from which such intent may reasonably be inferred, such as a reference to the will by date, or as being the will of the testator, in the absence of contradictory matter found on the face of the codicil or in the surrounding circumstances, is sufficient. It need not show that the testator knew the will had been revoked, nor contain words of express revival, ratification, or confirmation of the will.

5. A duly executed codicil in the following terms: "I, J. C. M., do make this a codicil to my will made on the 6 day of August, 1895, I do nominate and appoint J. B. W. as one of the executors of my will and do hereby revoke the appointment of W. R. J. to said will"—revives the will therein referred to.

(Syllabus by the Court.)

Appeal from Circuit Court, Lewis County; W. G. Bennett, Judge.

Action by Sevilla Francis and others against Dora Marsh and others. Decree for defendants, and plaintiffs appeal. Affirmed.

Linn & Bland, for appellants. W. W. Brannon and A. Edmiston, for appellees.

POFFENBARGER, P. This case presents two questions. One is whether a will, made by a man, showing affirmatively on its face his contemplation of future marriage, and making provision for his future wife in case of marriage, is excepted from the operation of section 6 of chapter 77 of the Code of 1899, declaring that "every will made by a man or a woman shall be revoked by his or her marriage, except a will made in exercise of a power of appointment, when the

estate thereby appointed would not, in default of such appointment, pass to his or her heirs, personal representative, or next of kin." On the 6th of August, 1895, John C. Marsh, a widower, and the father of several children, made a will, the second clause whereof reads as follows: "If so be I have a wife living at the time of my decease I will to her use one-third of the land I may own at that time to her use during life time I do so order and will it and do also will and bequeath to said wife if such exist one third of my personal estate to her entire use." In the fifth, seventh, ninth, and possibly other clauses, there are references to the possible future wife, accompanied by gifts to her, without naming her or indicating any particular person as his intended wife. On the 3d day of October, 1895, Marsh married. Did the testator intend by these provisions to avoid the effect of the statute? If so, is it possible to effectuate such intent? Can the law thus be nullified? It is not pretended that this will can stand if the Legislature intended to make marriage revoke a will executed antecedent to the marriage without reference to the intent of the testator. So construed, the Legislature does not take away or impair the right to dispose of property by will. It enables the maker of the revoked will to give it effect by re-execution or revival. It regulates and prescribes the mode of exercise of such power and right. The question, then, is not one of legislative power, but of legislative intent.

The Kentucky statute on this subject is exactly like ours, and in *Stewart v. Mulholland*, 88 Ky. 38, 10 S. W. 125, 21 Am. St. Rep. 320, the court declared an exception to the statute, but the case, in its facts, differed widely from this one. The will was made by a woman with the knowledge and consent of her intended husband, who subsequently, by an antenuptial contract, relinquished all interest in her estate, and agreed that she should hold it to her separate use and have power to dispose of it by will. Three days after the contract was executed, and on the day of the marriage, and after the performance of the ceremony, the wife, in the presence of her husband, handed the will to a friend for safe-keeping; telling him that it was her will. As the contract empowered the wife to hold her property to her separate use, and dispose of the same by will, the court held that the reason of the common law and of the statute for making marriage revoke the will of a woman no longer existed in that case, and the statute had no application. Had the will been made by the husband prior to his marriage, this reasoning would have been plainly fallacious, and without any foundation whatever. For some reason, entirely distinct from that upon which the common law revoked the will of a woman because of marriage subsequent to its execution, the statute of wills, 1 Vic. c. 26, § 18, from which our statute and the

Kentucky statute were taken, makes the marriage of a man revoke his will.

At common law, the marriage of a woman absolutely revoked her will, except in the case of a will made in the exercise of a power of appointment. This rule was in logical conformity with the marital rights existing between husband and wife, in consequence of which a married woman could not make a will. Having no power to make a will, she could not revoke one; revocation being as much a testamentary act as the act of making an ordinary will. Hence, but for the act of the law in revoking on account of subsequent marriage, it would have become irrevocable because of marriage, and so would have lost one of the essential characteristics of a will, namely, revocability at the pleasure of the maker thereof. By the common law the legal existence of the wife was merged in that of her husband, in consequence of which she could have no power or control over her will during coverture, and her will could not then be ambulatory in its character. 1 Jar. Wills, 110; *McAnnulty v. McAnnulty*, 120 Ill. 26, 11 N. E. 397, 60 Am. Rep. 552; *Swan v. Hammond*, 138 Mass. 45, 52 Am. Rep. 255; *Fellows v. Allen*, 60 N. H. 439, 49 Am. Rep. 328; 29 Am. & Eng. Enc. Law, 316. At common law the will of a man was not revoked by marriage alone, but was revoked by marriage and the birth of a child conjointly. The reason assigned for this revocation was entirely different from that upon which the revocation, by marriage, of a will made by a woman, rested. Originally it was that the circumstances of marriage and the birth of a child wrought such a total change in the testator's situation as to raise the presumption that he could not intend a disposition of property previously made under wholly different circumstances to continue unchanged. 1 Jar. Wills, 111; *Lugg v. Lugg*, 2 Salk. 592; *Gay v. Gay*, 84 Ala. 38, 4 South. 42; *Brush v. Wilkins*, 4 Johns. Ch. 506; *Havens v. Van Den Burgh*, 1 Denio, 27. Later the ground of revocation in such cases was determined by the English courts to be, not a presumption of intent on the part of the testator, but a rule of law which annexed to the will a tacit condition that it should not take effect in case of marriage, and the birth of a child not provided for. *Phaup v. Woodbridge*, 14 Grat. 332; *Marston v. Roe*, 8 Ad. & E. 14; *Israell v. Rodon*, 2 Moore, P. O. 51; *Jacks v. Henderson*, 1 Desaus. 543. As the reason for making marriage work a revocation of a will made by a woman, and the reason for making the same act, supplemented by the birth of a child who could not take under the will, revoke a will made by a man, were wholly different at common law, except in one respect, namely, that both revocations were acts of the law, not dependent upon the intent of the parties, it is difficult to see how the reasoning of the court in the case of *Stewart v. Mulholland* can support the con-

clusion announced, for the statute makes marriage alone revoke a will antecedently executed, whether by a man or a woman, and the common-law reason given in the one case could not apply in the other. Another reason for upholding the will, given in that case, is that the antenuptial contract, the will, and the marriage were all one transaction, by reason of which the will was not deemed to have been made before the marriage. Whether this placed the decision upon better ground, need not be determined here.

The case just cited and discussed is the only one produced or found in which, under said section 18, 1 Vic. c. 26, marriage is held not to have revoked an antecedent will. Both Kentucky and this state took it from Virginia. It was construed in *Phaup v. Wooldridge*, 14 Grat. 332. In that case, *Phaup*, having made a will in July, 1852, and married in July, 1854, after having entered into a marriage settlement by which it was agreed that all the wife's property should be settled upon her, with general power of disposition, and that she should have no claim upon his estate, died in 1856, without issue of the marriage, leaving his wife surviving him; and it was held that the marriage revoked the will, all the judges concurring. After reviewing the authorities at length, *Allen, P.*, delivering the opinion of the court, says: "The statute of Victoria was understood by the commentator to be free from difficulty, and it is admitted that in England it must be taken literally to effectuate the intention of the Legislature. Ours is a literal copy, and why should it not receive the same construction? It lays down a plain rule; it makes one exception; and from what source can the courts derive any authority to make another? Our statute has received the same construction by *Lomax* (volume 3 of his Digest, p. 148), which has been put upon the English statute, and which it is conceded it must there receive. It is argued, however, that, where the interests of the new parties brought by the marriage into close relation with the testator are in no wise affected by the will, the reason for such revocation ceases, and therefore the law should not apply. If this position could be maintained, it would result in a repeal of this section 7 of our statute, for, in view of the provision of dower for the wife in the realty, her paramount right to her portion of the personalty, independent of any testamentary disposition, if she chooses to renounce the provision made for her in the will, and in view of the provisions made by Code, c. 77, §§ 17, 18, in favor of the children of the testator pretermitted, or born after the will, or posthumous, the rights growing out of this new relation are sufficiently protected, and therefore there was no necessity for such implied revocation. This might have been an argument against incorporating the provision contained in the statute of Vic-

toria into our Code, but, when it has been so incorporated, it is not for the court to say that the Legislature did not mean precisely what they have said. They may have thought that as marriage is the most important step a man can take, gives rise to new duties, brings into close connection new parties, and of necessity calls for a different arrangement of his property, it should, without reference to the provision made by law for these new parties, lead to new arrangements in regard to his property."

Warter v. Warter, P. D. 15 (1890), is an English case, decided in 1890. In 1879 *Taylor* procured an absolute divorce from his wife, on the ground of adultery with *Warter*, in an action brought in the High Court of Judicature at Calcutta, India, under the divorce act of 1869, which imposed a condition upon the parties not to remarry within six months after the date of the divorce. *Warter* and Mrs. *Taylor* went to England and married within that period, and *Warter* executed a will by which he bestowed all his property on Mrs. *Taylor*, describing her as "my reputed wife." Afterwards, acting under advice of counsel, a second marriage was performed. In a contest over the will, the court held the first marriage void, and the will revoked by the second marriage. So thoroughly agreed upon the construction of the wills act are the English lawyers, that the only question argued was whether the first marriage was valid; and the court, after deciding against it, simply said the will was revoked by the second marriage.

The two views taken by the English courts as to the ground upon which the revocation, in the case of the will of a man, rested, which have been referred to, no doubt led to uncertainty and conflict in the decisions, and rendered unstable and uncertain titles to property. Where it was put upon the ground of presumed intention, the presumption was rebuttable, and, for overthrowing it, parol evidence was resorted to. *Havens v. Van Den Burgh*, cited; *Wilcox v. Rootes*, 1 Wash. (Va.) 140; *Yerby v. Yerby*, 8 Call, 334. For some reason—most likely, the great evil of uncertainty in the rules of property resulting from this practice—the English courts discarded the doctrine of presumed intention to revoke, and declared as a rule of law the revocation of a will by a subsequent marriage and birth of issue, and refused to receive any evidence of intention not to revoke. Pursuing this policy of securing certainty and stability in the rules of law determining the rights to property, the English Parliament, at about that period when so many great reforms affecting the landed estates of the realm were introduced—the reigns of William IV and the early part of Victoria—saw fit to extend the rule further, and fix it as we now have it in our statute. It was in opposition to this wills act that Lord Eldon, feeble and worn out with age and exertions, delivered his last speech in

the House of Lords, after having unremittably fought all the reform measures up to that date, and opposed them as innovations upon the Constitution of his country. The courts having been compelled to declare a rule of property on the subject of the revocation of wills, and the Legislature having deemed it necessary to fix the rule by an act of Parliament for greater safety, it would be arguing in the face of experience, history, and law, both common and statute, to contend that that rule may be set aside by showing an intent, on the part of the testator, not to leave his property subject to its operation. On this subject, Jarman (an English author) says (volume 1, p. 112): "These clauses suggest two remarks: (1) That, unless in the expressly excepted cases, marriage alone will produce absolute and complete revocation, as to both real and personal estate, and that no declaration, however explicit and earnest, of the testator's wish that the will should continue in force after marriage—still less, any inference of intention drawn from the contents of the will, and, least of all, evidence collected allunde—will prevent the revocation."

The evil of uncertainty in the rules of property in Virginia, growing out of the presumption of revocation from marriage and birth of a child, led to the incorporation into the Virginia statute of provisions of the wills act (1 Vic. c. 26), including the one thus commented upon by Jarman: "The conflict of decision, and the evils arising from letting in parol testimony in such cases, so much against the policy of our legislation and the current of decisions in later times upon the subject of wills, may have had some influence in inducing the legislature, by adopting the provision of the statute of Victoria, to put to rest all question as to implied revocations by marriage and the birth of issue. They have done so by declaring that marriage alone, save in the excepted cases, shall be an absolute revocation." *Phaup v. Wooldridge*, cited.

Thus, upon reason and authority, it is clear that the will was revoked, notwithstanding the evidence apparent upon its face of a possible intent that it should remain effective after the marriage.

The next question is whether the will was revived on the 27th day of July, 1900, by the due execution of the following codicil: "I, John C. Marsh do make this a codicil to my will made on the 6 day of August 1895, I do nominate and appoint J. B. Watson as one of the executors of my will and do hereby revoke the appointment of W. R. Jewell to said will. Given under my hand this 27th day of July 1900. John C. Marsh." Section 8 of chapter 77 of the Code of 1899 says: "No will or codicil or any part thereof which shall be in any manner revoked, shall, after being revoked, be revived otherwise than by re-execution thereof, or by a codicil executed in the manner hereinbefore required, and then only the extent to which an intention to re-

vive the same is shown." This was taken from section 22 of 1 Vic. c. 26. It is insisted that, under this section, a codicil, to have the effect of reviving a will, must refer to it in such manner as to show, on the face of the codicil, that the testator knew it was revoked, and wished to revive it. Some English decisions are referred to, which, it is argued, support this view; but a careful examination and analysis of them, together with opinions expressed by eminent English jurists, lead to a different conclusion. Williams on Executors, vol. 1, p. 187, says, if a codicil is executed according to the exigencies of the new statute, "it will amount to a republication of the will, according to the old law, as above stated, unless it appears on the face of it that it was not the intention of the testator to republish, or unless the will has been in some manner revoked, in which case the new statute further requires that the codicil should show an intention to revive the will." In a note referred to at the end of the last clause of this quotation, it is shown that under this statute a revoked will has been held to be revived by a codicil merely referring to it as "the last will of me," and as "my said will," and containing no express words of ratification or revival. *Neate v. Pickard*, Prerog. T. T. 1843. This note further says: "Again, where one part of a will in duplicate remained undestroyed in the possession of the testator, but the other part, in the possession of his solicitor, had been destroyed by the testator on the execution of a subsequent will, made in 1838, in terms revoking the prior will, it was held that such prior will was revived by a codicil made subsequently to the second will, though referring to the prior will merely by date; for that such reference sufficiently showed 'an intention to revive.' *Payne v. Trappes*, 1 Rob. 588. See, also, *Hale v. Tokelove*, 2 Rob. 318." The reports given in this note are not in the library, but it is not to be assumed the cases are misrepresented in this excellent work. 1 Jar. Wills, 156, says that in *Neate v. Pickard*, cited in the note to Williams, Ex., the testator confirmed his "last will," without referring to the date. The use of the word "confirmed" in the codicil, if that is the meaning of the author, seems not to have been regarded as material. It no more imports an intention to revive, or a knowledge of previous revocation, than the words "my will" or "my last will." At any rate, English authority clearly shows such words as "revive," "ratify," and "confirm" are unnecessary. "The deceased executed a will in 1866, and a codicil to it in May, 1871. In November, 1871, he executed a will which revoked all previous testamentary papers. In 1872 he executed a paper which was headed, 'This is a codicil to the will of R., dated May, 1866.' It concluded with the appointment of the son as executor of the will and codicil, and the attestation clause commenced, 'Codicil of the will of R., dated,

May, 1866, in the presence of,' etc. Held, that the only intention to be gathered from the words of the codicil was that the testator intended to revive the will of 1866, but not the codicil of May, 1871." In the Goods of Reynolds, L. R. 3 P. & D. 35. This codicil contained no express words of revival, ratification, or confirmation. Again, Jarman says (volume 1, p. 155): "A recognition in a codicil of the earlier of two inconsistent wills, by date or otherwise, as the will on which the codicil is founded, shows an intention to revive such earlier will." Citing *Re Reynolds* and *Re Stedham*, 6 P. D., decided in 1881. In the *Stedham* Case the testator made a will, and afterwards another, which by implication revoked the former. Subsequently, by the terms of a duly executed codicil, he, by mistake, referred to the former, instead of the latter, will; and it was held that the codicil, by its language, revived the former will. The reference was: "This is a codicil to my will which bears date the 21st day of May, 1877." The codicils in each of the cases above referred to made some alterations in the disposition of the testator's property, as found in the will of which it became a part; but this is by no means an express declaration of intent to revive, nor a declaration from which such intent can be more readily or clearly inferred than from the reference to the will by its date as "my will." Moreover, it is plain that in such cases the courts look to these provisions for the purposes of identifying the will, the intent to revive which is found in the reference by date, and the expression, "my will," or to see whether the intent shown by the reference is contradicted by the provisions of the codicil. *Re Stedham*, 6 P. & D. 205; *Re Reynolds*, 3 P. & D. 35; *Re Steele*, *Re May*, and *Re Wilson*, 1 P. & D. 575. The three cases in 1 P. & D., just cited, all of which, being similar, were disposed of in a single opinion, are relied upon by the appellants as sustaining their view. The opinion, it is true, is a strong argument against revival by implication, since the passage of the wills act of 1 Victoria, but it must be read in the light of the peculiar facts involved. All three cases involved the question whether a will which had been revoked, and for which another had been substituted, was revived by a subsequent codicil. In the first case a will had been made January 16, 1866, and another October 25, 1866, revoking the former. On January 12, 1868, the testator made a codicil to his "last will and testament, which will bears date the 16th day of January last past." Because of the words "last will," found in the codicil, it was held not to have revived the will of January 16, 1866. In the second case the testator made a will January 11, 1860, married August 18, 1860, and on the same day, after marriage, made a second will revoking the first, tore off the signature of his first will in September, 1860, and on July 3, 1861, made a codicil, describing it as

"a codicil of the last will and testament of me, John May, &c., and which bears date, the 11th of January, 1860." This codicil, it was decided, did not revive the first will, and thereby revoke the second. In the third case the testator made a will September 24, 1858, and another July 16, 1861, disposing of all his property. The first will was found after his death, with the signature torn off, and had been used by him as a draft for the second. On December 20, 1864, he made a codicil, declaring it to be a codicil to his "last will and testament, dated the 24th of September, 1858," but the contents of the codicil plainly showed that he really meant the will of 1861, and probate of that will was granted. By way of introduction, the court said in its opinion in these three cases: "This is a question of construction." In the construction of these three codicils, the court kept in mind certain rules, one of which is that a codicil will not, in law, revive the first will, in such case, if it has been not only revoked, but destroyed, *animo revocandi*, as was true of the first will in each of the last two cases. For this, *Hale v. Tokelove*, 2 Rob. 318, *Newton v. Newton*, 5 L. T. (N. S.) 218, and *Rogers v. Goodenough*, 2 Sw. & Tr. 342, were referred to. Another rule was that the intent was to be determined and ascertained by a reasonable construction of the language used, and not by any binding force which the law attached to certain words or expressions, for which proposition *Payne v. Trappes*, 1 Rob. 583, and *Marsh v. Marsh*, 1 Sw. & Tr. 583, were cited. Another was that the surrounding circumstances and situation of the testator might be considered in connection with the papers left by him, as in other cases, calling for construction and interpretation of written instruments. Another was that the intent manifested by a reference in a codicil to a revoked will might be contradicted and overborne by the provisions and recitals of the codicil itself. All these rules, applied to the facts in the several cases, lead unmistakably to the conclusion adopted by the court, without denying or in any manner impairing the proposition that a codicil, by referring to a revoked will, describing it by date and as the will of the testator, will, in the absence of contradictory matter, or circumstances calling for the application of the rules of construction referred to, revive the will. The following extract from the opinion establishes the correctness of this analysis of it: "It is proper here to take note of the case of *Payne v. Trappes*. In that case there would seem to have been but little beyond the reference by date to show the intention to revive a former will. But the court did not lay down the proposition that the date alone was sufficient. On the contrary, the learned judge said he must 'gather the intention from the codicil itself,' 'that the intention to revive the former will was clearly shown,' and 'that the testator had taken great pains to describe the instrument to

which the paper was intended as a codicil.' The decision proceeded upon the ground that the judge was convinced of the testator's intention, not that he felt bound by the language in the face of an opposite conviction. On the other hand, I am much fortified in the view I take of the meaning of the statute by the remarks of Sir C. Cresswell in the case of *Marsh v. Marsh*. I allude to his statement that the words 'last will' and 'prima facie' refer to the real last will, and particularly to the opinion he there expressed, that 'it appears to have been the object of the legislature to put an end equally to implied revocations and implied revivals.' Nor does this view conflict with the enunciation of the law found in the syllabus, which reads, in part, as follows: "In order to satisfy those words, the intention must appear on the face of the codicil, either by express words referring to a will as revoked, and importing an intention to revive the same, or by a disposition of the testator's property inconsistent with any other intention, or by some other expression conveying to the mind of the court with reasonable certainty the existence of the intention. Since the passing of the statute, a will cannot be revived by mere implication." These cases belong to a class forming no exception to the general rule, but calling for a cautious application of it. It is referred to by *Jarman* (volume 1, pp. 155, 156).

To attempt a review of all the English and Canadian cases bearing on the question would be a waste of time. Enough has been shown to make it clear that these authorities do not support the contention of counsel for appellant, and some attention will now be given to the Virginia cases. The Virginia statute and ours differ from that of 1 Victoria in phraseology, but evidently not in meaning or effect. Section 22 of 1 Vic. c. 26, reads as follows: "No will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown." It contains two clauses, and it is manifest that our Legislature has compressed both into one by changing the language of the first, from the words, "showing an intention to revive the same," so as to read "and then only [to] the extent to which an intention to revive the same is shown." As the second clause of the English act has not been, in terms, adopted by ours, and the report of the revisers, recommending the enactment of our present statute, has failed to assign any reason for the change in the language of the first clause, and, on its face,

it appears to have been the result of an effort to combine both in one, it is fair to assume that such was the case, and that there was no intention to alter the sense or effect of section 22 of 1 Victoria, c. 26, in so adopting it in different language and condensed form.

Only two cases have been decided in Virginia which are said to bear upon the question of the construction of our statute (section 8, c. 77, Code 1899), since it went into effect in that state, in the year 1850, and neither of them is directly in point. *Corr v. Porter*, 33 Grat. 278, was decided in 1880, but the will and codicil involved were dated, respectively, 1819 and 1820, and they were governed by the common-law rules. Moreover, it was not a case of revival of a revoked will, but one of republication of an existing will, so as to bring it down to the date of the codicil, and thereby make it effective, under the statute abolishing estates tail. Under the present statute, as well as at common law, there seems to be a difference between revival and republication. See *Bilke v. Roper*, 45 Ch. Div. 632; *Williams, Ex'rs*, 187. For this additional reason, it is almost wholly inapplicable here. *Hatcher v. Hatcher*, 80 Va. 169, was decided on the principles governing republication, instead of revival, also. "Upon a paper whereon there was writing, dated 1858, and purporting to dispose of H.'s property, but without signature or attestation, H., in 1864, wrote another instrument, with the caption, 'Codicil to the above will,' which instrument was duly executed and attested. Held, the execution of the codicil effects the republication of the will, and brings the latter down to the date of the codicil, so that both speak as of the same date." *Hatcher v. Hatcher*, supra. Whether, in law, it was a republication of an existing will, or the execution of a will which had never before existed, as insisted by counsel for appellants, it is quite plain that it was not a revival of a revoked will, and therefore the statute had no application. Common-law principles governed it. The difference between republication of an existing will, and revival or republication of a revoked will by a codicil, is that in the latter case the codicil must show an intent to revive, while in the former it need not—the statute being silent on the subject—in consequence of which the common law, as modified by the statute of frauds, governs. *Williams, Ex'rs*, 186; 1 Jar. Will, 158, 159. If, however, it could be said there is no such distinction, and the Virginia decisions referred to, or either of them, are authorities upon the question of revival, under the statute, they uphold the views expressed here.

The codicil in this case not only refers to the will by its date, and describes it as "my will," but revokes the appointment of one of the executors, and names another in his stead. It leaves no room for question or doubt as to the identity of the will to which

it refers, and appoints an executor for the will referred to, not an executor, merely. It says, "I do nominate and appoint J. B. Watson as one of the executors of my will and do hereby revoke the appointment of W. R. Jewell to said will." The will referred to had named two executors, and the codicil said Watson should be one of the executors of his will. All this could mean nothing short of an intent that the will referred to should be carried into effect. This sufficiently evidences an intent to revive, as shown by the authorities cited. Jarman says (volume 1, p. 159): "In *Serocold v. Hemming*, 2 Lee, Eccl. Rep. 490 [not in our library], a testator wrote at the bottom of his will a codicil not expressly mentioning the will, but directing certain annuities to be paid 'by my executors above named.' It was held that the reference was sufficient to revive the will." And this seems clearly to have been since the passage of the statute.

The rulings of the court, verdict of the jury, and decree complained of being in conformity with the principles here announced, it is unnecessary to enter upon any discussion of the exceptions to the rulings of the court. It is admitted by counsel on both sides that the only question involved is the construction of the statute, and sufficiency of the codicil to revive, in case the will is held to have been revoked.

The decree is right, and will be affirmed.

(54 W. Va. 656)

CAIN v. BROWN et al.

(Supreme Court of Appeals of West Virginia.
Feb. 9, 1904.)

TAXES—SALE—REDEMPTION—SUFFICIENCY —TITLE ACQUIRED.

1. The statute allowing infants one year after becoming of age in which to redeem lands sold for nonpayment of taxes is construed liberally in their favor.

2. Where land assessed to the heirs of a deceased person becomes delinquent for nonpayment of taxes, and, before sale for such delinquency, partition thereof is made among the heirs, and part of the land allotted to one of the heirs is purchased by a stranger at the tax sale, any of those who shared in the partition, and against whom the tax was assessed, may redeem.

3. Actual production of the money in offering to redeem is not necessary, when the purchaser declines to allow redemption, on the ground that the party is not entitled to redeem.

4. Where part of the land belonging to coparceners, and charged with taxes against them as heirs, has been sold by the sheriff for nonpayment of taxes and purchased by a stranger, and is so sold again for the nonpayment of the taxes assessed against the same persons for whose delinquency the first sale was made, but for years subsequent to those for the taxes of which the preceding sale was made, and one of the heirs buys the land at the second sale, and the purchaser at the first sale does not redeem from such second purchaser, the heir so purchasing acquires, as against him, a superior and better right to the title.

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County; John Homer Holt, Judge.

Bill by James Cain against T. P. R. Brown, trustee, and others. Decree for defendants, and plaintiff appeals. Affirmed.

J. A. Bent and J. J. Coniff, for appellant. Harding & Harding, for appellees.

POFFENBARGER, P. A tract of land, containing 561 acres, delinquent for taxes for the years 1893 and 1894, assessed to "John M. Crouch, Sr.'s heirs," was sold by the sheriff of Randolph county, in the month of November, 1895, and purchased by James Cain. John M. Crouch, Sr., dying some time prior to the year 1893, seised of a large landed estate, of which said tract formed a part, left surviving him his widow, Anna G. Crouch, who subsequently married, and was thereafter known as Anna G. Phillips, and three children, Charles E. Crouch, John M. Crouch, and Lillie J. Crouch. By some means, unexplained in the record and briefs, the widow owned one-tenth of said tract, and the three children three-tenths each. At the time of said sale Charles E. Crouch was of age, but the other two children were minors. John M. Crouch, Jr., was born May 11, 1876, and Lillie J. Crouch May 7, 1880. Before the expiration of one year after the sale, Charles E. Crouch redeemed from the purchaser his undivided three-tenths.

On the 22d day of October, 1897, a decree was made and entered by the circuit court of Randolph county, by which all the lands of which John M. Crouch, Sr., died seised and possessed were partitioned among the heirs, and to Charles E. Crouch a tract of 750 acres was assigned, which included said tract of 561 acres. To this suit Anna G. Phillips was a party, and to her was allotted one-tenth of the whole estate. On the 17th day of November, 1897, James Cain, the purchaser of said 561-acre tract, still holding seven-tenths of the same unredeemed, applied for, and received from the clerk of the county court of said county, a deed for an undivided seven-tenths thereof. Prior to the execution of this deed, however, T. P. R. Brown, representing Anna G. Phillips in her own right, and as the mother and agent of John M. Crouch, Jr., and Lillie J. Crouch, her infant children, called upon Cain and offered to pay the amount due him on his purchase of the land. The money had been furnished to him by Mrs. Phillips after he had calculated the amount necessary to effect the redemption, and he told Cain that Mrs. Phillips had said he had promised her, upon a former occasion, before the expiration of one year from the date of the sale, to allow her to redeem after the expiration of the year, and that he had come to redeem in pursuance of that agreement. Cain refused to allow him to redeem, saying Mrs. Phillips had not done as she had promised, and that he intended to take a deed for the land. Cain does not deny that Brown called upon him, but says he offered to redeem only the interest of Mrs. Phillips, that he did not tender any money, and that he

(Cain) does not remember of Brown's having mentioned the alleged verbal agreement between him and Mrs. Phillips. Brown's statement of the occurrence is positive and full as to details. He says he explained to Cain the rights of the infants to redeem, and that he urged him to accept the money, telling him that, if he refused and took a deed, a suit to set the deed aside would be instituted. He further says Cain seemed reluctant to talk about it, and that his impression is that Cain informed him that he had taken advice concerning the matter.

The tract of land was charged on the land books against the John M. Crouch, Sr., heirs for the years 1895 and 1896 also, and was again sold by the sheriff in the month of December, 1897, about a month after Cain had taken his deed, and was purchased by T. P. R. Brown, trustee, acting, as is charged by Cain and admitted by Brown, for Mrs. Phillips, John M. Crouch, Jr., and Lillie J. Crouch, and was paid for by Brown with money furnished him for that purpose by Mrs. Phillips. Prior to this purchase, as claimed by Cain, but subsequent thereto, as claimed by Brown and the other defendants, an executory contract of sale of this tract of land was entered into by Charles E. Crouch and the Bakers and Nelsons, whereby Crouch agreed to sell said tract to W. E. Baker, C. C. Baker, P. M. Nelson, R. L. Nelson, and R. M. Nelson. As to the date of this contract there is some controversy, but by a clear preponderance of evidence it is shown to have been made about the middle of January, 1899. On the 20th day of December, T. P. R. Brown, trustee, assigned the benefit of his purchase to the Bakers and Nelsons, and Charles E. Crouch and wife, on the 10th day of March, 1899, executed to them a deed for the tract of land, in pursuance of the contract of sale. On the 20th day of December, 1899, the clerk of the county court executed a deed to Baker and Nelson in pursuance of the purchase made by Brown at the tax sale in December, 1897.

On the 28th day of February, 1898, John M. Crouch, Jr., died, and his mother, brother, and sister inherited whatever interest he may have then had in the tract of land. Several attempts were made by Charles E. Crouch to redeem from Cain. He tendered Cain the money in April, 1898, to redeem the interest of John M. Crouch, Jr., and, upon Cain's refusal to accept, he deposited it with the clerk of the county court May 6, 1898. On October 6, 1899, he deposited with the clerk an additional sum for the redemption of the interest of Anna G. Phillips, then deceased, and took a receipt reciting that said sum had been tendered to Cain by Mrs. Phillips in her lifetime. On the same day, he deposited a further sum to redeem the interest of Lillie J. Crouch, taking a receipt reciting that it had been previously tendered to Cain.

In May, 1899, Cain brought this suit to set aside the tax deed executed to Baker and

Nelson, and the deed executed by Charles E. Crouch to Baker and Nelson, and to have the tract of land partitioned between him and Charles E. Crouch, or those who are entitled to the three-tenths interest in the said land redeemed by said Crouch. The bill was answered by Brown, Crouch, and Baker and Nelson, and depositions were taken and filed, and upon the hearing the court entered a decree dismissing the plaintiff's bill and authorizing the clerk of the county court to pay to him the several sums previously deposited for the redemption of the land.

In one aspect of the case, the two pivotal questions are, first, whether Anna G. Phillips, John M. Crouch, Jr., and Lillie J. Crouch had such interest in the land on or about the 17th day of November, 1897, when T. P. R. Brown waited upon Cain for the purpose of redeeming on their behalf, as entitled them to redeem; and, second, whether what Brown did amounted to a sufficient offer to redeem the interest of all, or any, of the parties whom he represented.

On the 22d day of the preceding month the whole of the land in question had been set apart and allotted to Charles E. Crouch in the partition suit, and the legal title to the same was thereby vested in him. After that, did his former co-tenants have any interest in that tract of land? It is insisted for the appellant that they did not, and that their power of redemption had been taken away by the transfer of their title to Charles E. Crouch. There was an implied warranty on their part of the title to the tract of land so set apart to their co-tenant. On failure of his title, it became obligatory upon them to make good his loss. *Bowers v. Dickinson*, 30 W. Va. 709, 6 S. E. 335; *Dingess v. Marcum*, 41 W. Va. 757, 24 S. E. 624; *Freem. Co-Ten. § 533*. This obligation was not an estate or direct interest in the land, legal or equitable, perhaps, but it gave them the right to uphold the title of their co-tenant. This right is incident to, grows out of, and may be treated as a part of the estate which the co-tenants had in all the lands divided among them. All the co-tenants are to be regarded as having held, before the partition, one entire title to one entire tract of land, and each, by maintaining the title of the other after partition, sustains the one single title to all the land divided among them. Each must do so, else the partition, in a measure, fails. The maintenance of the title of Charles E. Crouch was a matter of interest and importance to his co-tenants, for the sole reason that his land had constituted a part of the whole estate divided among them, and failure of his title would have necessitated compensation out of their land. Though they may not have had an interest in that land, in the sense of an estate therein, they had a deep financial interest in it, in the sense of the failure of the title thereto inflicting loss upon them. This relation to the land, coupled with the fact that they were

former owners of it, in whose name it had been assessed and taxed, and the very persons to whom the right of redemption is given by the strict letter of the statute, clearly sustains their right to redeem. "All that is required is proof of some connection, past or present, with the title, by deed, descent, contract, or possession. If this is made out, the party will be allowed to redeem without considering whether the title really is in him or in some adverse claimant." Blackwell on Tax Titles, §§ 704, 707.

From the evidence, it is clear and indisputable that Brown did call upon Cain with the money to redeem for the two infants before their right of redemption expired. He says he had the money with him, and told Cain he had come to redeem the land for the infants and their mother, and that Cain said the mother had not done as she had promised, and he intended to take a deed. The redemption statute is broadly and liberally construed by all courts in favor of persons to whom it gives the right of redemption. Blackwell on Tax Titles, § 704; Cooley on Taxation (3d Ed.) 1023. Cain says he did not produce the money. Actual tender of lawful money was excused by Cain's refusal to permit redemption. Poling v. Parsons, 38 W. Va. 80, 18 S. E. 379; Townshend v. Shaffer, 30 W. Va. 176, 3 S. E. 586; Danser v. Johnsons, 25 W. Va. 380. Cain says Brown offered to redeem for no one except Mrs. Phillips. Brown says he not only went to him to redeem for all the parties, and with sufficient money to do so, but brought to Cain's attention the fact that two of them were infants and had the right to redeem. He also says he thinks Cain told him he had taken legal advice on the subject of this right of redemption. Cain's subsequent conduct, and his position in this case, indicate that he relied then, as now, upon the extinguishment of the right of redemption on the part of the two infants by the decree of partition. He does not deny that the rights of the infants were discussed by Brown, nor that he told Brown that he had consulted counsel on the subject. Upon the whole, Brown's testimony is not only the more satisfactory in its terms, but is more consistent with the prior and subsequent conduct of the parties and the circumstances surrounding them; for which reason we conclude that a sufficient offer to redeem on behalf of John M. Crouch, Jr., and Lillie J. Crouch was made within the time allowed them by the statute in which to redeem. Cain having declined to permit redemption, after the interests of all the parties represented by Brown had been brought to his attention, it was unnecessary for Brown to count out the actual amount of redemption money due from each of the parties represented by him and make an actual tender of each separate amount. To require this would be to give the redemption statute a strict construction which the authorities do not warrant.

The offer to redeem in due time invalidated Cain's deed, and inured to the benefit of Chas. E. Crouch, though not made by him, and perfected his title in equity to the six-tenths of the land owned by John M. Crouch, Jr., and Lillie J. Crouch before the partition, and the right thereby vested in him to have Cain's deed canceled as to said interests passed to his grantees by force of the contract and deed executed by him later. This conclusion renders discussion of the other efforts to redeem unnecessary.

As to the interest of Anna G. Phillips, the period within which redemption might be made had expired long before Brown attempted to redeem for her. There is no competent evidence of any agreement on the part of Cain to allow her to redeem after the expiration of the redemption period, unless it can be said that Cain, by saying she had not done as she had promised, admitted such agreement. That this statement amounts to an admission that there was an agreement relating to the matter of redemption is clear, but there is no evidence showing the terms of the agreement. The statement made by Cain may be treated as one of confession and avoidance. Upon it, an inference that there had been an extension of time may be based, but it appears from the same statement that the condition upon which it was given had not been complied with, or that the time had again expired. As to her interest, therefore, there was no redemption.

Did she acquire a right superior to Cain's by the purchase made for her by Brown at the tax sale on the 14th day of December, 1897? But for her failure, as one of the heirs of John M. Crouch, Sr., in whose name the lands were assessed with the taxes for the years 1895 and 1896, for the nonpayment of which the sale at which she purchased was made, to discharge her duty by paying the taxes, the land would not have been sold at that time. To her coheirs and to the state she owed the duty of paying the taxes, and, as against them, she could acquire no right by her purchase at a sale predicated upon her omissions of that duty. Battin v. Woods, 27 W. Va. 58; Williamson v. Russell, 18 W. Va. 623; State v. Eddy, 41 W. Va. 95, 23 S. E. 529; Cooley on Taxation, 964; Blackwell on Tax Titles, § 566. But to Cain she owed no duty. His claim upon the title to the land was adverse to her interest. He claimed, on the ground of forfeiture and purchase by him from the state, the very title which she had, and was bound by her own interest, to uphold and defend. Between them there was no privity. Their claims were adverse and hostile, and all duties respecting the land and the taxes thereon, previously resting upon her, were due from her to the state and persons other than Cain, and of her violation of any of them he had no reason to complain, and her failure respecting them conferred no right

upon him. Many authorities hold that no person can be a purchaser at a tax sale whose duty it was to pay the taxes for the nonpayment of which the land is sold, on the theory that the law permits no man to take advantage of his own wrong; but this rule is generally applied where the upholding of such purchase would prejudice the rights of co-tenants or other persons standing in a relation of privity or confidence with the delinquent taxpayer purchasing the land. Thus, a tenant whose duty it is to pay the taxes cannot allow the land to become delinquent, and then purchase it, and thereby acquire his landlord's title. Nor can an agent acquire the lands of his principal, nor a guardian, administrator, or executor the lands of the ward or heirs, nor the husband the lands of the wife. But where no such relation exists, there is no reason for the application of the rule, and the views expressed by Judge Cooley in his work on *Taxation* (3d Ed.) pp. 974-976, are unanswerable, except by reference to a mere technicality. He says: "There being nothing in the relation of the parties to each other upon which an estoppel can be raised, it is necessary to look elsewhere for the disqualification insisted upon, and this can only be found in some general rule of public policy. It is certainly an imperative requirement of public policy that the revenues of the state shall be collected, and that no one shall be allowed to defraud the treasury of his due proportion; but in the case where a tax sale has been made there is no fraud, and the revenue chargeable upon the land has been received. No wrong has consequently been done to the state. There has been delay in payment, but it is one for which the state makes ample provision, and for which it charges and collects all costs, as well as a further sum, under the name of interest or penalty, sufficient fully to compensate for any public inconvenience. It is not perceived that the state can then have any complaint to make, as the duty owing to it, though performed tardily, has been performed at last, and the incidental inconvenience paid for. The state, then, not being wronged in the purchase, it would seem that if any individual objects to it he ought to be able to point out how and in what particular it wrongs him. It is difficult to dispute the truth of what is said by the Supreme Court of Pennsylvania, that 'there is nothing in reason or law to prevent a man who holds a defective title from purchasing a better at a treasurer's sale for taxes.' As between himself and any adverse claimant, the state is not concerned to inquire whether the one or the other was in possession. If the state, in taxing land, takes any notice of ownership, it is either for the convenience of the officers in making collections, or for information to parties concerned. The tax is upon every possible interest in the land, and all parties having interests are equally under obligation to the

state to make payment. The penalty for failure is a forfeiture or sale which will cut them all off; and while, without doubt, any one may defeat such a sale who can give satisfactory reasons for an assertion that it would be unjust to him for the purchaser to be allowed to reply upon it, it is not perceived that any other person can, upon plausible grounds of equity, insist upon the privilege to do so."

The application to this case of the reasoning found in the above quotation, which we approve, gives the assignees of the purchase made by Mrs. Phillips a right to the title superior to that of Cain. Had any stranger to the title, owing no duty to pay the taxes for which it was sold, made this purchase, it would undoubtedly be good against Cain. Why, then, is not the purchase of Mrs. Phillips, whose interests were adverse to his, and who owed him no duty in the premises, equally good? What the status of her purchase would be, if attacked by Charles E. Crouch or some person claiming under him, or by some one else to whom she was under obligation to protect the land from sale, or estopped by her situation from holding the title so acquired, we need not decide. It is generally held that the purchase operates, in such case, as a redemption, or as a mere payment of the taxes, and confers no title. *Battin v. Woods*, cited. Whether this be true, or whether the purchaser takes a good title, but is, in equity, bound to hold it in trust for his co-tenant, principal, landlord, ward, or other person whose rights he has violated, like one who purchases land with money furnished for the purpose by another, and takes a deed conveying it to himself, are questions not presented by this record, for no such person complains. It is enough to say the sale cannot be set aside at the instance of one to whom the purchaser owed no duty which has been omitted, and who stands, not in any relation of privity or confidence with, but in an attitude of manifest and extreme hostility to, the purchaser.

Seeing no error in the decree, we affirm it.

(54 W. Va. 581.)

CRESAP v. CRESAP et al.

(Supreme Court of Appeals of West Virginia.
March 9, 1904.)

APPEAL — LIMITATIONS — CONSTRUCTION OF WILL — CLAIM OF REALTY — LACHES — RES JUDICATA — PLEADING — EXCEPTIONS TO ANSWER — RESULTING TRUST.

1. The date of a decree or judgment, as shown by the record, marks the point of time from which the statute of limitation governing an appeal from, or writ of error thereto, commences to run.

2. Where a widow is executrix of the will of her late husband, and claims certain real estate under the will as a devisee therein, and also claims it as her individual property upon a resulting trust, as against her husband's estate, she may set up her individual claim to said property in a bill filed by her to construe the will and settle the estate.

3. Laches is inexcusable delay in asserting a right, and is an equitable defense, controlled by equitable considerations. To be a bar, the lapse of time must be so great, and the relation of the defendant to the right such, that it would be inequitable to permit the plaintiff to assert it, where he has had, for a considerable period, knowledge of its existence, or might have acquainted himself with it by the use of reasonable diligence.

4. Point 1 in *Biern v. Ray*, 38 S. E. 530, 49 W. Va. 129, and in *Sayre's Adm'r v. Harpold*, 11 S. E. 16, 33 W. Va. 553, approved and applied.

5. Where exceptions to a part of an answer are sustained, and the defendant does not ask leave to amend his answer, it is not error to proceed to hear the case on the bill, and so much of the answer as is not excepted to.

6. Where the husband buys land with the wife's money, and with her assent, but, without her knowledge or consent, takes the title to the property to himself, and such facts are established by clear and satisfactory proof, and the transaction is free from fraud against creditors, equity will treat the property as her separate estate, and establish a resulting trust in her favor, good both as against the husband and his creditors.

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County; John Homer Holt, Judge.

Bill by Agnes O. Cresap against the Bank of West Virginia and others. Decree for plaintiff. Certain defendants appeal. Affirmed.

W. B. Maxwell, for appellants. Sam V. Woods, for appellee.

MILLER, J. Appellee Nannie I. Brown insists that this appeal should be dismissed because, as she claims, the term of the court at which the decree appealed from was entered commenced on the 21st day of January, 1901, and was continued from day to day until the 1st day of February, 1901, when the said decree was entered in the record. The appeal was allowed on the 23d day of January, 1903, more than two years from the commencement of the term at which said decree was pronounced. In *Dew v. Judges*, 3 Hen. & M. 27, 3 Am. Dec. 639, the court says: "The term 'session,' when applied to courts, means the whole term, and, in legal construction, the whole term is construed as but one day, and that day is always referred to the first day or commencement of the term." In *Dunn's Ex'rs v. Renick*, 40 W. Va. 349, 360, 22 S. E. 66, 70, it is said: "By reason of this rule that the whole term is one day, the common-law rule was that a judgment rendered on any day has relation to, and is a judgment of, its first day." *Tidd*, *Prac.* 547; 1 *Lomax*, *Dig.* 287; 1 *Black*, *Judg.* § 441; 2 *Freem. Judg.* § 369; *Farley v. Lea*, 32 Am. Dec. 680. This doctrine or rule had always been recognized in Virginia before we had a statute, but is now embodied in a statute, as regards the effect of the judgment as a lien. Code 1899, c. 139, § 5; *Society v. Stanard*, 4 *Munf.* 539; *Coutts v. Walker*, 2 *Leigh*, 268; *Skipwith's Ex'r v. Cunningham*, 8 *Leigh*, 272, 31 Am. Dec. 642;

Withers v. Carter, 4 *Grat.* 418, 50 Am. Dec. 78. The court, in *Dunn's Ex'rs v. Renick*, *supra*, holds: "Though a decree or judgment relate to the first day of a term, yet, if the case was not ready for hearing or trial, and therefore no judgment or decree could have been given on such first day, it does not relate to the first day, but has the date of its actual entry on the record." This rule of law seems to be necessary, in order to give effect to the proceedings of the courts. Without it the administration of justice might be thwarted in many cases by successive alienations of property pending the suit wherein the property is the object of the litigation. All men are presumed to take notice of the proceedings in courts of justice.

Section 3 of chapter 135 of the Code of 1899 provides that "no petition shall be presented for an appeal from, or writ of error or supersedeas to, any judgment, decree or order, whether the state be a party thereto or not, nor to any judgment of a circuit court or municipal court rendered in an appeal from the judgment of a justice, which shall have been rendered or made more than two years before such petition is presented." The petition for the appeal in this case describes the decree, in part, as having been made on the 1st day of February, 1901, but does not give the date of the commencement of the term at which the decree was entered. It is probable that no petition for an appeal or writ of error can be found among the records of this court, which describes the decree or judgment sought to be reviewed by the date only of the first day of the term of the court at which it was made and rendered. It is believed to be the universal practice to state in the petition the day on which the decree or judgment was made or entered, as the date of such decree or judgment. Such seems to be the construction placed upon the statute by the bar. No appeal from a decree or writ of error to a judgment can be allowed, or correction thereof made, under chapter 134 of the Code of 1899, until the same be entered on the record of the court. Certainly no execution can be issued thereon until the record thereof be made and signed by the judge. The execution must follow the judgment, and be supported by it. *Freeman on Ex. 42*; *Herm. on Ex. vol. 1, § 42*. It is a part and continuation of the record.

In order to stop the running of the statute of limitations, it is necessary to present a petition, in a case specified by the statute, to the Supreme Court of Appeals, or to a judge thereof, in vacation, within a time limited by the statute. It is a sufficient compliance with the terms of the statute if the petition for an appeal or writ of error be presented within the time limited. *Ambrouse's Heirs v. Keller*, 22 *Grat.* 769. In *Hoy v. Hughes*, 27 W. Va. 778, 780, the court cites *Buster v. Holland*, *Id.* 510, and holds that no appeal can be entertained from any decree of any

character, whether final or interlocutory, which had been rendered more than two years before the petition for the appeal was presented. *Stout v. Phillips M. & M. Co.*, 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843; *Tiernan's Adm'r v. Minghini's Adm'r*, 28 W. Va. 314. As to appeals to the Supreme Court of the United States, the act of Congress provides that no judgment, decree, or order of a circuit court or district court in any civil action at law or in equity shall be reviewed in the Supreme Court on writ of error or appeal unless the writ of error is brought or the appeal taken within two years after the entry of such judgment, decree, or order. Rev. St. U. S. 1878, § 1008 [U. S. Comp. St. 1901, p. 715]. In the case of *Iron Co. v. Hoagland*, 105 U. S. 701, 26 L. Ed. 1109, decided at its October term, 1881, under the statute above cited the court held that "the time within which a writ of error must be served, in order that it may operate as a supersedeas, must be computed from the date of the judgment which is the subject of review." In the case of *Cummings v. Jones*, 104 U. S. 419, 26 L. Ed. 824, decided at the same term, the court held that "the judgment of a state court cannot be re-examined here unless within two years after it was rendered a writ of error be brought." Barton's Law Pr. vol. 1, 53, 57, cites several decisions of the Supreme Court of Appeals of Virginia construing the statute of that state relating to appeals and writs of error, which statute is somewhat similar to our own. In all of the decisions examined, the actual date of the decree or judgment, as shown by the record, marks the time from which the statute of limitations governing the allowance of appeals from, and writs of error to, decrees and judgments, commences to run.

In the light of the adjudicated cases, we therefore hold that the date of the decree or judgment complained of, as shown by the record, is the point of time from which the statute of limitations governing an appeal from, or writ of error thereto, commenced to run. However, in computing the time within which an appeal or writ of error may be allowed, Code 1899, c. 13, § 12, must not be overlooked. The appeal in this case was therefore allowed within the time prescribed by the statute in such case made and provided.

Appellants Gustavus J. Cresap, Rachel R. Murdoch (née Cresap), and Mary B. Cresap insist that the main question, to wit, the right and title to the "John Burkett property," situate in the town of Beverly, which was conveyed to C. J. P. Cresap by deed dated June 2, 1871, attempted to be adjudicated and determined by the decree now complained of, made and entered by the said circuit court on the 1st day of February, 1901, was at the date of said decree res judicata by the decision of this court, pronounced on the 6th day of December, 1890, in *Cresap v. Cresap*, 34 W. Va. 310, 12 S. E. 527. This suit

was originally brought by Agnes C. Cresap, widow and executrix of the last will and testament of Charles J. P. Cresap, deceased, referred to above as C. J. P. Cresap, against the devisees and creditors of said testator, to ascertain the several creditors of the decedent, and the amount and priorities of their demands against the estate; to provide for the payment of said demands, when so ascertained; and to have a settlement of the accounts of plaintiff as such executrix. The plaintiff afterwards filed an amended bill, in which she set up a claim individually, under the said will, to the title in fee simple to all of the real estate, and to the absolute ownership of all the personal property, of which said testator died seised and possessed, subject only to the payment of his debts and the lawful expenses of the administration of the estate. She prayed in her said amended bill that the said will be construed by the court, and that her rights, powers, and duties under the provisions thereof be ascertained and declared, in order that she might administer the estate according to the true intent and meaning of said will, and for general relief. Said Gustavus J. Cresap, Mary B. Cresap, and Rachel R. Cresap (now Murdoch), named in said will as residuary legatees, filed their answer to said bill and amended bill, in which they deny the claim of the plaintiff to absolute ownership, under the will, of the estate devised and bequeathed by said will, subject only to the debts of the testator, and the lawful charges of the administration of the estate. They also prayed a construction of the will, a copy of which is made a part of the record. There was a general replication by the plaintiff to said answer. "Upon this state of the pleading, the circuit court, proceeding to construe said will, decreed that the plaintiff Agnes C. Cresap had, under said will, full power and authority to sell, convey, and transfer the said property, both real and personal, and that under said will she is the absolute owner of said personal estate, and the absolute owner in fee simple of any real estate held by him in fee simple, and, as to any estate not held by him in fee simple, she, under said will, hath succeeded to all rights held thereto by him at the time of his death; and a commissioner was appointed, to whom an order of reference had been made in the cause, to ascertain the amount and priorities of the debts of said testator, and to settle the accounts of said testatrix, and was directed to proceed with said accounts." *Cresap v. Cresap*, 34 W. Va. 315, 316, 12 S. E. 527. This court, in its opinion, delivered by English, J., at pages 321, 322, 34 W. Va., and page 531, 12 S. E., says: "We must conclude that said testator authorized his wife to sell and convey his estate for convenience, so that, in case she might see fit to sell any or all of his real estate, conveyances might be made without trouble or expense, and to avoid the necessity of having the others who might be

interested in the proceeds to join in such conveyances; and these sales were to be made, 'so far as she might see proper,' for two purposes: First, for her support, according to her condition in life; and, second, for the benefit of his estate. The will then proceeds to point out the objects of such trusts, as follows: At the death of his wife, and after she has enjoyed a support according to her condition in life out of his estate, he desired one-fourth of the remainder to be disposed of by her, one-half of said residue to be divided equally between his brother Gustavus J. Cresap and his sisters Mary B. Cresap and Rachel R. Cresap, and his niece Nannie I. Evans to have the remaining fourth; and, in the event his said wife did not dispose of said one-fourth, then the said fourth was to be divided between his brother Gustavus J. Cresap and any unmarried sister or sisters at her death. As to the fourth of said residue, which he directed his wife to dispose of, he clearly intended to give her the power to deed or will it to whom she might see proper, and this fourth she derived as a beneficiary under said trust declared in the first part of the instrument; and, in the event that she does not dispose of it, he directs how it shall be distributed." And on page 325, 34 W. Va., and page 532, 12 S. E., it is further stated: "Looking to the entire will, I think the construction hereinbefore indicated is the proper one, and the decree complained of must be reversed, and the case remanded to the circuit court of Randolph county for further proceedings to be had therein."

Afterwards, on the 15th day of October, 1892, the said Agnes O. Cresap, in her own right, and as executrix of the last will and testament of said Charles J. P. Cresap, deceased, filed in said cause her amended and supplemental bill against the said devisees and creditors of the decedent, in which she, among other things, alleged that she was married to said Charles J. P. Cresap on the 25th day of January, 1870; that at the time of her said marriage, she was possessed of personal estate, consisting of money, bonds, notes, etc., well secured, amounting to about \$4,000, all of which was collected for her, and was intrusted by her, as the same was collected, to the custody and care of her husband, without any other right thereto or interest therein in him than that of her trusted agent for the care and management thereof for her use; that at the time of their marriage her husband was a young lawyer, just commencing the practice of his profession at Beverly, in Randolph county, and was possessed of not more than \$500 worth of property; that not long after their marriage she authorized her husband to purchase for them a home in Beverly from John Burkett, to be paid for out of her separate estate; that, in pursuance of this authority, her husband, on the 2d day of June, 1871, did purchase of said Burkett the said property for \$2,500, all of which was paid out of her said separate prop-

erty by her husband for her use; that no part of said sum was paid by him out of his estate; that she did not at any time, to any extent or in any manner, assign or transfer to him any part of said property, or any interest therein, save only that he occupied and used the same with her as a home and dwelling place during his lifetime, and that she has used it herself as such home since his death; that she did not at any time give, transfer, or set over to her husband any part of or interest in her money which was paid for said property; that her husband, without her knowledge or consent, procured said Burkett and his wife to convey the legal title to said property to himself; that she had unlimited confidence in the good faith of her husband in the transaction, and believed that the property had been conveyed to her; that she remained in perfect ignorance of the fact that it had not been so conveyed for some time thereafter; that, when she learned that the conveyance had been taken by her husband to himself, she complained to him about it; that afterwards her husband repeatedly assured her that he would convey said property to her, which he never did; that he made and published his will on the 29th day of July, 1871, the existence and contents of which plaintiff well knew, in which he devised to plaintiff the whole of his estate, which will he carefully kept in his safe until the time of his death; that after her husband's death, which took place on the 6th day of August, 1886, it was discovered that on the 15th day of May, 1884, he had made a second will, revoking his said former will—the last will being the one in question, but which, as plaintiff was advised, by counsel learned in the law, had the legal effect to vest in her an estate in fee simple in all of the real estate, and an absolute ownership of all the personal property, of the decedent. She then sets out the proceedings, decrees, and orders had and made upon the original and amended first bill, up to and including the decision of this court *supra*, and says that, by reason of the aforesaid wills and proceedings in the circuit court, she had, before the filing of her amended and supplemental bill, made no claim against her said husband's estate, either for the said property so purchased from Burkett, or for her money invested therein. She then prays that the said Burkett property be decreed to her as her separate estate, and conveyed to her as such, or, if that cannot be done, that the sum of \$2,500, the amount of her money used by said testator in the purchase of said property, with interest on said sum from the 2d day of June, 1871, be decreed to her out of the assets of the said estate.

After filing her said amended and supplemental bill as aforesaid, said Agnes C. Cresap departed this life testate, and, by her last will and testament, which bears date on the 5th day of March, 1900, and which was probated on the 18th day of April, 1900, she

"willed and bequeathed" to her niece, the said Nannie I. Brown, all of her real and personal estate, of every kind and character. On the 3d day of May, 1900, the death of plaintiff Agnes C. Cresap was suggested on the record, whereupon the cause was revived and ordered to proceed in the name of Leland Kittle, as administrator de bonis non with the will annexed of said C. J. P. Cresap, deceased; and at the same time, upon motion of said Nannie I. Brown, the said cause was also revived in her name, as administratrix with the will annexed of said Agnes C. Cresap, deceased. It will be remembered that said Brown was from the commencement of the suit a defendant therein. At the January term of the court, 1901, said Brown filed another answer, alleging that she is the sole devisee of the late Agnes C. Cresap, who departed this life, testate, on the — day of March, 1900. She makes the said will a part of her answer. No person is named in the will as executor thereof.

At the said January term, 1901, said Gustavus J. Cresap, Mary B. Cresap, and Rachel R. Murdoch filed their amended and supplemental answer in said cause, and, with many other averments, say that to the said amended and supplemental bill filed by said Agnes C. Cresap in her own right, and as executrix as aforesaid, they had theretofore appeared and demurred, which demurrer had not then been passed upon by the court; that the grounds of demurrer had been verbally stated by counsel, and that they now state such grounds to be:

"(1) Said Agnes C. Cresap, in her own right, seeks to set up claims to property which are in direct conflict with her claim to the property in her fiduciary capacity.

"(2) Said Agnes C. Cresap by her said last will seeks to assert the title to property by an alleged resulting trust in favor of herself, contrary to the averments of her original and first amended bill, and is for that reason chargeable with a departure in her pleading.

"(3) By her said last-mentioned amended and supplemental bill said Agnes C. Cresap admits that her late husband took title to said real estate on the 2d day of June, 1871, and, while she does not definitely inform the court as to when she first knew that her husband had taken the title to this land in his own name, yet by her said bill she does inform the court that he made and published his last will and testament on the 29th of July, 1871, or less than sixty days after he had taken title to the property, of which will and its contents she had full notice and knowledge, so that she certainly had knowledge as to how the title stood not later than July 29, 1871, and yet did not, prior to his death, in August, 1886, do anything to assert her title, and thereafter, for more than six years, and until the October term, 1892, of this court, she claimed under said will; and respondents now insist that whatever

rights said Agnes C. Cresap in her own right may have ever had are long since barred by the statute of limitations, and she and her devisee are barred by her laches from now asserting any title to said land, or setting up any debt against the estate of said Charles J. P. Cresap, deceased."

The said demurrer was by the court overruled, and of this ruling of the court appellants complain. The questions raised by the demurrer will be first considered, and disposed of in the order as stated therein.

Appellants contend, but not very strenuously, that plaintiff should not be allowed to assert, as plaintiff in the same suit, one claim in her own right, and another in her fiduciary character. In *Sadler v. Taylor*, 49 W. Va. 104, 38 S. E. 583, it is held that in equity it is generally sufficient if all the parties interested in the subject-matter of the suit are before the court, either as plaintiffs or defendants. *Story's Eq. Jur.* 630; *Platt v. Oliver*, 3 McLean, 27, Fed. Cas. No. 11,116; *McArthur v. Scott*, 113 U. S. 366, 5 Sup. Ct. 652, 28 L. Ed. 1015; *Hogg's Eq. Proc.* vol. 1, § 84; *Spooner's Adm'r v. Hilbish's Ex'r*, 92 Va. 340, 23 S. E. 751. If one person holding a fiduciary and another person having a personal interest may be joined as plaintiffs, certainly the same person, claiming interests in both capacities, may, as plaintiff, in equity, join such claims in his bill. Plaintiff's amended and supplemental bill is not such a departure in the pleading in said cause as renders it demurrable. *Cresap v. Cresap*, supra; *Hogg's Eq. Proc.* vol. 1, §§ 325, 326, 327; *Burlew v. Quarrier*, 16 W. Va. 108; *Bird v. Stout*, 40 W. Va. 43, 20 S. E. 852; *Belton v. Apperson et al.*, 26 Grat. 207.

It is also contended by appellants that their demurrer should have been sustained by the court by reason of the laches of the plaintiff Agnes C. Cresap in asserting her alleged right. Laches is inexcusable delay in asserting a right, and is an equitable defense, determinable by the particular facts.

It is further insisted that plaintiff had knowledge of all the facts pertaining to the title of the Burkett property in a short time after the deed therefor was made by Burkett and wife to her husband, because he made his first alleged will on the 29th day of July, 1871. In *Halstead v. Grinnan*, 152 U. S. 412, 14 Sup. Ct. 641, 28 L. Ed. 495, in discussing the laches which may be successfully interposed as a bar to the enforcement of an alleged right, it is held that "laches is an equitable defense, controlled by equitable consideration; and the lapse of time must be so great, and the relation of the defendant to the rights such, that it would be inequitable to permit the plaintiff to assert them, where he has had for a considerable period knowledge of their existence, or might have acquainted himself with them by the use of reasonable diligence." We think the plaintiff has satisfactorily explained her delay in filing her amended and supplemental bill, if

the allegations thereof be true, as they are taken to be on appellants' demurrer thereto. The said demurrer was therefore properly overruled.

Upon the pleadings in the case, at the time of the decision therein by this court, there could not have been an adjudication on the merits of plaintiffs' claim to the Burkett property, as alleged in her said amended and supplemental bill. That contention of appellants is not well founded.

On the 1st day of February, 1901, the decree appealed from was made and entered. It recites that the cause came on again to be heard upon the papers theretofore read, and decrees therein; the answer of Nannie I. Brown, tendered in court and filed, exhibiting therewith a copy of the will of Agnes C. Cresap, deceased, with general replication thereto (and upon her motion, and by consent of parties, the cause was revived in her name and individual right as sole devisee of Agnes C. Cresap, deceased, as well as in her fiduciary character as theretofore ordered; and, the death of Samuel Woods, having been also suggested, by like consent the said cause was also revived and ordered to proceed in the names of and against J. Hop Woods and Samuel V. Woods, as administrators with the will annexed of said Samuel Woods, deceased); upon the said supplemental bill of Agnes C. Cresap, filed in the cause at the October term, 1892, upon the written grounds of demurrer thereto interposed by appellants as aforesaid; upon the joint answers to the bill and amended bill; and upon the exceptions to the first of said answers, filed at the May term, 1894, on the ground that said answer is not verified by respondents, and is not responsive to the allegations of the amended and supplemental bill; and upon the exceptions to their second joint answer, filed on the 25th day of January, 1901, in so far as the same purports to be an answer to said supplemental bill, because said last-mentioned answer fails to controvert any material allegations in said amended and supplemental bill. The said exceptions to said answers were made thereto and indorsed thereon by said Nannie I. Brown during the said January term, 1901, of the court. The general replication to said answers filed by plaintiff was withdrawn for the purpose of allowing said exceptions to be made. Thereupon said demurrer to the amended and supplemental bill was overruled, the exceptions aforesaid to said answers, and each of them, were sustained for the reasons and to the extent as indorsed thereon, and the general replications to said answers were modified accordingly. The decree further recites that it appearing to the court from the report of Commissioner J. B. Ward, supported by the depositions of Nehemiah Carper, Geo. W. K. Yokum, James H. Logan, and Adam C. Rowan, and from the allegations of said amended and supplemental bill, taken for confessed, that the dwelling house and lots

occupied by C. J. P. Cresap at the time of his death, and purchased by him on the 2d day of June, 1871, from John Burkett, by deed of that date, exhibited with the bill, were purchased by C. J. P. Cresap at the price of \$2,500, and paid for out of the separate estate of said Agnes C. Cresap, deceased, and that the title thereto was improperly vested in him, "the court is of opinion, and doth accordingly adjudge, order, and decree, that the title to said Burkett property was vested in said C. J. P. Cresap in trust for Agnes C. Cresap, who was entitled at the time of her death to be invested with the title to the same." The decree then appoints J. F. Strader a special commissioner, and directs him to convey said property to said Brown, as sole devisee of Agnes C. Cresap, deceased. The decree also overrules certain exceptions to the report of said Commissioner Ward, filed on the 23d day of April, 1894, and confirms said report in so far as the same had not been confirmed by the decree of said court entered at its May term, 1894.

Upon the question of res judicata, relied on by appellants, *Blern v. Ray*, 49 W. Va. 129, 38 S. E. 530, is cited by them. In that case Judge Poffenbarger reviews not only our own decisions, but many others, bearing upon that doctrine, and refers to *Sayre's Adm'r v. Harpold*, 33 W. Va. 553, 11 S. E. 16, in which it is held that "an adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to matters actually determined, but as to every other matter which the parties might have litigated as incident thereto, and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits." It is scarcely necessary to say that the case, until the plaintiff filed her amended and supplemental bill, was not such, by the pleadings, that the parties might have had the question of title to and ownership of the Burkett property, by reason of the payment of the whole of the purchase money therefor, out of the money and means of the plaintiff, determined and adjudicated between the parties on its merits. Prior to the filing of her amended and supplemental bill, the plaintiff claimed and relied for title to and ownership of the property on her husband's will, which, she was advised by counsel, did confer such title and ownership upon her. The circuit court so held, and, until this court decided otherwise, she was excusable for not asserting her alleged right to the property as now claimed by her.

Appellants insist that inasmuch as the court, at its May term, 1894, permitted them to file their original answer to plaintiff's amended and supplemental bill, to which an-

swer the plaintiff at that term replied generally, and also allowed them to file their amended answer at its January term, 1901, to which there was also a general replication, the court should not, at the hearing, have permitted a codefendant to except to said answers, and should not have rejected said answers, as in said decree recited; that said answers should be treated as yet in the cause; and that appellants are entitled to the relief sought thereby. As a general rule, one defendant cannot except to the answer of his codefendant to the plaintiff's bill. This rule may be different where relief is sought by one defendant against another. It will, however, be borne in mind that Nannie I. Brown succeeded to all of the property rights of Agnes C. Cresap, the original plaintiff in the cause, by virtue of the will, and her appointment as executrix with the said will annexed of Agnes C. Cresap, deceased. The cause was revived in her name as plaintiff in her respective rights as an individual and as fiduciary, as aforesaid. At the same time (January term, 1901) she excepted to said answers. The answers, and each of them, are insufficient in the particulars pointed out by the exceptions. Therefore the action of the circuit court in sustaining the said exceptions was not erroneous, unless it be so for some other reason. Nannie I. Brown having become plaintiff, she was entitled to make the exceptions, unless that right had in some way been waived by her predecessor plaintiff. She had not the legal status to make the exception until the January term, 1901, and the second amended answer of appellants was not filed until that term. The record, as to it, was then made up for the first time. Said last-mentioned answer was tendered and filed; exceptions were indorsed thereon, which were sustained; a general replication thereto, as modified by the exceptions sustained as aforesaid, was entered; and a final decree was then made thereon. This court, in *Hartman v. Evans*, 38 W. Va. 669, 18 S. E. 810, held that, "when a replication to the answer is entered or filed, the exceptions to the answer are treated as abandoned, and the answer deemed sufficient as to any discovery prayed for." Code 1899, c. 125, § 54, provides that, "when a plaintiff in equity files an exception to an answer, the exception shall at once be set for argument." The necessity for this rule is very apparent. In *Arnold v. Slaughter*, 36 W. Va. 589-596, 15 S. E. 250, 252, it is said: "The object of exceptions is to direct the attention of the court to the points excepted to, and to take its opinion thereon, before further proceedings are had, to the end that, if the answer is insufficient, a better answer may be compelled, or, if scandalous or impertinent, that the scandalous or impertinent matter may be expunged." *Daniell's Ch. Pl. & Pr. vol. 1, § 766*, says: "No exceptions can be taken to any answer for insufficiency after replication; but in some cases, however, the court has, on spe-

cial application, permitted the replication to be withdrawn, and exceptions to be then filed." In *McKell v. Collins Colliery Co.*, 46 W. Va. 625, 33 S. E. 765, the defendant, at the May rules, 1897, filed his answer to the bill. From that time until September 28, 1897, both plaintiffs and defendant took depositions to sustain their respective pleadings, and the cause was thus fully prepared for hearing on its merits. The answer was excepted to by plaintiffs for insufficiency, on the last-mentioned day. This court held: "In such case the plaintiff will be held to have waived his right to except to such answer for want of proper filing and attestation, and the cause comes within the purview of section 4, c. 134, Code 1899."

Recurring to said original answer filed by appellants at the May term, 1894, we find that it is not verified by affidavit of any kind; the amended and supplemental bill to which it is filed being properly sworn to. The said answer makes no direct denial of the material allegations of said amended and supplemental bill. No depositions appear to have been taken in the cause after said original answer was filed, by either party. In fact, no evidence was at any time taken by the defendants to support their contentions contained in their said answer. The action of the court in sustaining the exceptions to said answer does not appear to have prejudiced the defendants. The court, upon the facts and circumstances of the case, did not err in sustaining the exceptions to each of said answers.

Should the court have then given the defendants leave to file additional or amended answers? The plaintiff did not ask for further answer or discovery from the defendants. *Daniell, Ch. Pl. & Pr. vol. 1, § 775*, says: "If the exceptions are allowed, the court will, at the request of the parties, at the time of giving its decision, appoint a time within which the defendant is to put in his further answer." In *Chapman v. Railway Co.*, 28 W. Va. 300, an exception to a part of the answer was sustained by the court, and the cause then heard upon the bill and answer, without an opportunity given to the defendant to amend its answer. The court held: "Where exceptions to a part of the answer are sustained, and the defendant does not ask leave to amend his answer, it is not error to proceed to hear the case on the bill, and so much of the answer as is not excepted to." In this case the defendants did not ask leave to file an additional or amended second answer. It must be presumed that they did not desire to do so. They cannot be heard to complain of the action of the court in proceeding to hear the cause, without further denial or delay of the plaintiff.

The evidence in the case is clear, full, and satisfactory that the Burkett property was paid for with the money and means of Agnes C. Cresap. The circumstances of the case,

and the acts and admissions of C. J. P. Cresap, rebut any presumption that Agnes C. Cresap intended either the purchase money therefor or the property as a gift to her husband. Perry on Trusts, § 127, says, "If a husband purchase lands with the separate estate of his wife, in his hands, or with the proceeds or accumulations from it, or money put into his hands to invest for his wife, and take the title in his own name, a trust results to the wife." See cases cited in note 1, *Id.*; *Smith v. Turley*, 32 W. Va. 14, 9 S. E. 48; *Beach, Mod. Eq. Jur.* vol. 1, § 183; *Berry v. Wiedman*, 40 W. Va. 36, 20 S. E. 817, 52 Am. St. Rep. 866.

It is also urged that the heirs and devisees of Judge Samuel Woods, deceased, should have been made parties to the suit. It nowhere appears that said Woods, deceased, was ever in any way interested in the Burkett property. J. Hop Woods and Samuel V. Woods, administrators with the will annexed of said Samuel Woods, were made parties before the final hearing. What their powers and duties are under the will of their testator, do not appear. It is presumed their authority is ample for the purposes of the suit.

We find no reversible error in the record. The decree complained of must therefore be affirmed, and the cause remanded to the circuit court of Randolph county for such further proceedings to be there had therein as may be necessary and proper. Affirmed and remanded.

NOTE BY BRANNON, J. I wish to say that I am not clear that our decision conforms exactly to dry law, in excusing Mrs. Cresap from laches, from ignorance of the legal construction of the will, and in holding that the amended and supplemental bill was no departure from the original bill. But, as to laches, the court has wide range to do equity according to the facts of each case; and the claim of Mrs. Cresap is so just, and her excuse for delay so strong, that I concur under this head. As to departure, the objection is technical, not going to the merits of the case. Why may we not treat the amended and supplemental bill as an original bill to accomplish justice?

(54 W. Va. 621)

VAN WINKLE v. BLACKFORD et al.
(Supreme Court of Appeals of West Virginia.
Feb. 9, 1904.)

ADMINISTRATOR—COMPENSATION—PRINCIPAL AND SURETY—CORPORATION—STOCKHOLDERS—CLAIM AGAINST INSOLVENT—OFFICIAL BOND—ACCOUNTING.

1. A personal representative who, within six months after the end of any one year of his service as such, has fully explained to the parties entitled to the money received in such year, verbally and by informal written statements, the amount so received, together with the sources from which it came, and the amount disbursed, including charges of administration,

and has actually paid to such parties all they are entitled to receive on account of such money, is entitled to compensation for his services for such year, in respect to the interests so settled for and paid.

2. When the parties entitled are infants, and the personal representative has neither given their guardian a complete statement in writing, nor paid the money over to the guardian, within the time aforesaid, but has only given information verbally and by informal memoranda to the guardian concerning the receipts for the year, he is not entitled to commission on the shares of the infants.

3. An administrator of a surety, having in his hands, as such administrator, bank stock certificates, when the principal debtor becomes insolvent, may and should apply on the debt for which the decedent is bound as surety the value of the stock and any dividends thereon remaining in his hands.

4. That stock stands on the transfer book of a corporation in the name of a deceased person is not conclusive evidence that it belongs to his estate. As it is equally consistent with his having held the stock as collateral, circumstances clearly indicating that it was so held are sufficient to support a finding to that effect by a commissioner, especially when it is shown that the deceased person kept a careful book account of his investments, which does not disclose an investment in such stock.

5. A creditor of an insolvent person, after having applied on the debt due him the value of securities in his hands, can prove only the balance due him against the estate of the insolvent.

6. When it is shown by public records that an official bond has been given by a public officer, but search for it is unavailing, the presumption in favor of the regularity of the acts of public officers applies, and the court may assume that the condition of the bond was such as the law required.

7. Prima facie, an administrator is liable for the whole amount of the estate of his decedent, and must account for the same; but, as to any assets of the estate, he may so account by showing that the same are worthless, or have been lost without any fault or negligence on his part, or failure on his part to use due diligence to prevent the loss; and his oath is prima facie proof of such worthlessness or loss.

8. A testator whose personal estate amounted to less than \$60,000, of which \$40,000 was represented by equal amounts of the interest-bearing bonds of two railroad companies, and the balance, for the most part, by other bonds and notes, directed, by his will, that two funds, of \$5,000 each, be invested "in some safe public bonds or securities, bearing at least six per centum annual interest," or deposited "with some trust company at the time reported solvent," and the interest thereon paid to his two sisters during their natural lives, and after their deaths the principal sums to be put into the residuum of his personal estate. He died in 1872, and the administrator with the will annexed, by way of compliance, set apart \$5,000 of each of the two classes of railroad bonds, believing them to be good; and in the panic of the year 1873 the bonds representing one of the funds greatly depreciated, and were afterwards sold for 48 cents on the dollar. Held that, under the circumstances stated in the opinion here filed, the administrator is not chargeable with the loss, nor, on account thereof, with compound interest, in his settlement.

9. When a personal representative is in no sense at fault, and yet a balance for any year appears against him, the interest on such balance is not carried into the account for subsequent years, but stands over until final settlement, or until sufficient disbursements have been made to discharge it, after having extinguished the balance of principal due.

10. But when the debts have been paid, or there has been time in which to pay them, and the personal representative has only legacies and distributive shares to deal with, he is treated and settled with, as to interest, on the principles governing settlements between ordinary creditors and debtors, except that under peculiar circumstances he may become chargeable with compound interest.

11. Where there is a balance due the personal representative for any year, the interest thereon is carried into the account for subsequent years, except when by so doing he would be allowed interest on interest.

(Syllabus by the Court.)

Appeal from Circuit Court, Wood County; L. N. Tavenner, Judge.

Bill by W. W. Van Winkle against G. L. Blackford and others. Decree for plaintiff and defendants appeal. Reversed.

Camden & Peterkin, for appellants. Van Winkle & Ambler and W. N. Miller, for appellee.

POFFENBARGER, P. This is a suit in equity, brought by W. W. Van Winkle, to surcharge and falsify a settlement made by him as administrator with the will annexed of Peter G. Van Winkle, in which capacity he acted from the 13th day of May, 1872, until the 24th day of April, 1883, when, upon his own motion, his powers as such administrator were revoked. Godwin L. Blackford was afterwards appointed administrator de bonis non with the will annexed. One of the items in controversy here formed, in part, the subject-matter of an action at law brought by W. W. Van Winkle against Blackford, administrator, in 1884, which came to this court on a writ of error, and is reported in 28 W. Va. 670. It was also the principal matter of controversy in the chancery suit instituted in 1889 by W. W. Van Winkle against Godwin L. Blackford, administrator, which also came to this court on appeal, and is reported in 33 W. Va. 578, 11 S. E. 26. It will be seen there that the cause was remanded, with leave to the plaintiff to amend his bill by making new parties thereto, and to ask for a settlement of his whole administration account. Syllabus 6. At June rules, 1890, the amended bill was filed and prosecuted to a final decree, which was pronounced on the 9th day of January, 1901, and from which this appeal has been taken by M. C. Van Winkle, H. C. Van Winkle, Harriette G. Van Winkle, and Juliette E. Morrison.

It appears from the bill and proceedings that P. G. Van Winkle had a large estate. He bequeathed \$5,000 in trust for Anna Maria Van Winkle during her natural life, and \$5,000 in trust for Margaret Elizabeth Van Winkle during her natural life, they to receive the income and profits therefrom; and at their deaths, respectively, said two sums were directed to be distributed with the residuum of the estate. He gave \$2,000 to W. W. Van Winkle, to be paid in installments if he should not have reached the age of 25 years at the death of the testator, and, if

he should have attained that age at that time, he was to receive the whole of the \$2,000. He released his brother Adolphus W. Van Winkle from the payment of any indebtedness that might be due from him to the testator at the time of the death of the latter. He bequeathed to the wives of his sons, Rathbone and Godwin Van Winkle, and the husband of his daughter, J. G. Blackford, \$1,000 each, if living at the time of his death, all of whom were living at that time. The residue of his personal property, exclusive of notes, bonds, stocks, debts due him, and money on hand, he gave to the survivors of his three children, Rathbone, Godwin, and Mary, wife of J. G. Blackford, and the children of such of them as might die before the testator, per stirpes. All his real estate he devised to his said sons and daughter, in three equal, undivided portions, the same to be partitioned as soon as practical after his death, and his two sons to take one equal third part of his estate each, and hold the same in fee simple, while his daughter was to have the remaining one-third, with power to take the rents and profits to her own separate use during her natural life, remainder in fee to her children and their heirs, but with power and authority in the executor, upon her request and his approval, to make sale of any of the real estate which might be allotted to her, and to invest the proceeds, and hold the same in trust, and pay over the interest and profits thereof to his daughter during her natural life, and at her death divide and distribute the fund among her children and their heirs; or the executor, should he deem it most expedient, was authorized to sell said share, and divide and distribute the proceeds thereof as aforesaid, or, at the request of his daughter, and upon his approval, invest the proceeds in other real estate, to be held by her during her natural life, and remainder in fee to her children and their heirs. She was also authorized, with the approbation of the executor, or, in the event of his decease, of her brother Godwin, to lease or rent the land for the term of her natural life, etc. Of all the rest and residue of his property and estate, he gave to his sons, Rathbone and Godwin, two-thirds, to be equally divided between them and their respective heirs absolutely, and the remaining one-third to them, or the survivor of them, to be held in trust, and to pay the interest and profits to his daughter during her natural life, and, after her death, to pay to each of the children of his daughter who might then be 25 years of age one equal share therein, and, to such as might be under the age of 21 years, so much of the interest and profits on their respective shares as might be necessary to their maintenance and education while under the age of 21 years, reinvesting any surplus that might remain, and paying to them the whole amount of the interest upon their shares while between the ages of 21 and 25, and at the age of 25 their

respective shares, with all accumulations thereon.

Rathbone Van Winkle died in 1870, prior to the death of his father, leaving surviving him his widow, Sarah Van Winkle, and four children, M. C. Van Winkle, H. C. Van Winkle, Juliette Van Winkle, and Harriette G. Van Winkle, all of whom were under the age of 21 years at the time of the death of the testator. The plaintiff here qualified as the administrator of Rathbone Van Winkle, in which capacity he acted until 1877, when he resigned, and was succeeded by M. C. Van Winkle. On or about the 1st day of June, 1873, Anna Maria Van Winkle died, and about September, 1883, Godwin Van Winkle died without issue, leaving surviving him his widow, Sarah E. Van Winkle, and Joseph B. Neale qualified as his administrator. J. G. Blackford died about September, 1884; and A. W. Van Winkle, another of the legatees, in April, 1875.

As already stated, the executor named in the will having died before the testator, W. W. Van Winkle was appointed administrator with the will annexed, and entered upon the execution of the trust, and paid and set apart, as directed by the will, all the specific legacies. About this there seems to be no controversy. He alleges in his bill that during the first year of his administration he divided between and paid to each of the other legatees, so far as the same came into his hands to be administered during that year, all the rest and residue of the property and estate to which the testator was entitled. But this is denied by the joint and separate answer of the appellants and Sarah Van Winkle, and the answer of Mary V. Blackford and others. However, it clearly appears that the great bulk of the estate was paid over during the year.

Presumably, no settlement, such as the statute requires to be made before a commissioner and recorded, was ever made by the administrator, nor any inventory filed. On the 5th day of April, 1883, Mary V. Blackford caused a notice to be served on him to the effect that, on the 23d day of that month she would move the county court of Wood county to require him to execute a new bond, and, if he refused to give it, she would move the court to revoke his powers as administrator, and appoint another in his stead. On the return day of the notice he appeared and moved the court to revoke his powers, refusing to give a new bond. This was done, but he was required to settle his accounts before O. M. Clemens, who was appointed a special commissioner of said court for that purpose. Afterwards he made up a statement of his account, and presented it to the commissioner; and it was approved by him, and returned to the county court, with exceptions taken by Mary V. Blackford. It showed that there was due the administrator upon his administration of the personal estate, \$2,858.41; and upon transactions in reference to the

real estate, \$2,520.45; total, \$5,378.86. The court sustained the exceptions, and the account was recommitted to K. S. Snodgrass, commissioner, to be reconsidered and restated. Commissioner Snodgrass' final report was made November 23d, showing an indebtedness of the administrator to the estate in the sum of \$4,118.86, as of May 13, 1883, on account of the personal property and estate of the testator. His report further showed that there was due the administrator the sum of \$2,342.31, as of the same date, for moneys expended by him, on account of the real estate, over and above what came into his hands from that source. This report was confirmed by the county court in November, 1886, and was never disturbed in any manner until the amended bill in this suit was filed. In the meantime, however, the two suits hereinbefore referred to as having been disposed of in this court had been brought and prosecuted.

The object of the amended bill is to obtain credit for several items which Commissioner Snodgrass, of the county court, refused to allow in the settlement. One of these is a claim for commission on the account settled with and paid to Anna M. and Margaret E. Van Winkle. Another was a claim for \$266.10 for commission charged for 10 years' attention to and management of the real estate. Another was for \$850 paid to the treasurer of the sinking fund of the city of Parkersburg—the principal item of contention in said two former suits. Another was a claim of \$2,315.77 commissions, as administrator, on receipts for the first and second years of the administration. The bill also seeks relief from an alleged erroneous charge of \$2,152.15 on account of certain shares of bank stock which stood on the transfer book of the bank in the name of P. G. Van Winkle, and were transferred by W. W. Van Winkle, administrator, to himself individually; he claiming to have been the rightful holder of them, as collateral security to indemnify him as indorser on a note made by J. G. Blackford, the original owner of the stock, who had before that time transferred it to P. G. Van Winkle to indemnify him as indorser upon another and older note, and subsequently the absolute owner by purchase and agreement with Blackford. It is contended by the appellants that the note upon which P. G. Van Winkle was indorser, and to the payment of which said stock was pledged, was paid out of the estate of the testator, and that it was the duty of the administrator to apply the stock on said note, or account to the estate for the value of it. There are two other small items—\$125.71 and \$121.69, respectively—which it is claimed were disallowed, but the appellants insist that they were allowed. The controversy over them arises from the different methods adopted by Commissioners Clemens and Snodgrass in stating the account.

The answer filed by the appellant not only

resists all these attacks upon the settlement made in the county court, but goes beyond that, and sets up several matters with which it is claimed that the administrator should have been charged, but was not. One of these is in respect to dividends collected by him upon said bank stock, amounting to several hundred dollars. Another is in reference to certain bonds of the Little Kanawha Navigation Company, which it is claimed were delivered by J. G. Blackford to the testator as collateral to indemnify him against loss as indorser upon a note made by said Blackford. Another is in reference to a loan of something over \$8,000 made by the plaintiff, as administrator of Rathbone Van Winkle, to Godwin Van Winkle, who subsequently went into bankruptcy in the state of Texas, in return for which the appellants received only certain real estate and personal property, which they say was not worth anything like the debt.

On motion of the plaintiff, and over the objection of the defendants, the court on August 24, 1893, entered a decree referring the cause to J. W. Vandervort, commissioner, to settle the accounts of the complainant, late administrator with the will annexed of P. G. Van Winkle, deceased, and to regard the settlement made by him before Commissioner Snodgrass as prima facie correct, subject to be surcharged and falsified by the plaintiff or the defendants, or any of them. The plaintiff was also required in that decree to return and file before the commissioner an inventory of all the assets which came into his possession or knowledge, and also all papers, vouchers, and books in his possession, relating to any of the items in said settlement, so far as they are surcharged and falsified in the bill, answer, or specifications filed by any of the parties. Commissioner Vandervort filed his report August 16, 1897, and returned therewith all the depositions and the evidence taken by and filed with him. He reported against all the claims made by the plaintiff, and gave it as his opinion that the account, as stated by Commissioner Snodgrass, was correct, and should stand, as to the amount, \$4,118.86, with interest from May 18, 1883, found to be due from the administrator to the estate. He reported that there is due to the administrator the sum of \$2,342.52, with interest from May 18, 1883, on account of his transactions relating to the real estate, but gave it as his opinion that said real estate account was not proper to be considered in the settlement, and submitted it to the court whether any deduction should be made on account thereof from the amount due from the administrator on account of the personal property. As to the attacks made upon the settlement by the defendants, the commissioner reported that, not having sustained any of the allegations of error made by the plaintiff, he did not deem it necessary, under the pleadings, to consider the allegations of error made by

the defendants; it being his understanding from the answers that the defendants did not wish to disturb the settlement, unless surcharged and falsified in respect to some of the claims made by the plaintiff. Before the report was filed, the plaintiff filed five exceptions thereto with the commissioner. The first was on the ground that the report failed to show that the administrator had compromised with Mary V. Blackford while the suit was pending. The second was based on the absence of the commissioner's notice, which he certifies, in passing upon the exception, had become lost, but gives the date of its issue and return. The third was based upon the failure of the commissioner to notify Margaret E. Van Winkle, who had never appeared in the cause. The fourth was based upon the refusal of the commissioner to allow plaintiff his commissions and credit for the \$850 heretofore mentioned. The fifth seems to have been general, going to the whole report. All of them were overruled by the commissioner.

On January 9, 1901, a stipulation, signed by counsel for all the parties, was filed, wherein it was recited that the court was of opinion that before final decree the cause should be recommitted to the commissioner, and agreed by the parties that such recommitment was thereby waived, and that all matters arising upon such accounts and surcharges and falsifications thereof, and upon all matters presented by the papers, proceedings, and evidence, were referred to the court for final determination and adjudication; "the finding of the court to have the same effect as upon a report of a commissioner regularly made up and filed in the cause." The final clause of the stipulation reads as follows: "And this cause is submitted to the court, in accordance with this agreement and stipulation, upon the pleadings and proofs and evidence taken and filed as aforesaid in said cause." On the same day a decree was entered whereby it was adjudged, ordered, and decreed "that subexception 'b' of the fourth exception of complainant to said report of Commissioner Vandervort, for disallowing the complainant commissions (\$266.10) on the real estate account, and subexception 'c' of said fourth exception, for disallowing the exceptor credit for \$850 paid April 11, 1891 [1881], to W. N. Chancellor, treasurer," etc., were well taken, and therefore sustained, and "that subexception 'd' of said fourth exception, to the extent of \$2,315.77, the amount of the commissions on the receipts and disbursements for the first year, * * * is well taken; the court finding as a fact that, within six months after the end of the first year of the administration of said estate by complainant, the said complainant, as such administrator with the will annexed of Peter G. Van Winkle, gave to the parties entitled to the money received in said year a statement of said money, and actually settled

therefor with them." Having made these alterations in the settlement, the decree ascertained and adjudged that there was due from the administrator \$953.06, as of May 13, 1883, on account of personal estate, and allowed the administrator credit for \$268.10 commission, and his account of \$2,608.61, growing out of his transactions in reference to the real estate, and found, by deducting from the amount due to the administrator the sum due from him to the estate, that there was a balance due to him of \$1,655.52, as of May 13, 1883, with interest from said date, making a total of \$3,409.54, and decreed said sum to be paid by Godwin L. Blackford, administrator de bonis non with the will annexed, out of the goods and chattels remaining in his hands to be administered. But the court refused to decree over against the distributees of the estate for said sum, on account of the staleness of the demand.

On the theory that the bill could not be amended in the manner in which it was, the defendants demurred to it, but the court overruled the demurrer. It is argued that this amendment amounts to a departure in pleading; making a new cause of action, different from that set out in the original bill. If that were true, the demurrer should have been sustained. But this court held the original bill to be, in substance and effect, a bill to surcharge and falsify the administrator's settlement, but defective and insufficient for want of parties only. *Van Winkle v. Blackford*, 33 W. Va. 573, 583, 11 S. E. 26. It sought correction of the settlement in respect to only one or two items, but its object was to surcharge and falsify the settlement in respect to them. That fixes the nature of the bill. Its character, as thus fixed and determined, is not changed by the addition of attacks upon the settlement relating to other items, nor the making of new necessary parties to it. It is a familiar principle of equity that, after sufficient steps have been taken with respect to one or more items in an *ex parte* settlement or stated account to surcharge and falsify it in respect thereto, all parties to the bill may, by mere informal specifications, attack the settlement as to other items without limit. In view of this, it is not perceived that this bill is in any respect or degree a departure, such as is claimed. However, the court having remanded the cause to the circuit court with an express adjudication of the right of the plaintiff to so amend his bill and to proceed as he has done, is not the question *res judicata*? *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. 26.

By the decree complained of, the settlement was altered to the extent of giving the plaintiff credit and charging the estate with the sum of \$850 paid by him, July 18, 1881, to W. N. Chancellor, treasurer of the sinking fund of the city of Parkersburg. Unquestionably said sum was paid by the plaintiff

within 10 years from the time at which the testator, by reason of his death, ceased to be such treasurer. Nor is it denied that said sum went into his hands, and was never by him paid over to the trustees of that fund. It is contended that at the time of his death he held it, not as treasurer, but as borrower. Against this contention, however, stands the decision of this court in the case of *Van Winkle v. Blackford*, 28 W. Va. 670, holding that the note, which it was claimed was given by the testator, was void for want of delivery. But whether that decision is sufficiently pleaded here to bar this defense is an interesting question. No reference is made to it in the original bill. On the first appeal this court, in its opinion, however, fully and specifically stated the decision of this very point of nullity of the note for want of delivery, in 28 W. Va., and referred to the opinion in that case. The amended bill in this case contains the following: "Your orator further avers that he has been wrongfully and unjustly deprived of the credit of \$850 paid to W. N. Chancellor, treasurer of the sinking fund, on the 18th day of July, 1881, which was allowed in the account of said Clemens, and as to which your orator respectfully refers the court to the opinion and direction of the Supreme Court of Appeals of West Virginia, reversing the decree of this court in this case on the original bill, and holding, as to the said item of \$850 that said Snodgrass refused credit to your orator within his said account, that 'this payment was made on the 18th day of July, 1881, when the right of action on the deceased treasurer's bond had still ten months to run before the barring of the statute could constitute a valid defense; and where a debt is not already barred the administrator may pay it, if confessedly just and due, without waiting to be sued, and ordinarily, when he has funds of his testator, it is his duty to do so, and credit himself with such payments in his settlement.' Your orator charges that the said debt upon which said \$850 was paid was not paid at the time of such payment on the 18th day of July, 1881; that it was confessedly a just debt, and then due, and that, in the performance of your orator's duty as administrator, he paid such debt, and the same should have been credited to him by said Snodgrass in his said account; and that it should now be admitted as and credited to the account so made by said Snodgrass, revised and corrected in that particular according to the opinion and judgment of the said Supreme Court of Appeals." Can this be treated as making the opinion of this court in 33 W. Va. 573, 11 S. E. 26, part of the amended bill? If so, does it thereby set up the decision in accordance with the opinion in 28 W. Va. 670? That was evidently the intention, and it seems to have been so understood by the defendants, for in their joint and separate answer they say "and

they allege that the decision of the Supreme Court, based on false facts, is not binding on these respondents, who were not parties to said suit." Proceeding upon the theory that they are not bound by the decision, because not parties to the suit, they offer evidence of the delivery of the note. If the decision is sufficiently pleaded here, they are undoubtedly bound by it. Nothing is involved here but the personal estate, and any decision, for or against the administrator, in the absence of fraud or collusion, is, as to it, binding upon the legatees and distributees. *Hooper v. Hooper*, 32 W. Va. 526, 534, 9 S. E. 937; *Corrothers v. Sargent*, 20 W. Va. 351; *Castellaw v. Guilmartin*, 54 Ga. 299; *Carey v. Roosevelt* (C. C.) 83 Fed. 242; *Black*, *Judg.* §§ 560, 561; *Big. Estop.* 148. Whether it is sufficiently brought into this record need not be decided. The evidence relied upon to prove delivery of the note is of the same kind as, and less in amount, if any difference, than, that found in the record upon which the decision reported in 28 W. Va. 670, is based; and, though not bound to find the same way on it now, the court ought to do so, unless the finding is clearly wrong. That decision is a precedent, having at least persuasive influence. Moreover, that decision gave the administrator complete acquittal of liability on one ground, and to find the other way now would acquit him of another demand for the same money, predicated upon the very ground of action disclosed to him by said former decision. It would make two decisions of the same question by the same court directly conflict, as well as defeat the ends of justice. At the time that finding was made in favor of the Van Winkle estate, the bench of this court was occupied by a body of jurists as able and eminent as any of their predecessors or successors—Judges Green, Snyder, Johnson, and Woods.

The only remaining contention about it is that there is no proof that any bond was ever given by the testator as such treasurer, and that, if one was given, its contents are not shown. It appears from copies of the minutes kept by the trustees of the sinking fund that P. G. Van Winkle was designated by the board as their treasurer, and that he, with his sureties, James Cook and W. L. Jackson, entered into a bond in the penalty of \$10,000, conditioned as required by the ordinance, and that afterwards, owing to a defect in the form of that bond, a new one was given, with William Logan and Beverly Smith as sureties. What that condition was, the record fails to disclose; and it is shown by the custodian of the papers and records of the city of Parkersburg that diligent search by him for the bond among the records has failed to reveal it. The minutes show that it was given in October, 1859. From these facts, the only reasonable inference is that the bond was given, and has been lost, and that, as it was given by the

testator as treasurer of a large fund, it was conditioned for the faithful performance of his duties. The maxim, "*Omnia præsuntur rite esse acta, donec probetur in contrarium*" (All things are presumed to be rightly done until the contrary is proven), applies here. This was a bond given by a public officer, the condition of which is prescribed by the law, namely, that it shall be for a faithful discharge by him of the duties of his office, and for accounting for and paying over, as required by law, all money which may come to his hands by virtue of the said office. Code 1899, c. 10, § 6. It having been shown that the bond was given, and has been lost, secondary proof of its contents is admissible. Of what such proof may consist is shown by the case of *Leland v. Cameron*, 31 N. Y. 115. There an execution had been issued and lost. The attorney who issued it, and the sheriff into whose hands it went, were both dead, and the only evidence was an entry by the attorney in his register of the issuing of the execution. In the headnotes the court say: "The contents of the execution in such case may be inferred from the facts that the law prescribes its form, the attorney issuing it was conversant with such instruments, and the sheriff to whom it was directed knew what it must contain to authorize him to sell the property. In view of such facts, and after a lapse of thirty years, the court may assume that the execution was in due form, containing all such directions as the statute required it should contain." In 22 Am. & Eng. Enc. Law (2d Ed.) 1274, it is said: "The presumption of the regularity of official acts applies, as a general rule, to all kinds of official acts." In view of these authorities, the objection of want of proof of the bond and its contents clearly fails. It being clearly shown that, as treasurer, he failed to pay over said sum of money, there was a breach of the condition of the bond, for which a right of action existed against his administrator, which was not barred at the time he made the payment. That is sufficient to entitle him to credit. Counsel for appellee claim the right to credit for this amount is res judicata by the decision in *Van Winkle v. Blackford*, 33 W. Va. 587, 11 S. E. 26, but that cannot be. The sufficiency of the bill was the only question before the court then. It is now a question of proof of its allegations.

The next item, in logical order, is the allowance by the decree to the plaintiff of \$2,315.77, his commissions on receipts and disbursements for the first year of his administration, to which extent the decree altered the settlement. This claim was disallowed by Commissioner Snodgrass and the county court, and by Commissioner Vandervort, for the reason that the plaintiff had failed to make a settlement of his account before a commissioner within six months after the expiration of one year from the date of his qualification as administrator. It was also

held by these commissioners that the plaintiff had failed in his effort to show that with-in that time he had given to the parties entitled to the money received in such year a statement thereof, and actually settled therefor with them, and thus relieved himself from the forfeiture of his commissions, as it is provided in section 7 of chapter 87 of the Code of 1899 he may do. Upon all the evidence in the case brought up and made a part of the record by agreement of the parties, the court set aside this finding of the commissioner, and found as a fact that with-in six months after the end of the first year the administrator gave to the parties a statement, and actually settled with them. This is a finding of fact by the court, and, while not conclusive, this court will not reverse the finding unless it is decidedly against the weight of evidence. *Weaver v. Akin*, 48 W. Va. 456, 87 S. E. 600; *Kennewig Co. v. Moore*, 49 W. Va. 323, 38 S. E. 558; *Chilhowie Lumber Co. v. Lance*, 50 W. Va. 636, 41 S. E. 128.

But, to ascertain whether it is against the weight of evidence, it is necessary to see what the evidence is, and whether, upon the facts disclosed by the evidence, there was a settlement within the time stated. The inventory filed by the plaintiff shows the total amount of personal estate in his hands to have been \$59,132.11. Of this, \$40,000 was in railroad bonds. These bonds were disposed of by the administrator in the year 1872 as follows: Set apart to Margaret E. Van Winkle and Anna Maria Van Winkle, under the second clause of the will, \$5,000 each; delivered to Godwin Van Winkle, trustee for Mary V. Blackford, \$8,666.67; delivered to W. W. Van Winkle, for the heirs of Rathbone Van Winkle, \$8,666.67; delivered to Godwin Van Winkle \$8,666.67; delivered to Sarah Van Winkle, \$1,000; to Sarah E. Van Winkle, \$1,000; and to W. W. Van Winkle, \$2,000. It was ascertained that it would require \$7,106.99 to pay the J. G. Blackford legacy of \$1,000; the amount due the city of Parkersburg on account of the sinking fund; taxes for the years 1872-73, due and to become due; estimated expenses and for contingencies amounting to \$175; and commissions on receipts, estimated at \$2,396.93. This, added to the \$40,000 of bonds, makes \$47,196.49. The administrator shows that, up to May 13, 1873, in addition to the bonds, he had collected from various sources \$5,573.94. The balance of the estate in his hands at that time consisted of solvent claims amounting to \$4,859.20, and actual and supposed insolvent claims amounting to \$8,698.97. According to this showing, the ascertained and approximated liabilities of the administrator and what he paid out in said first year were in excess of what he had collected at that time, although he then held \$4,859.20 worth of good assets, and \$1,500 of shares of the Little Kanawha Navigation Company, which he says were supposed at that time to have no market value. The administrator shows that

the deficit was partially covered by withholding payment of interest, amounting to \$1,776.75, received on account of railroad bonds and other securities, until January, 1873, thus carrying these amounts as credits of the estate for that year, and reducing the deficit to \$481.04. His general statement for the first year shows disbursements, \$45,616.26; commissions, \$2,315.77; debts, taxes, etc., to be paid, as stated, \$7,106.99; total, \$55,039.02. Against this he places receipts, \$47,813.33; actual and supposed solvent assets, specified, \$4,859.20; total, \$52,672.53. This shows deficiency of assets May 13, 1873, of \$2,366.49. Now, it is claimed by the defendants that the administrator should have charged himself with about \$3,000 on account of the 25 shares of stock of the First National Bank of Parkersburg, and also with the value of certain bonds of the Little Kanawha Navigation Company, of the par value of \$1,700. These are the only items which are claimed to be assets in excess of what is included in the inventory, and they are matters of contention in this suit. This record fails to disclose that any such contest existed at the time of the alleged settlement within the period of 18 months. It is to be observed, also, that the \$7,106.99 of indebtedness, taxes, and administration charges found in the statement do not include a note of \$4,000 made by J. G. Blackford, and indorsed by P. G. Van Winkle, bearing date May 2, 1870, and for which the estate was liable, and for which it is claimed the First National Bank stock and the Little Kanawha Navigation Company bonds were held by P. G. Van Winkle as collateral. As J. G. Blackford, to whose estate these matters properly belong, was at that time living, doing business, and supposedly solvent, he not having failed until 1876, it is not at all likely that the estate was supposed during the first year of the administration to have been affected one way or another by this liability or the collateral, nor that either the administrator or the distributees of the estate paid any attention to them, or took them into account in any settlement or statement that may have been made. Hence, if it be true, as claimed by the plaintiff, that in June, 1872, he ascertained the amount of the assets, and classified them as hereinbefore set out, and had frequent interviews with Mary V. Blackford, Sarah Van Winkle, as guardian for the children of Rathbone Van Winkle, and Godwin Van Winkle, personally and as trustee for Mary V. Blackford, thus representing all parties interested as residuary legatees, preliminary to the distribution of the \$40,000 of bonds (pointing out the fact that by doing so he would reduce the available assets in his hands to an amount insufficient to pay the debts, taxes, and administration charges), and afterwards made the distribution as shown by his vouchers taken from Godwin Van Winkle, Sarah Van Winkle, Sarah E. Van Winkle, and Godwin Van Winkle, trustee, bearing

dates in May and September, 1872, and in July, 1872, set apart to Anna Maria and Margaret E. Van Winkle their trust funds of \$5,000 each, and for Sarah Van Winkle, guardian for Rathbone Van Winkle's children, \$8,666.67, and in September took out his own legacy of \$2,000, it would seem that in that year he made to all the parties a full disclosure of the condition of the estate in his hands as it then stood. His uncontradicted testimony is that he had frequent interviews with Mary V. Blackford, and kept her informed of the condition of affairs; exhibiting to her slip statements of the results, not only in that year, but every time she asked it for the next two years, and up until the fall of 1882. In August, 1873, he gave her and the other interested parties, or their representatives, a written statement of the distribution. He says that in October of that year he gave another statement, covering the rents and profits of the real estate. Objection is made to his testifying to transactions between himself and Godwin Van Winkle, who is dead; but, it having been shown that in June, 1872, he wrote Godwin Van Winkle a letter relating to the condition of the estate, and that unsuccessful efforts had been made to obtain the original, he was properly permitted to file a copy prepared from the copy retained by him in his copying book, which shows an approximation of debts and assets, exclusive of investments with which he proposed to pay them. It also mentions an advancement in bonds to Godwin Van Winkle prior to that time, and speaks of the necessity of making the dates of the distribution to the other parties correspond with the date of his. The voucher signed by Godwin Van Winkle for \$6,000 bears date May 20, 1872. In the record, as exhibits, are copies of statements of the account of the administrator with Mary V. Blackford, bearing date August 27, 1873. All these appellants are the children of Rathbone Van Winkle. At the time of this alleged settlement the plaintiff here was the administrator of the estate of Rathbone Van Winkle, and Sarah Van Winkle was the guardian of these children. The plaintiff testifies that he fully informed Sarah Van Winkle, their guardian, of the condition of the estate, and gave her verbally the result of his approximation of the condition of the estate, and afterwards, within the 18 months from the date of his appointment, gave her a written statement of the distribution. The statute does not require any particular form of statement; nor is it, in terms, required to be in writing. The record contains no copy of the statement rendered Sarah Van Winkle, guardian, but the testimony is that it was similar to the statement rendered Mary V. Blackford. One of these is a mere statement of the distribution of bonds, and the other is an individual account of Mrs Blackford with the administrator, relating to her share of rents, and her interest on bonds, disbursements on account of taxes,

improvements on her real estate, and moneys paid to her. Neither of them can be regarded as fully showing his receipts as administrator for the year. But, as no particular form or method of statement is required, and as it appears that a verbal statement was made, in which a fuller and more formal statement would, no doubt, have been given, if asked, it would seem to be sufficient. Whether the statute contemplates actual payment within six months from the end of the year in requiring actual settlement for the money received therein, or not, it is certain that payment will include actual settlement. From what has been stated, it is manifest that the administrator, within the year, actually paid all that Godwin Van Winkle and Mary V. Blackford were entitled to receive on account of the assets which came into his hands during the first year of his administration. The view that there was a statement and settlement is much strengthened by the fact that in the year 1872 the bulk of the estate was distributed, and that there is nothing in this record to indicate that for a period of 10 years thereafter there was any dissatisfaction with the conduct of the administrator, or any complaint against him. No steps were taken to bring him to a final settlement until in April, 1883. It is hardly probable that the parties interested in a large estate, such as this, would have remained so long a time without information as to its condition. This is regarded as an important circumstance tending to support the testimony of the administrator to the effect that they were fully informed.

It is objected that the court has allowed too much for commission, for the reason that the bonds of the Central Railroad Company of Iowa, amounting to \$7,333.34, set apart and held for the Rathbone Van Winkle estate, and loaned to Godwin Van Winkle, were lost by reason of the bankruptcy of Godwin Van Winkle, and the remainder of said railroad bonds, amounting to \$1,333.33, held for the Rathbone heirs, depreciated in value, and finally became worthless, and were lost by reason of the negligence of the administrator. It is claimed that he ought not to be allowed commission on these sums, but, on the contrary, should be charged with the same as lost by his negligence. The \$8,666.67 of bonds belonging to the Rathbone Van Winkle estate were set apart to that estate by the administrator in 1872. In the same year \$7,333.33 of them were loaned by the administrator to Godwin Van Winkle, together with an additional \$5,000. Notes were taken for these amounts, and secured by a deed of trust upon real estate, executed by Godwin Van Winkle and wife, and dated December 14, 1872. Afterwards, May 15, 1883, Godwin Van Winkle and wife conveyed absolutely the real estate upon which these debts were secured to M. C. Van Winkle, H. C. Van Winkle, Juliette Van Winkle, and Harriette G. Van Winkle, the appellants

here, in payment and discharge of said debts; the deed reciting that the value of the real estate and the amount of the debt ascertained were nearly equal. There is nothing in this record to show that the property was not worth the amount of the debt. On the contrary, the recitals of this deed show that the debt was fully paid out of the security taken by the administrator when the loan was made. However, commission cannot be allowed on the \$8,666.66, face value, of the bonds set apart for the heirs of Rathbone Van Winkle. There was no actual payment of that part of the estate, so as to make it appear that as to it there was a statement and actual settlement. Had the bonds been delivered to the guardian, and accepted by her as so much cash, the administrator would have been entitled to his commission thereon. *Farneyhough's Ex'rs v. Dickinson*, 2 Rob. 582; *Hipkins v. Bernard*, 4 Munf. 83. Merely designating these bonds as belonging to the Rathbone Van Winkle heirs is not enough. W. W. Van Winkle was not entitled to hold them as administrator of Rathbone Van Winkle, who died before the testator. By his death the bonds went to his children, and should have been delivered to their guardian. There having been no actual payment to the guardian, there is nothing from which it can be inferred that within six months after the end of the year the administrator gave her a statement, and actually settled with her for the money to which her wards were entitled. Commission should not have been allowed on said sum, and the decree in favor of the administrator should be reduced to the extent of \$433.33.

The complaint or claim that the estate has been charged with \$17.50 each year as commission on interest collected on bonds held for M. E. Van Winkle, and paid to her, is absolutely groundless. The whole amount of interest, \$350, is credited to the estate each year. Then the estate is charged with \$17.50, the commission on it, and with \$332.50, the balance as paid to M. E. Van Winkle. So the charges and credit exactly offset each other, and the transaction leaves the account of the estate just as if it had never been carried into it at all.

The only other alteration in the settlement in favor of the plaintiff is the allowance of \$266.10 as commission on the amounts received from real estate during the period of plaintiff's administration of the estate. It is objected that this service was wholly outside of the duties of the administrator, and that whatever he may be entitled to for them cannot be included in his administration charges. The principle laid down in *Dunn's Ex'rs v. Renick*, 33 W. Va. 483, 10 S. E. 813, seems to settle this question. The court did not stop there to decide whether it was the duty of the executors to pay the taxes on the land. It only ascertained that they had paid them in good faith, and under the belief that it was their duty to do so,

and did what the heirs had neglected to do. The opinion then proceeds as follows: "The payment of these taxes was for the benefit of the estate, and, those entitled to the residuum being those whose duty it was to pay them, it is entirely equitable that the executors should be credited for the amount they paid, as against the residuary legatees for whose benefit the payment was made." This record makes it absolutely certain that the collection of rents, payment of taxes and insurance, and the making of repairs on the real estate was with the consent of all the parties interested in this suit. Otherwise the plaintiff would not have obtained the rents from this property for a period of 10 years, amounting to several hundred dollars. It is suggested that he took charge of the real estate, collection of rents, etc., simply because he could do so. But it is hardly likely that he would have sought the privilege of paying out, on account of it, about \$2,500 in excess of what he received. The appellants here were represented by a guardian in respect to all these matters, and surely it cannot be pretended that she was ignorant of the fact that the plaintiff was discharging a duty which protected the estate of her wards along with, and as a part of, his administration of the estate of his decedent. Nor can it be said that she was without power to take the management of the real estate of her wards out of his hands and perform those duties herself. It is also manifest that, had she done so, it would have been at a cost of considerably more than one-third of \$266.10. Clearly, it was an arrangement made, by all parties interested, for convenience and economy in the management of the whole estate, both real and personal, and the equitable principle asserted in *Dunn v. Renick* ought to be applied. In that case, as in this, the executors had a naked power of sale, more extensive than the one given in this case, but still a mere naked power of sale. Here the power extended to one-third of the real estate, and was to be exercised only upon request of Mrs. Blackford, while in *Dunn v. Renick* it was practically unconditional, and extended to the whole of a certain farm. If such power confers the right to pay taxes and take credit for the amount thereof in the settlement of the administration account, the limitations upon the power above noticed cannot affect the principle. But the decision in *Dunn v. Renick* is based, not alone upon the power of sale vested in the executors, but upon their payment of the money for the benefit of the estate, in good faith, under the belief that it was their duty to pay it, and the fact that the payment so made benefited equally those who, as residuary legatees, took, in equal proportions, the surplus of the proceeds of the land on which the taxes were paid, and also the personal estate. The Van Winkle lands, on which the administrator with the will annexed paid taxes and insurance and made

slight repairs, were devised to the persons who took the bulk of the personal estate as legatees, and the divisions of the real estate and residuum of the personal property among these persons were made in almost, if not exactly, the same proportions. Hence the rule adopted in *Dunn v. Renick* is clearly applicable. To the suggestion that this case involves only the settlement of the administration account, while that of *Dunn v. Renick* was an ordinary suit in equity to construe *Dunn's* will and for other purposes, the reply is that so much of the decision as related to the taxes went no further in its effect than to give the executors credit for the amount of the taxes in their settlement. As, under that case, the administrator is entitled to credit for the money expended, less the amount of rents received, why should he not have commission on the rents collected? What is the difference between applying the whole amount of rent collected, and allowing commission on the same, and crediting the rents less the commission? None. The question presents two methods of calculation, each of which produces the same result.

Having disposed of the objections to the alterations of the settlement made by the decree of the court in favor of the plaintiff, the complaint made by the appellants on account of the failure of the court to charge the plaintiff with certain sums, with which it is claimed he is justly and legally chargeable, is now to be disposed of. From what has been said respecting the commissioner's report, the stipulation upon which the cause was submitted, and the decree, it will be seen that the record presents a novel question in procedure. No exceptions to the commissioner's report were filed by the appellants. That report shows on its face that the specifications filed by the appellants were not considered by the commissioner. The decree recites that, in the opinion of the court, a re-committal of the report was necessary. By the stipulation filed the re-committal was waived, and the cause was by agreement submitted to the court, upon all the evidence and papers filed, for final determination and adjudication, "the findings of the court to have the same effect as upon a report of a commissioner regularly made up and filed in the cause." But, with one exception, the court failed to certify in the decree, or otherwise, what facts were found. The decree deals with the report of the commissioner as if the cause had been submitted upon that report and the exceptions thereto filed by the plaintiff. The defendants, the appellants here, filed no exception to the report, nor does the decree set forth any exceptions to the findings or rulings of the court. It is a well-settled rule in equity that where a decree is based upon a commissioner's report, and there is no exception to the report, pointing out, with reasonable certainty, the particular errors complained of, so as to direct the

minds of the court to them, the appellate court cannot consider any error in the decree, unless it be such as appears upon the face thereof. *Ward v. Ward*, 21 W. Va. 262; *Estill & Eakle v. McClintic's Adm'r*, 11 W. Va. 412; *Keck v. Allender*, 37 W. Va. 214, 18 S. E. 520; *Kester v. Lyon*, 40 W. Va. 161, 20 S. E. 933; *Kester v. Hill*, 46 W. Va. 750, 34 S. E. 798. Errors in the report and decree, not apparent on the record, nor made the subject of exceptions to the report, are regarded as waived, or, rather, the parts of the report not excepted to are deemed to be admitted to be correct. *Kester v. Lyon*, cited. But the court, having acted upon the stipulation, was bound to follow and adhere to its terms. By that instrument the findings of the commissioner were set aside, although the report and the evidence taken by the commissioner were made parts of the record by the same instrument. Hence this decree, although apparently based upon the commissioner's report and exceptions thereto, must be treated as a decree of the court upon all the pleadings and evidence in the cause, made independently of the findings of the commissioner. It stands, therefore, upon the footing of a decree in a case in which there is no reference nor any report of a commissioner, and the assignment of error may be considered.

The first disallowance complained of is in respect to the bank stock hereinbefore mentioned. It will be remembered that the plaintiff is charged with \$3,000, which he claims was the value of that stock in 1876, when he settled for it with the estate, taking it into his own hands, and charging himself with \$3,000 as its value. In 1894 the stock was worth \$3,875, and, from 1872, dividends had been paid on it amounting to \$3,882. The contention is that this stock belonged absolutely to the estate of P. G. Van Winkle, and is still a part of the unadministered assets of that estate, and wrongfully withheld from it by the plaintiff. Wherefore it is insisted that he should be charged not only with \$875 more on account of its value, but also with the dividends. There is no evidence that this stock belonged to P. G. Van Winkle, except that, at the time of his death, it stood upon the transfer book of the bank in his name, J. G. Blackford having formally transferred it to him on the 22d day of November, 1871. W. W. Van Winkle testifies as follows, in reference to the cause of that transfer: "I was present at the transaction between them [P. G. Van Winkle and J. G. Blackford, on or about November 22, 1871] in the rooms of P. G. Van Winkle's—residence of J. G. Blackford—where he lived about the date mentioned. It had reference to the indorsement by P. G. Van Winkle of the note of four thousand five hundred dollars for the accommodation of J. G. Blackford. J. G. Blackford requested P. G. Van Winkle to make such indorsement for him, but P. G. Van Winkle declined, unless J. G. Blackford

would give him collateral to secure such indorsement, for the reason stated, that he, P. G. Van Winkle, was already his security. Thereupon J. G. Blackford offered twenty-five shares of the stock of the First National Bank as collateral for the indorsement of the four thousand five hundred dollar note so requested." He then states that the note was executed by Blackford, and indorsed by P. G. Van Winkle, on the faith of the bank stock as collateral, and on the same day the stock was transferred as aforesaid, all with the understanding that, upon the maturity of the note, it was to be reduced to \$2,500, for which sum only renewals were to be made. The obligation upon which P. G. Van Winkle was already surety for Blackford was a note for \$4,000, dated May 2, 1870, payable to W. W. Van Winkle, administrator of the estate of Rathbone Van Winkle, given in part settlement of the value of 520 United States bonds, of the face value of \$5,000, for which Blackford, at the death of Rathbone Van Winkle, was indebted to him. Their ascertained value at that time was \$5,670.25, which was reduced to \$4,000 by a note of \$1,000 due from Rathbone Van Winkle to P. G. Van Winkle, with \$60 accrued interest, accounts due from Rathbone Van Winkle to Blackford amounting to \$256.86, and a check for \$353.37. These facts also are testified to by W. W. Van Winkle. His testimony as to these, as well as to the facts relating to the execution of the \$4,500 note, and the transfer of the stock as collateral therefor, was objected to as being testimony to a personal transaction between the witness and deceased persons. W. W. Van Winkle further testifies that P. G. Van Winkle indorsed Blackford's note for \$2,500, at 60 days, in part renewal of the \$4,500 note, and that in March, 1872, P. G. Van Winkle being sick and unable to transact business, Blackford came to him and requested him to indorse for him a note in part renewal of the \$4,500 note, upon the faith of the same bank stock as collateral for his indemnity; and that in that month, upon the agreement with Blackford that he should hold the bank stock for his indemnity, he did indorse Blackford's note for \$2,000, at 60 days, with the understanding that he would continue to indorse for him to the amount of \$2,500, the par value of the bank stock, in such amounts as Blackford would from time to time request. He further says that, at the time of the original pledging of the bank stock to P. G. Van Winkle, the certificate of stock was handed to him (W. W. Van Winkle), he being then a clerk or assistant in the office of P. G. Van Winkle, and that it had ever since remained in his possession. He claims that, in pursuance of the agreement between him and Blackford, he continued to indorse for the latter, and at the time of Blackford's failure, in 1876, he was liable as such indorser for three notes, one at 90 days, for \$350, dated December 9, 1875, another at 90 days, for \$600, dated February 17, 1876,

and another at 75 days, for \$1,200, dated January 15, 1876, and was compelled to pay, on account of said notes, the sum of \$2,150. Copies of these three notes, and of the checks given in payment thereof, are filed as exhibits with W. W. Van Winkle's deposition. He files, also, copy of account of First National Bank with him as administrator, taken from the passbook, showing that from 1872 to 1876 he deposited the dividends on the bank stock, amounting to \$1,200, in his name as administrator, and paid nearly all of them out by check to J. G. Blackford. Blackford having failed in 1876, and made an assignment for the benefit of his creditors, fixing the liability upon W. W. Van Winkle to pay the notes indorsed by him, he says he agreed about that time with Blackford that he would take the bank stock at \$3,000. In pursuance of that agreement, he wrote out a form of transfer of the stock to himself, under date of October 11, 1878, and signed it as administrator of P. G. Van Winkle, and, in pursuance thereof, the stock was transferred to him upon the books of the bank. After 1876, Van Winkle appropriated the dividends on the stock to his own use. J. W. Leese, cashier of Parkersburg National Bank, testifies that on November 22, 1871, a 60-day note for \$4,500, made by Blackford and indorsed by P. G. Van Winkle, was discounted, and the money used by Blackford. It fell due January 24, 1872, when Blackford discounted his note at 60 days for \$2,500, indorsed by P. G. Van Winkle, and the proceeds were placed to his credit, and paid the \$4,500 note by his check. The \$2,500 note was paid by Blackford, March 25, 1872, on which date there was placed to Blackford's credit a 60-day note for \$2,000, made by Blackford and indorsed by W. W. Van Winkle. On May 25, 1872, the \$2,000 note was paid by Blackford, and a note for \$1,500, made by him and indorsed by W. W. Van Winkle, was placed to his credit. On July 27, 1872, the \$1,500 note was paid, and a note for \$1,000, indorsed by W. W. Van Winkle, was credited to Blackford. On October 3, 1872, the \$1,000 note was paid by Blackford, and a \$600 note, indorsed by W. W. Van Winkle, was placed to Blackford's credit. On December 5, 1872, the \$600 note was paid, and a 90-day \$500 note, made by Blackford and indorsed by W. W. Van Winkle, was placed to the credit of Blackford, and paid by Blackford March 8, 1873. C. A. Bukey, assistant cashier of the same bank, testifies to numerous notes handled by that bank, made by Blackford and indorsed by W. W. Van Winkle, in the years 1874-75, all of which were paid by Blackford, except the \$350 note, dated December 9, 1875, which was paid by Van Winkle in 1876. The other two notes paid by him as indorser were handled in the Second National Bank of Parkersburg. Mr. Van Winkle testifies that from March 13 to June 13, 1874, his indorsements for Blackford amounted to \$6,500, and on the latter

date he indorsed a 74-day note for \$4,000 for Blackford. The amount charged to the estate of P. G. Van Winkle on account of the \$4,000 note of May 2, 1870, is \$3,589.71, with interest thereon from February 23, 1876, to April 2, 1876, amounting to \$29.91 making a total of \$3,619.62. Against this, Commissioner Snodgrass charged the administrator with \$3,000, the value of the bank stock, and \$198.27 received by the administrator from the assignee of J. G. Blackford, being 32 per cent. dividend on \$619.62, the balance due on the \$4,000 note, after crediting thereon the \$3,000, making in all \$3,198.27, as a credit upon the amount paid by the Van Winkle estate on account of the \$4,000 note, leaving the loss to the estate \$421.35.

Independently of the testimony of the plaintiff, there is enough evidence in this record to warrant the finding that the bank stock was held by P. G. Van Winkle, not absolutely, but as collateral. It was transferred to him on the very day on which he indorsed the \$4,500 note. P. G. Van Winkle is shown by his books to have been a very careful man and an accurate and systematic bookkeeper, and his books do not disclose any investment by him at any time in the stock of that bank, although they do show all his investments in other stocks and bonds. From the death of P. G. Van Winkle, early in 1872, until the failure of Blackford, early in 1876, a period of four years, during all which time Blackford was transacting a large business and handling large amounts of money and property, and during which, as indicated by the evidence, nobody suspected that there was any danger of his becoming insolvent, the dividends on the stock were paid to him by W. W. Van Winkle, the administrator, who, having been in the office of Mr. Van Winkle for several years, undoubtedly had some knowledge of his relations to Blackford and the status of that stock. Commissioner Snodgrass, the county court, and the circuit court have all found and held that the stock was collateral in the hands of P. G. Van Winkle, and not his property absolutely, and the facts herein stated as disclosed by the record, independently of the testimony of the plaintiff concerning any personal transaction between him and P. G. Van Winkle or between him and J. G. Blackford, are sufficient to support that finding. There is no evidence against it, except that at the time of the death of P. G. Van Winkle the stock stood on the books of the bank in his name, which fact is clearly insufficient to overcome the inference arising from the other facts, with which it is also perfectly consistent. Jones, Pled. & Col. Secu. § 153. Either as collateral in Van Winkle's hands, or as his own property, the stock would properly have stood in his name on the transfer book.

The only circumstance in the record from which, in the absence of anything to the contrary, it might possibly be inferred that that

bank stock was pledged for the payment of the \$4,000 note, as well as the \$4,500 note, is the application of part of the proceeds of that stock to the payment of said \$4,000 note, as hereinbefore shown. This application, however, is referable to a right on the part of the administrator of an entirely different kind. Blackford, the principal in the \$4,000 note, was insolvent at the time the application was made, and this stock was a chose in action belonging to Blackford's estate, remaining in the hands of the administrator of the estate of Peter G. Van Winkle, the surety in said note. The insolvency of Blackford, the principal, conferred upon the surety the right in equity to withhold and apply this stock to payment of the debt by way of relieving himself as surety. *Mattingly v. Sutton*, 19 W. Va. 19. The act being attributable to this right, the inference that the application was made on the ground of the stock having been pledged for the payment of the note is negatived. In addition to this circumstance, Van Winkle says he applied it as a creditor of Blackford, and not as pledgee. He is certainly competent to explain his own act. This raises the question whether the administrator exercised his right of application to its full extent, and with reasonable care and diligence, to absolve the estate from loss on account of said \$4,000 note. There was a loss of \$421.35, as has been shown. Did the administrator give to the estate the full value of that stock? It seems so. The commissioners, county court, and circuit court have fixed the value at \$3,000.00. On that valuation it was paying 8% per cent. at the time. Van Winkle says that was the market price, and the statement stands unchallenged. But any dividends accrued or remaining in his hands when the Blackford failure came were equally applicable in the same right. The last dividend shown to have been paid to Blackford was the May dividend of 1875. Another, amounting to \$125, was received in November of that year, and the failure seems to have occurred between that date and May, 1876, when the next dividend accrued, for on March 11, 1876, Van Winkle paid off, with his individual check, one of the notes on which he was indorser for Blackford. As to the exact date of the failure, the testimony is silent. Hence the best evidence of the time, as related to dividend accruals, is the circumstance of payment of the note above referred to. Van Winkle says the failure occurred, and he took and held the stock in his own right, in 1876. So it must have been after the receipt of the dividend of November, 1875, and before that of May, 1876. Clearly, therefore, the administrator ought to be charged with the \$125 dividend of November, 1875, which he did not pay to Blackford nor charge himself with.

In immediate connection with the foregoing, relating to the bank stock, arises the contention that the administrator failed to

collect from the assignee of J. G. Blackford the full amount of what belonged to the P. G. Van Winkle estate, as its share of the assets of J. G. Blackford, upon the pro rata distribution thereof. The amount charged to the administrator as having been received from the assignee is \$198.27, being a dividend on Blackford's liabilities, but it is insisted that the whole amount due upon the note, without deducting the value of the stock, should have been put in against the Blackford assets, reserving the stock to pay the balance, after applying the amount received in the pro rata distribution of the general assets. In the first instance that was done. W. W. Van Winkle combined the amounts due to himself individually, \$2,157.15, less \$400, agreed value of the Little Kanawha Navigation Company bonds, leaving \$1,757.15, and to himself as administrator of Rathbone Van Winkle, on account of the \$4,000 note, \$3,589.71, making a total of \$5,346.86, on which he received a 32 per cent. dividend from the assets of Blackford—\$1,710.98. Afterwards, he and the assignee came to the conclusion that the value of the bank stock should have been deducted and the dividend computed on the balance—\$2,346.86—showing an excess of \$960 paid by the assignee to Van Winkle on account of the two claims, on which interest had accrued to the amount of \$816.40, making a total due from Van Winkle to the assignee of \$1,776.40. They also found an additional dividend of \$330.53, due on the two claims, which was credited on the excess and interest, leaving a balance of \$1,445.87, which was paid by Van Winkle to the assignee. By the general rule in equity, the pledgee may prove his whole claim against the pledgor's estate in insolvency without deducting the value of his security. *Jones, Pled. & Col. Secu.* § 587; *Lewis v. U. S.*, 92 U. S. 618, 23 L. Ed. 513; *Merrill v. Bank*, 178 U. S. 181, 19 Sup. Ct. 360, 43 L. Ed. 640; *Mason v. Bogg*, 2 Mylne & Craig, 443. But this principle is not applicable here. The security had been converted into money, or, at least, its value had been ascertained and applied in satisfaction pro tanto of the debt, and the creditor could prove only the balance due against the assets of the insolvent debtor. *Jones, Pled. & Col. Secu.* § 587; *Midgeley v. Slocomb*, 32 How. Prac. 423.

As to the bonds of the Little Kanawha Navigation Company, which by some means came into the hands of the plaintiff from J. G. Blackford, there is not a particle of evidence that they ever belonged to the estate of P. G. Van Winkle, or that they were held as collateral by him, or for the \$4,000 note upon which he was surety for Blackford. It only appears that they were in the hands of the plaintiff, and that he credited \$400, as their agreed value, upon the amount due him by reason of his having paid the three notes of Blackford upon which he was indorser. That is in no sense an admission that they

were in any way applicable to the payment of the \$4,000 note, and there is no evidence that they were so applicable. Hence the court properly disallowed the claim of the appellants made in reference to them.

Only one other item remains to be considered. On the 18th day of October, 1888, a decree was made by the circuit court of Wood county, in a suit brought to sell real estate of the Rathbone Van Winkle heirs, reciting that certain real estate, belonging to the estate of P. G. Van Winkle, in which said heirs were interested, had been sold for the sum of \$1,650, out of which W. W. Van Winkle had received, as special commissioner, the sum of \$220 as the share of said heirs, and that the estate of P. G. Van Winkle, of which he was administrator, having also sole charge of the real estate, was indebted to him in the sum of \$982.30, for money necessarily paid out for taxes, repairs to buildings, and insurance in excess of the receipts from rents, of which \$327.43 was charged to said heirs, and ordering that he retain said sum of \$220 and apply it as a credit upon said sum of \$327.43. The refusal of the court to charge W. W. Van Winkle with this sum is assigned as error. All that can be said of this decree is that it gave the plaintiff the right to retain the \$220 and apply it as a credit as therein stated. It does not show that he did so, nor is there anything in this record which shows it. He swears that the money was not retained by him, but was paid out and expended in this suit and in the improvement of the estate of these appellants. Whether he did retain the money which he was so authorized to retain is the vital question. The real estate account and settlement, made by Commissioner Snodgrass and approved by the court, shows neither a charge nor a credit relating to the transactions under the decree of October 18, 1888. If it were shown that the plaintiff retained out of the \$372, this \$220, he ought to be charged with it here, otherwise he ought not to be so charged. He says he did not so retain it, but paid out the whole amount for the benefit of said heirs, and his testimony is uncontradicted. There being no dispute about the indebtedness to the plaintiff on account of his services and expenditures in caring for the real estate, the burden is upon the appellants to show payment, and they have clearly failed to show that said sum of \$220 was actually applied on that indebtedness. They have only shown that his right to do so was adjudicated. Had the parties who were entitled to the fund been adults, that right would have existed without adjudication, and the adjudication was no doubt asked for the sole reason that they were infants, and the fund belonged to the corpus of their estate, and could only be expended upon an order of the court.

Two errors have been noted, either of which is sufficient to reverse the decree. A

more serious one, however, remains to be indicated. Taking the report of Commissioner Snodgrass, which disallowed to the administrator his claim for commission for the first year, amounting to \$2,315.77, as the basis of its action, the circuit court gave credit for said sum on the amount found due by said commissioner from the administrator to the estate—\$4,118.86. This sum included \$1,189.62 charged against the administrator as interest. Had the court gone back and credited said commissions in the first year of the account in the statement, there would have been no balance of \$2,197.17 against the administrator, for that year, on which to charge interest. And if, after giving credit there for the commission, the court had restated the whole account for subsequent years, it is not likely that the close of it would have contained any interest charged against the administrator of any consequence. We now find and hold that, instead of allowing \$2,315.77 as commission, the circuit court should have given credit for \$1,882.44, and this sum should be credited in the account for the first year of the administration, and the whole account reformed and restated. This commission was earned in the first year, and should be credited as of that year. All the forms of statements in the settlements of administration accounts, found in the books, show credits for commissions in the years in which they were earned. 4 Min. Ins. 1500. The hardship and injustice of postponing such credits until final settlement is too apparent to require an argument to show it. As the item of \$125 became chargeable to the administrator, apparently, before May, 1876, it should be entered in the account for the year ending May 13, 1876. The item of \$850 paid on account of the debt due to the sinking fund of the city of Parkersburg should be entered as of July 18, 1881.

As the case is to be remanded for restatement of the account, the principles governing the allowance of interest in such accounts will be set out, and, in connection therewith, an additional assignment of error will be disposed of. When the personal representative is not in default, although there is a balance against him in favor of the estate, the interest on the balance is not carried into the account, but stands over until final settlement, or until sufficient disbursements have been made to discharge it, after the balance of principal against him has been extinguished. 3 Min. Ins. 641. This is the method followed by Commissioner Snodgrass in his report. In restating the account, a different rule is to be applied. The administrator should have separated from his general account the accounts of payments, to legatees and distributees, long before he made his settlement, as it does not appear that the existence of any debts prevented his doing so. Therefore he ought to settle under the rule of debtor and cred-

itor, charging interest on money due, and applying payments to the liquidation of the interest first, and then of the principal. *Garrett v. Carr*, 3 Leigh, 418; *Handly v. Snodgrass*, 9 Leigh, 484; 3 Min. Ins. 642. If a balance shall appear at any time in favor of the administrator, the same rule is to be applied. 3 Min. Ins. 641. Nothing appears in the case calling for the application of the rule of compound interest against the administrator. He is so charged when he uses the money of the estate in trade and will not disclose the profits he has made, or where the fund is directed to be laid out to accumulate, or where he has acted as quasi guardian as well as executor. 3 Min. Ins. 640, 642. The plaintiff has not used the funds of the estate in trade. By the second and third clauses of the will, two separate funds of \$5,000 each were directed to be invested "in some safe public bonds or securities, bearing at least six per centum annual interest," or deposited in some trust company reported to be solvent, the interest on which was to be paid to the testator's two sisters during their natural lives, and after their deaths the principal sums were to fall into and constitute a part of the residuum of the estate. This direction of the will was not strictly observed, and it is urged, for this reason, not only that compound interest should be charged against the administrator, but that he should be compelled to account also for alleged resultant losses. By way of compliance, \$10,000 in railroad bonds were set apart and held for the purposes aforesaid. Soon afterwards, one set of these bonds, part of which constituted one of the \$5,000 funds, greatly depreciated in value, something like 52 per cent., as a result of the panic of 1873. These were bonds in which the administrator found his testator's funds already invested. He could not foresee the panic of the following year. He might well have assumed that the testator himself considered them a safe investment. A short time before his death, some time in the fall of 1871, he exchanged United States bonds for these railroad bonds, \$20,000 of Cincinnati, Baltimore & Ohio Railroad bonds, and \$20,000 of Central Railroad of Iowa bonds. These bonds constituted by far the larger part of the solvent personal estate. There was but little cash. To have followed strictly the directions of the will, it would have been necessary to convert \$10,000 of the bonds or of other assets into cash and change the investment. Whether that could have been done before the Central Railroad of Iowa bonds depreciated is not shown. It may have been practicable, and it may not have been. The sequel shows they were not as good as the Cincinnati, Baltimore & Ohio bonds, but there is nothing here to indicate that there was not ground, at the time they were set apart, for considering them equally as good. Considering them good, W. W. Van Winkle took his own legacy of \$2,000

in them. It is not the case of a requirement to invest actual cash, for the testator did not leave as much as \$5,000 in cash, nor could his debts have been paid, and these two funds invested as directed by the will, without converting some of the bonds or other property into cash. Not only was it necessary to do this in order to comply with the direction found in the will, but an investment in safe public bonds or securities bearing at least 6 per cent. interest must have been found. It may be that such opportunities were at hand, but there is nothing in this record to show it, or that the railroad bonds could have been readily converted. An executor or administrator is not to be charged with losses, nor with compound interest, unless guilty of negligence or misconduct. *Hooper v. Hooper*, 32 W. Va. 541, 9 S. E. 937; *Holt v. Holt*, 46 W. Va. 397, 35 S. E. 19. *Prima facie*, he is chargeable with all the assets undoubtedly, and must account for them, but if he account by showing a loss, which he could not have prevented by the exercise of due diligence and vigilance, he thereby discharges himself as to the assets lost. 3 Min. Ins. 634; *Evans v. Shroyer*, 22 W. Va. 581; *Reitz v. Bennett*, 6 W. Va. 417; *Cavendish v. Fleming*, 3 Munf. 198. Some of the authorities say he is not to be charged with a debt not collected unless it is shown that it has been lost by his negligence. Under the circumstances shown by this record, it cannot be said or held that the loss on account of the bonds is due to the negligence of the administrator. The statement of the account shows that the bonds of the Central Railroad of Iowa were charged off early in 1874, as being in default of interest and of no salable value. How could the administrator have foreseen this? It was a result of a great financial panic which suddenly swept over the whole country, spreading financial havoc and ruin on every hand. Who can say that he could have converted them into safe bonds, or into cash, within the short time allowed him, without sacrifice? It is not to be assumed that this could have been done. The occasion of the loss was a great public calamity. By extreme wariness and caution its effect might have been avoided, not because the disaster was foreseen or anticipated, for that was impossible, but merely by extreme caution, which the law does not require. As to compound interest, an executor acting as a *de facto* guardian, under a will requiring him to invest a fund for accumulation or to pay interest to some designated person, is chargeable with compound interest when he fails to so invest it and uses the money himself. Is there any rule under which he is to be so charged for mere failure to invest in the particular class of securities, or in the mode, indicated by the testator? No such rule has been produced, or found. In case of negligent loss of the fund, he probably would be, but such question does not arise here.

In the brief of counsel for appellant there are some references to alleged errors in the report of Commissioner Clemens. That is not the report upon which the decree complained of is based. Nor are the supposed errors referred to attributable to the cause assigned. In one the estate is credited with \$265.65 as interest received, and then charged with \$243.82 as interest paid out. The difference is the commission, and not interest. The same is true of the other item complained of—\$296.69 interest received, and \$281.06 interest disbursed—the difference being practically the amount of commission. Evidently, there is an error in the calculation. The disbursement was clearly intended to be the amount received, less the commission.

Another apparently groundless complaint in the brief filed for appellant M. C. Van Winkle says compound interest is allowed in the real estate account, because it is made up with annual rests. A hasty examination of it reveals no charge of interest upon interest, though made with annual rests. Against each charge of interest, on an annual balance, credits of rents received, largely exceeding the interest, appear to have been entered, and the interest charges thus extinguished under the partial-payment rule. But if there is any compound interest in the account, it should be expunged.

It is urged in the brief that this court enter a decree finally settling this case, but counsel for appellant asks the court to go back into the account and apply the two sums, in respect to which there is error in the decree, so as to show the final result. This work properly belongs to a commissioner, and counsel, by agreement, cannot impose it upon the court. It is manifest that no proper decree can be entered without a restatement of the account upon the principles herein stated. For this purpose, the cause must be remanded, and, in restating the account, the report of Commissioner Snodgrass is to be taken as the basis, and altered according to the findings and directions herein given.

For these reasons, the decree is reversed, and the cause remanded to the circuit court of Wood county to be further proceeded in according to the principles here stated, and, further, according to the rules and principles governing courts of equity.

(54 W. Va. 608)

WALDRON v. HARVEY et al.

(Supreme Court of Appeals of West Virginia.
Feb. 9, 1904.)

PARTITION—SALE FOR COSTS—DECREE—VALIDITY—PRAYER FOR RELIEF—EQUITY—JURISDICTION—MARRIED WOMAN—SALE OF REALTY—VOID DECREE—COLLATERAL ATTACK—PARTIES IN PARTITION—ESTOPPEL—LACHES—ADVERSE POSSESSION—COLOR OF TITLE—TAXES—PAYMENT.

1. Upon a bill purely and only for partition of land in kind between parceners, asking no sale for costs, or other cause, there can be no

sale for costs, and a decree of sale is void, not simply erroneous. A sale and conveyance under it confer no title.

2. Where there is no pleading to warrant a decree, or part of a decree, the decree, or such part of it, is not merely voidable, but void, as it is not on matter in issue.

3. Where the subject-matter and purpose and nature of a suit are such as not to warrant a given decree, but the decree is foreign thereto, it is null and void.

4. A prayer for general relief will authorize a decree upon matter of the bill, though such decree is not asked by a prayer for specific relief; but not unless the matter of the bill warrants the decree in law.

5. While a court of equity having jurisdiction for one purpose may go on and give full relief as to all matters comprehended under the allegations of fact in the pleadings, yet it is limited in its relief to the allegations of the bill or other pleading, and cannot decree beyond their scope.

6. After a final decree at one term, giving the full relief warranted by the facts stated in the bill, the case is ended, and out of court, and the court has no further jurisdiction of the subject-matter or parties, and all orders and decrees at a later term are null and void.

7. A decree selling in fee land of a married woman, not separate estate, for debt made during coverture, is wholly void, and passes no title. A decree selling in fee the separate estate land of a married woman for a debt made during coverture and before chapter 3, p. 6, Acts 1893 (Code 1899, c. 66, § 15), is wholly void, and passes no title.

8. A decree which is void, not merely erroneous, may be attacked directly by appeal or bill of review or by collateral attack.

9. In a suit purely for partition of land, unless a sale and distribution of its proceeds are sought, a trustee and creditor in a deed of trust are not necessary parties.

10. A married woman cannot lose her land, separate or not separate estate, by estoppel by conduct (in pais) without actual fraud, if even by it.

11. One cannot lose vested title to land by oral admission that it is the property of another.

12. Laches cannot be imputed to a married woman to defeat her suit for land not her separate estate.

13. Laches will not defeat a suit for land when the adverse claimant is not in actual possession.

14. Where one is vested with legal title to land, laches will not defeat a suit for it when the right is yet not barred by the statute of limitation applicable to it.

15. Adverse possession of a married woman's land, not her separate estate, beginning during coverture and continuing for the term of the statute of limitations, will bar the wife's and husband's right during coverture; but, though the right during coverture is barred, the wife, or those claiming under her, has five years after the coverture ends to sue for the land.

16. Waldron has actual possession of a tract of her land, and Nighbert has actual possession of a tract of his land. A part of Waldron's land is sold under a decree void, not merely voidable, and is purchased by Nighbert. The part sold adjoins the land of Nighbert, and also the remaining land of Waldron. Neither ever has actual possession within the part so sold. By law the constructive actual possession of Waldron over the part sold commencing before the void sale continues after it, and Nighbert has no constructive actual possession of the part sold so as to be adverse to Waldron and bar Waldron's title by limitation.

17. A deed for land to a purchaser under a judicial sale, though the decree is without jurisdiction and void, is color of title for adverse possession, and actual possession under it is adverse to the owner of the land.

18. Possession by a purchaser under a judicial sale not wholly void is adverse to the owner.

19. Passing the state title to forfeited land to another claimant under the Constitution, art. 13, § 3.

20. Payment of taxes by a purchaser under a void judicial sale inures to the benefit of the former owner, so as to save his title from forfeiture for failure to enter it upon the taxbooks in his name.

21. Equity has jurisdiction to remove cloud over title to land by vacating a void judicial sale and a deed under it, the former owner being in actual possession.

22. A purchaser of land from a purchaser under a decree void for want of jurisdiction is not a bona fide purchaser without notice. He is bound to know the want of jurisdiction and defect of title apparent in documents under which he derives title.

(Syllabus by the Court.)

Appeal from Circuit Court, Mingo County; E. S. Doolittle, Judge.

Bill by Hester A. Waldron against Thomas H. Harvey and others. Decree for defendants, and plaintiff appeals. Reversed.

John W. English and Robert H. Hoyle, for appellant. John B. Wilkinson and Thos. H. Harvey, for appellees.

BRANNON, J. George W. Clark died in 1861, owning a large tract of land in Logan county. In 1885 M. H. Waldron and Hester A. Waldron, his wife, filed a bill against Luemma Clark and others in the circuit court of Logan county, stating in it the death and seisin of Clark; that he left a widow, Luemma Clark, and three children, Hester A., John B., and Jane Clark; that Hester A. Clark had married M. H. Waldron, and Jane had married — Waller, and died leaving one child, George R. Waller. The bill prayed that the widow's dower be assigned, and the land divided between the three heirs. The bill contained the common prayer for general relief. A decree was made at April term, 1886, assigning the widow's dower, and assigning to Hester A. Waldron, John B. Clark, and George R. Waller each a separate parcel of the land, and requiring each heir to pay a third of the costs, and retiring the case from the docket. U. S. Buskirk gave a notice to the parties to the suit, saying that he was the beneficiary of the several parties entitled to costs in the case, and that he would at the October term, 1886, move the court to reinstate the case on the court docket. At that term an order was entered reciting that, as at the April term, 1886, the cause was dropped from the docket without any provision for payment of costs, "on motion of the plaintiff this cause is ordered to be reinstated upon the docket of this court that an adjudication and proper process may be had for the costs herein." At the same term another decree was made reciting that the former decree had required Hester A. Waldron, J. B. Clark, and George R. Waller to pay the costs equally, and fixing the amount of costs, and decreeing that, unless said parties should pay

the costs and interest, a special commissioner should sell sufficient of the land which had been set apart to said heirs to pay the costs chargeable to them respectively. Under this decree 99 acres of the tract which had been allotted to Hester A. Waldron was sold, and purchased by J. A. Nighbert, and the sale confirmed by decree. Nighbert's right passed to Thomas H. Harvey, S. S. Altizer, Niele Nighbert, and G. F. Miller. By deed of trust, September 17, 1883, M. H. Waldron and Hester A. Waldron, his wife, and John B. Clark conveyed to William Stratton, as trustee, to secure a debt to James A. Nighbert, all their interest, then undivided, in the land descended to them from George W. Clark. In a suit to enforce liens against John B. Clark a decree was made to sell John B. Clark's tract allotted to him, and in this suit the said trustee and Nighbert were parties, and under the decree the tract of John B. Clark was sold, and bought by Nighbert by decree. That suit was brought and the sale under it made before the sale to Nighbert of the 99 acres out of Hester Waldron's land. The John B. Clark land bought by Nighbert adjoins said 99 acres. When Nighbert purchased the John B. Clark land, he at once took possession of it, and yet has such possession; but his possession actual includes no part of the 99 acres. Before George W. Clark's death he allotted a portion to Hester A. Waldron, and she and her husband took actual possession of it, built a house upon it, and have ever since been in actual possession; and the part assigned to her in the partition included this improvement, and ever since such partition they have continued such possession. The 99 acres sold from her is part of the tract assigned her, and adjoins the remainder of her tract; but she has never had actual possession within the 99 acres, if we can give it a boundary. The said 99 acres seems to have no definite boundary. The decree under which it was sold prescribes no definite boundary; simply tells the commissioner to sell a sufficient amount of land to pay the debt. The said 99 acres was, for taxation, deducted from Hester A. Waldron's tract, and ever since Nighbert's purchase of it the 99 acres has been taxed to Nighbert and those claiming under him, and not to Hester Waldron. The sale to Nighbert of the John B. Clark land paid the deed of trust, but it was not actually released until after the sale of the 99 acres under the decree. The said 99 acres is in a state of nature. In the year 1900 Waldron and wife brought a chancery suit in the circuit court of Mingo county, wherein the land now lies, against Thomas H. Harvey and others, owning the 99 acres under Nighbert's purchase under said judicial sale, basing their claim to relief on the theory that the decree of sale and the sale and confirmation decree were all void, and conferred no title, because the court was without jurisdiction to make the decrees, and praying that said decrees and sale and deed

under them be set aside as clouds upon the title of Hester Waldron. The court entered a decree denying any relief to Waldron and his wife, and dismissing their bill, and from this decree they have appealed.

One important question is this: The bill for partition was purely and only a bill for partition. It stated only the facts that Clark owned the land at his death, his title, who were his heirs, and that they were entitled to partition. It asked nothing as to costs, did not pray that they be charged on the land and that the land be sold for them. The utmost the court could do on that bill was to divide the land, order each party to pay his share of costs by personal decree, and perhaps, as some courts do, declare such costs a lien on the lands assigned, which would be unnecessary, because the decree personal would be a lien. This decree did not declare the costs a lien. If it had done so, there could not be a sale for costs on that bill. The decree that the heirs pay costs was a judgment. It had to be enforced by another bill, because it did not exist at the date of the suit, and the bill made no allegation as to its payment, and made no statement or prayer as to costs or their nonpayment. There had been no execution for such costs. It was not a judgment lien suit. It did not seek a sale of the land for any cause. "A decree is a conclusion of law from pleading and proofs, and where there is a failure of either pleading or proofs there can be no decree." *Keneweg v. Schilansky*, 47 W. Va. 287, 84 S. E. 773; *Vance Shoe Co. v. Haught*, 41 W. Va. 275, 23 S. E. 553. A decree, or any matter of a decree, which has no matter in the pleadings to rest upon, is void, because pleadings are the very foundation of judgments and decrees. "Matters not charged in the bill or in the answer, and not in issue in the cause, are not proper to be considered on the hearing." *Hunter v. Hunter*, 10 W. Va. 321. There must not only be jurisdiction as to the person affected by the decree by having him before the court by process or appearance, but there must be jurisdiction of the matter acted upon by having it also before the court in the pleadings. Multitudinous cases attest this elementary axiom of jurisdiction. If either is wanting, the decree or judgment is void, not merely voidable or erroneous. *Hogg's Eq. Proced.* § 573; *Haymond v. Camden*, 22 W. Va. 180, point 5; *McCoy v. Allen*, 16 W. Va. 724; *Shaffer v. Fetty*, 30 W. Va. 248, 4 S. E. 278; *Bland v. Stewart*, 35 W. Va. 518, 14 S. E. 215. Akin to this case is *Seamster v. Blackstock* (Va.) 2 S. E. 36, 5 Am. St. Rep. 262, where a widow sued to assign dower, making the heirs parties, and the court decreed a sale, and the decree was held void because in selling the court exceeded its jurisdiction. So, in *Hull v. Hull*, 26 W. Va. 1, and *Hoback v. Miller*, 44 W. Va. 635, 29 S. E. 1014—suits brought by widows for dower—sales decreed were held absolutely void. Why? Because

in such suit, upon such a cause of suit, a sale was improper, the court not having proper jurisdiction for that purpose. So, in this case, a suit purely for partition, there could be no sale except for the reason that the land was indivisible; certainly not for costs. In the cases just given there was more reason to justify decrees than in this case, because the bills asked a sale, and this bill did not, and stated no ground for sale. You cannot, in a suit for one purpose, decree for another. *Billingsley v. Menear*, 44 W. Va. 651, 30 S. E. 61, is like this case, in that the bill was good for part, but not all, of the decree. It was held bad as to the part not covered by the facts stated in the bill.

It is argued that the prayer for general relief makes the decree good over the defect just stated. This cannot be so. Under a prayer for general relief you can get relief not specifically asked, provided the facts alleged in the bill and the nature of the case warrant it; not otherwise. *Hogg's Eq. Proced.* § 105; *Vance Shoe Co. v. Haught*, 41 W. Va. 275, 23 S. E. 553.

It is further argued that, as the court had unquestionable jurisdiction to decree partition, the sale decree was warranted by the rule that, having jurisdiction for one purpose, it must go on, and give full relief on principles stated in *Sinnett v. Cralle*, 4 W. Va. 600; that is, where the nature of the case and the facts given in the bill justify it. A court cannot do everything in a case. This case was only one for partition. Sale was not its object or nature. The bill contained nothing to call for it. That was not in the issue. "It is impossible to concede that because A. and B. are parties to a suit a court may decide any matter in which they may be interested, whether such matter be involved in the litigation or not." *Black on Judg.* 241. So the decree for sale was ultra the case.

Another reason why the sale is void is the indefiniteness of the land sold. It seems simply a sale of 99 acres out of 378. No boundary, no description; all vague and general. Ejectment could not be maintained for it, for it was agreed in the present suit that it had never been surveyed, and that its boundaries had never been ascertained; and, if the case should go for defendants, the court should direct a survey, and its metes and bounds be fixed and entered of record. Thus the surveyor, not the court, would be the vendor, in effect. *Blakey v. Morris*, 89 Va. 717, 17 S. E. 126.

Another reason occurs to me to show this decree void. The suit sought partition only. When the decree making final partition and adjudicating costs was entered, it disposed of everything involved in the case. It was a final decree, and ended the case, because it had fully performed its office of giving full relief according to the facts, and the court had nothing further to do. A final decree puts the case out of court. *Cocke v. Gilpin*, 1 Rob.

22; *Vanmeter v. Vanmeter*, 3 Grat. 148; *Hogg's Eq. Proced.* § 568; *Morgan v. Railroad*, 39 W. Va. 17, 19 S. E. 588. *Childers v. Loudin*, 51 W. Va. 559, 42 S. E. 637, holds that after the term the powers of the court are closed. The decree alone put the case out of the court, but the decree expressly struck it from the docket. There was no case in court for a further decree, and the decree of sale was a nullity. *McKinney v. Kirk*, 9 W. Va. 26; *Crim v. Davison*, 6 W. Va. 465. It is no answer to this to say that Code 1899, c. 127, § 11, allows reinstatement. That does not apply to suits closed by final decree, but only to nonsuits and dismissal before decree.

Another reason for holding the decree of sale void comes from the question, where did the court find its jurisdiction to sell the fee simple of a married woman's land for her debt? At the date of the decree equity could subject the issues and profits during the coverture. This was the extent of its powers until Acts 1893, p. 6, c. 3, Code 1899, c. 66, § 15. Under no state of facts could it go further to pay her debts, if the land was her separate estate, without a lien. *Radford v. Carwile*, 13 W. Va. 572; *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917. Was the land *Hester Waldron's* separate estate? We do not know. She inherited it in 1861. We do not know when she was married. If before April 1, 1869, it was not separate estate; if after that date, it would be, under chapter 66, § 2, Code 1899. If the land was not separate estate, I do not see how it could be at all subjected. As a contract to pay costs, her promise would not be enforceable. But say there is the decree against a married woman. It would be void, as would a judgment at law. The suit was not one to sell her land. But, as the costs were in partition, they might be charged expressly on the land; but this was not done. Let us say, however, that the decree is personal, and, being in partition, is valid; still, could you sell the corpus of her land? Whether we view the land as maiden land, not separate estate, or separate estate, I do not see how the land could be sold in fee. Under *Thorn v. Sprouse*, 39 W. Va. 706, 20 S. E. 676, it seems her land would not be liable for costs.

Counsel for the defense say that the court had jurisdiction for partition, and that, even if it erred in a decree of sale, it is merely error, and is *res judicata*, and forever binding, and could be attacked only by appeal, not collaterally, as is done in this case. But this is answered by the fact that the decree is void, not voidable. A void decree may be reversed on appeal or bill of review, or attacked collaterally. *Cook v. Dorsey*, 38 W. Va. 196, 18 S. E. 468; 2 Cyc. 590.

It is argued that, as the trustee and creditor were not parties, the decree is also for that reason void. It would be as to them; but as to other parties it would be only er-

aneous, not void. It was only a partition suit, to which they were not necessary parties, unless a sale was asked. 1 Daniel, Ch. Prac. 257; 2 Minor's Inst. 418.

It is claimed that the plaintiff is estopped to say the decree of sale is void on the theory that that decree was at her instance. To bar one of his right, the case must be plain. The record does not show that Hester Waldron moved the decree. It is likely that Buskirk did. An order does show that she moved the reinstatement, which, though it so states, is not likely, and probably an unauthorized statement, as Buskirk gave the plaintiff notice that he would ask reinstatement. But pass this. The decree of sale—another order than that of reinstatement—was not moved by her. Is it likely she would move a decree against herself? She got the benefit of the decree in having its proceeds pay her debt, but did not ask its benefit. Though the record does not disclose that she did anything working an estoppel, yet, as it is argued that she did, I will say that, if she did, yet, as she was a married woman, whether this land is or is not separate estate, she could not lose her title by estoppel in pais for reasons given in *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, point 11, 38 L. R. A. 694, 64 Am. St. Rep. 891. In that late excellent chancery work, *Amer. & Eng. Dec. in Eq. vol. 4, p. 363*, in a full note on estoppel by conduct, I find this: "She cannot be estopped with reference to her legal title to real estate, however, since that can only be conveyed according to the statutory requirements." Very many cases are cited from all quarters to support the proposition. *Heavener v. Godfrey*, 3 W. Va. 426; *McNeeley v. Oil Co.*, 52 W. Va. 643, 44 S. E. 508, 62 L. R. A. 562. The answer says Hester Waldron admitted in conversation that Nighbert owned the land. Title to land cannot pass by admissions when statute requires a deed. Cases given in *McNeeley v. Oil Co.*, 52 W. Va. 644, 44 S. E. 508, 62 L. R. A. 562; *High v. Pancake*, 42 W. Va. 607, 26 S. E. 536. But the replication denies this allegation. It was mere mistaken opinion, not misleading any one to outlay.

Laches. This defense cannot avail. View Hester Waldron's estate as not separate, and the rule applies that laches cannot be imputed to a married woman. *Baker v. Morris*, 10 Leigh, 284; 18 Am. & Eng. Ency. L. (2d Ed.) 107; *Hogg's Eq. Princip.* 418. The Waldrons being in possession, laches is not imputable to them, as the defendants were not in possession. *State v. Sponaule*, 45 W. Va. 415, 32 S. E. 283, 43 L. R. A. 727. In addition, this case is one of legal title, and is governed by the statute of limitations—that is, the right to the land—and, as that statute does not bar the plaintiffs, as will be presently sought to be shown, laches cannot bar, as clearly a right yet good under the

statute is not lost by laches. Laches applies to equitable demands, where the statute of limitations does not. "Mere delay in asserting a right, short of the limitation fixed by statute, does not bar the right in equity." 8 Am. & Eng. Dec. in Eq. 677. If a legal right gets into equity, the statute governs. *Hogg's Eq. Princip.* 415; *Wilson v. Harper*, 25 W. Va. 179. The cases of *Pusey v. Gardner*, 21 W. Va. 470, and *Trader v. Jarvis*, 23 W. Va. 101, do not apply because they were about equitable rights. View Hester Waldron's land as separate estate, and say that laches are imputable to a woman as to her separate estate. If the statute does not bar, laches do not bar, as just stated.

Statute of limitations: If the land was maiden land, not separate estate, and there had been actual possession by the purchaser, Nighbert, of the 99 acres, the statute would bar the joint right during coverture. *Merritt v. Hughes*, 36 W. Va. 366, 15 S. E. 56; *Caperton v. Gregory*, 11 Grat. 505. But the wife's estate would be saved by coverture. But the joint right of Hester Waldron and husband cannot be so barred for want of actual possession of the 99 acres by those claiming under the sale. Before that sale Hester Waldron and husband had actual possession of the tract assigned her, and that possession, though not on the 99 acres, included it, as possession of part is of the whole. If Nighbert's purchase were not void, it may be that his possession of the John B. Clark land would be extended over the 99-acre coterminous tract on the same principle, as it would in such case be the better right, and would displace the constructive actual possession of the Waldrons; but the sale, being void, did not displace the constructive actual possession of the Waldrons of the 99 acres, because it did not for a moment extend to it. *Overton v. Davisson*, 1 Grat. 211, 42 Am. Dec. 544. So Nighbert and those under him never had actual, or constructively actual, possession of this 99 acres. Thus the joint estate is not barred. So, if we view it as separate estate, the wife's right is not barred, for like reason—want of possession.

The defendants ask, are not our purchase and deed under it color of title? The plaintiffs say that they are not, because it has been held that one who buys at a court sale that is void holds no adverse possession against the former owner. For this broad position that a deed under a void sale is no color of title *Hall v. Hall*, 27 W. Va. 468, *Lynch v. Andrews*, 25 W. Va. 751, *Sturm v. Fleming*, 26 W. Va. 54, are cited. I think the last case only holds that payment of taxes by the purchaser keeps the land from being forfeited for nonentry by the former owner. The first two cases at first seem to conflict with *Mullan v. Carper*, 37 W. Va. 215, 16 S. E. 527, and with *Swann v. Thayer*, 36 W.

Va. 47, 14 S. E. 423, holding void sales good for color of title and adverse possession, which they certainly are on sound principle. *Bennett v. Pierce*, 50 W. Va. 604, 40 S. E. 395; *McNeeley v. Oil Co.*, 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562. But on examination we see that in the cases of *Hall v. Hall* and *Lynch v. Andrews* the litigation in which the sales were made continued, and the sales were set aside in those same cases. The purchasers were like pendent lite purchasers, who cannot plead the statute. Those cases do not apply in this case for the reasons just stated. It is clear that, except under special circumstances, possession under a sale is adverse, though the sale be void. "The possession of a purchaser at a judicial sale is adverse to the judgment debtor." 1 Cyc. 1054; 1 Am. & Eng. Ency. L. (2d Ed.) 850. On page 854 we read: "A deed which is executed pursuant to a decree of a court of competent jurisdiction gives color of title, even though the decree is void." Possession under a deed from a vendor is adverse to him; possession under a void tax deed is adverse to the former owner. By a parody of reason, a deed under a void decree purporting to pass the owner's title is color of title. *Simpson v. Edmiston*, 23 W. Va. 875; *Ketchum v. Spurlock*, 34 W. Va. 597, 12 S. E. 832. A void deed was so held in *Cooey v. Porter*, 22 W. Va. 121. Whilst I assert that a deed under a void decree would give good title by adverse possession, yet for want of actual possession in this case it avails nothing. Besides, the decree was void for want of description of the land, and thus not good for color of title. And if the land was maiden land, not separate estate, no possession would avail against *Hester Waldron* or her heirs until after the death of her husband. *McNeeley v. Oil Co.*, 52 W. Va. 617, 44 S. E. 508, 62 L. R. A. 562; *Caperton v. Gregory*, 11 Grat. 505. She has been under disability every moment since the sale, and her right is protected by section 3, ch. 104, Code, giving one, or those claiming under him, five years for suit after the end of disability.

I do not understand that it is contended in the brief that payment of taxes by Nighbert and his alienees and the failure of Waldrons to pay tax vest title in Nighbert by reason of forfeiture of Waldron's right for nonentry for taxes under section 3, art. 13, Const. If such is the meaning of the allegation of such payment by Nighbert and nonentry by Waldrons, it is not tenable. There has been no actual possession under the first and last clauses to apply them, and no claim under a grant from the state to apply the second clause. And, further, *Sturm v. Fleming*, 26 W. Va. 54, and *Lynch v. Andrews*, 25 W. Va. 751, and *Hall v. Hall*, 27 W. Va. 468, hold that taxes paid by a purchaser under a void decree inure to the former owner's benefit to prevent forfeiture by his non-

entry for taxes. This is on the theory of identity of title and privity of estate.

Equity jurisdiction: I have shown above that the Waldrons have always been in actual possession. That gives them right to sue in equity to remove cloud. *Smith v. O'Keefe*, 43 W. Va. 172, 27 S. E. 353; *Hogg's Eq. Princip.* 81. Likely we may say they have jurisdiction to vacate a void decree.

As the money of Nighbert and those under his title paid just claims against Waldron and wife to pay costs of partition and taxes, the plaintiffs must do equity by refunding the same, with 6 per cent. per annum interest from proper dates, which shall be ascertained, and declared a lien on the 99 acres.

I believe it is not claimed that, though the sale and deed are void, the purchasers under Nighbert can be protected. They cannot be for these reasons: First. Their answer does not show that they are complete purchasers by payment of purchase money before notice of defect of title. *Hogg's Eq. Proced.* § 433. Second. They are not complete purchasers, because the legal title was outstanding in trustee Stratton, who was not a party to the suit in which Waldron's land was sold. Third. A purchaser from a purchaser under a decree void for want of jurisdiction is not a bona fide purchaser without notice. He is bound to know the want of jurisdiction. He is bound to know defects in papers showing his claim of title. *Hoback v. Miller*, 44 W. Va. 635, 29 S. E. 1014; 23 Am. & Eng. Ency. L. (2d Ed.) 508; *Wood v. Krebs*, 30 Grat. 708; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891. Code 1899, c. 132, § 8, does not protect a sale under a totally void decree. Title falls with its vacation. The title was never for a moment good; never existed.

Therefore it is adjudged, ordered, and decreed that the decree of the circuit court of Mingo county entered on the 21st day of February, 1901, be reversed; that the decrees entered in the case of *M. H. Waldron and wife against Luemma Clark and others* by the circuit court of Logan county on the 14th day of October, 1886, and 15th day of April, 1887, be vacated and annulled, and that the deed made under said decrees by *H. C. Ragland*, commissioner, to *J. A. Nighbert*, on record in the office of the clerk of the county court of Logan county in Deed Book J, page 341, be vacated and set aside, so far as the plaintiffs are concerned therein; and that the title or right of *Thomas H. Harvey*, *S. S. Altizer*, *Nicie Nighbert*, and *G. F. Miller* in the tract of 99 acres of land specified in said commissioner's deed be vacated, and held for naught as to the plaintiffs. The cause is remanded to the circuit court of Mingo county to ascertain the proper sum payable by Waldron and wife for costs and taxes as according to this opinion.

Reversed and remanded.

(54 W. Va. 600)

HAZELTINE v. KEENAN et al.

(Supreme Court of Appeals of West Virginia.

Feb. 9, 1904.)

NOTE—PAYEE—SALE—NOTICE—ATTORNEY'S
LIEN.

1. A negotiable note is payable on its face to a payee, with the word "attorney" suffixed to his name; and he indorses it to a party, suffixing to his own name the word "attorney," in his signature to the indorsement. The note is owned by the payee and other parties. The word "attorney" indicates an interest in such other parties, and puts the purchaser upon inquiry as to their rights, and the right of the payee to sell the note.

2. An attorney's charging lien for his fee is confined to the judgment or fund recovered by him as attorney. His retaining lien on papers of his client for fees due him for general services depends on his possession of such papers, and ceases when he voluntarily parts with possession of them.

Dent, J., dissenting.

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County; John Homer Holt, Judge.

Petition by D. D. Hazeltine against L. H. Keenan and others. Decree for plaintiff, and certain defendants appeal. Affirmed.

Scott, Cobb & Maxwell, for appellants.
Harding & Harding and W. B. Maxwell, for appellee.

BRANNON, J. Hazeltine, L. H. Keenan, and Wilson together effected a sale to Patterson of some timber belonging to Caplinger, the price being \$2,500, of which \$2,000 was paid Caplinger by Patterson, and \$500 was profit to Hazeltine, Keenan, and Wilson; and for this balance Patterson made two promissory notes, one for \$200, and one for \$300, purporting to be negotiable, payable on their faces to "L. H. Keenan, attorney." Before maturity of the notes, L. H. Keenan transferred one of them to his father, by an indorsement reading, "Transferred the within note to Thomas G. Keenan, L. H. Keenan, Atty.;" and the other he transferred to his brother by similar indorsement. Judgments were obtained on them in the names of indorsees against Patterson, and in two cases, of Ward and Brown, Trustees, v. Patterson, and Nalle v. Patterson, in Randolph, a joint decree was rendered, subjecting property to the payment of Patterson's debts. These judgments were decreed to be paid to said indorsees out of a fund in the hands of a trustee, realized by a sale of Patterson's property under the decree. After this decree, Hazeltine filed what is styled a "petition" in the cases, claiming that he was owner of one-third of the debt represented by said notes, and that their transfer by L. H. Keenan to his father and brother was invalid, and made to defraud said Hazeltine; that nothing was paid for such transfers, and at their date said indorsees well knew that the notes were not the property of L. H. Keenan, as their faces imported that they were the property of other parties, and only

executed to Keenan as attorney. The petition asked that Hazeltine be paid out of the fund in the hands of the trustee under the control of the court one-third of said notes. A decree was made giving Hazeltine one-third of the amount of said notes, and from it T. J. Keenan and T. G. Keenan appeal.

The right of Hazeltine to one-third of the debt represented by the notes is clearly established by the evidence, as the circuit court found on the evidence. It is scarcely contested here. But appellants contend that they are bona fide holders for value of negotiable paper, and, no matter if Hazeltine had an interest in the notes, it is not good against them. The notes are payable to Keenan as attorney, and so they were indorsed by him. Does the word "attorney" detract from their negotiability? If it derogates from their currency or negotiability; if one buying them is by that word warned of rights of others, and is put on notice of their rights, and therefore cannot say he is a holder without notice of defect of right in the indorser—then the notes cannot be negotiable. In *Third Nat. Bank v. Lange*, 51 Md. 188, 84 Am. Rep. 304, a note payable to the order of one as "trustee" was held not negotiable. The court said the word "trustee" restricted its free circulation. But whether negotiable or not, the authorities say that when the word "trustee," "guardian," or any word suggesting rights in others, is upon a note, it puts a purchaser on inquiry, and he purchases subject to the just rights of others, and does not hold the place of an innocent purchaser. In the case just cited the court said: "In the case of the present note, it cannot be read understandingly without seeing upon its face that it is connected with a trust, and is part of a trust fund. It was the duty of the bank, before purchasing it, to have made inquiry into the right of the trustee to dispose of it"—and quoted from *Story's Eq. § 400*: "Whatever is sufficient to put a party on inquiry is, in equity, held to be good notice to bind him." In *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115, a stock certificate was in the name of one as "trustee." The court said: "The rules of law are presumed to be known by all men, and they must govern themselves accordingly. The law holds that the insertion of the word 'trustee' after the name of stockholder does indicate and give notice of a trust." "Express notice is not indispensable. There may be evidence of the infirmity of the paper apparent on its face, or such indications as put the purchaser on inquiry." 1 Dan. Nego. Instru. § 795a. In section 271 that author says that the better opinion is that, though a fiduciary may pass good title, if the transfer is in execution of the trust, yet if there is suffixed to the payee's name "such words as 'trustee,' etc., they put the indorsee upon inquiry as to the title, and, if the transfer be in fraud of the trust, the indorsee must suffer the consequences." The words, "Agt. Glass Buildings," added to

a signature to a check, are enough to put one receiving it in payment on inquiry as to the signer's authority to use the fund to pay his debt. *Gerard v. McCormick* (N. Y.) 29 N. E. 115, 14 L. R. A. 234. If the word "trustee" is on the face of the note, that compels the purchaser's "ascertaining whether the trustee has power to sell." *Bank v. Lowney*, 99 Tenn. 278, 42 S. W. 149, 38 L. R. A. 837, 63 Am. St. Rep. 830. The word "trustee" is notice of a trust, and calls for inquiry and examination. *Marbury v. Ehlen*, 72 Md. 206, 19 Atl. 648, 20 Am. St. Rep. 467, and note. An indorsement by "A. H., Syndic," put the purchaser upon notice. *Nicholson v. Chapman*, 1 La. Ann. 222, cited in 2 Randolph, Commercial Paper, §§ 1010, 1012, under the proposition that "where paper is held by a trustee or guardian, and this appears on its face, it will put the purchaser on inquiry as to the authority and title of such officer." "The fact that the instrument on its face is made payable to a person in his fiduciary capacity is notice that the payee is acting in such capacity, and that he can only give title or deal with such instrument for the benefit of the person whom he represents." *Eat. & Gilb. on Commercial Paper*, § 75, clause "d," p. 370. "Where a bill or note is indorsed by a person in an official capacity, as guardian, syndic, or trustee, the purchaser is put upon inquiry." 4 Am. & Eng. Ency. L. (2d Ed.) 305. An attorney, at law or in fact, is but an agent. He cannot sell his client's paper, especially, as did the party in this case, for his own private use. 3 Am. & Eng. Ency. L. 369. The party might collect from the debtor, but not sell.

An objection is made to the decree because the petition was filed after final decree, too late to file a petition or a bill of review. Of course, it is not a bill of review, as it is not filed by a party, and does not seek a reversal for law error or on new evidence. No matter what it calls itself. We look to its matter. The fund was in court. Is it possible that one claiming an interest in it could not petition the court to give it to him according to his right? How else could he get it? The fact that the fund was in court justifies what is usually termed a "petition," because it is an application to the court. In so far as the interests of the defendants are concerned, they were made parties, given the right to defend, and we may call it an original bill to overthrow or modify their rights under the decree. If it were to rehear on same matters, a stranger can come in by petition and ask a rehearing. *Heermans v. Montague* (Va.) 20 S. E. 899. But as it is on matter not in the record, I regard it a bill to affect the decree—an original bill to impeach or change a decree—and not too late.

As to the point that the decree does not fix out of which note Hazeltine should be paid: What has he to do with that? Both notes made one solid debt, as to him, in which he had an undivided share. He had right to

payment out of the fund regardless of rights of appellants as between themselves. He did not have to settle their equities. Moreover, the indorsements of the two notes seem contemporaneous.

I will add, as pertinent to what is said a few lines back as to the contention that a petition does not lie in this case, because the decree is final, that the fund is in court, subject to its control. The design of Hazeltine is not to complain of the matters involved in the suit, and the decree on them, but merely to vary the decree as to the disposition of that fund; and he intervenes only to say that he has a share, though decreed in the name of Keenan, and begs the court to vary the decree as to the disposition of that fund. The Virginia case cited above is ample authority to justify the petition; but I will add that Story's Eq. Pl. §§ 429, 430, allow a bill not only to enforce a decree already rendered, but to modify or vary it. Keenan claims that Hazeltine agreed that the latter's share in this Patterson deal (so called in the case) should be applied to pay fees to Keenan as attorney in litigation of a firm called Hazeltine & Hall, and perhaps some litigation of Hazeltine individually. In the first place, whilst Keenan so swears, Hazeltine swears to just the opposite; and the circuit court has passed its verdict on conflicting evidence, and we cannot overrule that verdict. In the second place (and this is very important) Keenan's claims for such fees are of the most general, indefinite character. He files no specification to say what cases they were in which such fees arose, what cases were those of Hazeltine & Hall, what cases were those of Hazeltine alone, nor what were his fees in such cases, respectively. How can the court see whether Hazeltine's share in the fund in this case equals, is less, or greater than those fees? True, Keenan swears that Hazeltine agreed to apply his share on those fees, and that fees would still be left unpaid; but this is a general, indefinite statement. In the third place, Keenan wants to charge Hazeltine individually with fees against a firm. They would not be chargeable as a set-off without express agreement. The burden of proof for this is heavy on Keenan, and the evidence of man against man defeats it.

It has been suggested that, without evidence, the law itself gives Keenan a lien for those attorney's fees upon the fund. This lien cannot be supported. It cannot be what is called a "charging lien," because the notes constituting the fund were not recovered in a suit by Keenan, and for this reason he has no charging lien. *Fowler v. Lewis*, 36 W. Va. 113, 14 S. E. 447. But it is claimed that Keenan has another kind of lien as attorney; that is, a retaining lien, to secure all and any attorney's fees in any cases. To this a definite answer is given by Jones on Liens, § 128: "This lien is lost by the attorney's voluntary surrender of the papers to his client."

ent, for possession is indispensable to the lien. The lien is lost when the attorney has parted with the possession of the papers by his own act, even though this was a mistake on his part." This retaining lien is like the common-law lien discussed in *Burrough v. Ely*, 54 W. Va. —, 46 S. E. 371, of a sawyer on lumber sawed by him. The very life of the lien depends on the continued retention of the article, because the lien is, in terms and nature, a thing fastening itself on the very thing itself. In this case Keenan, by his own voluntary act, transferred these notes, and gave up possession of them.

Therefore we affirm the decree of the circuit court.

DENT, J. (dissenting). L. H. Keenan et al. appeal from a decree of the circuit court of Randolph county in favor of D. D. Hazeltine for the sum of \$195.25 and costs, on a petition filed by him in the chancery cause of *Ward, Trustee, et al. v. M. M. Patterson et al.* The petition was filed after final decree, and sets out that the petitioner is entitled to one-third of the proceeds of two certain negotiable notes executed by M. M. Patterson to L. H. Keenan, attorney, and assigned by him to his father and brother, J. P. and L. H. Keenan, in violation of petitioner's rights, and without his knowledge and consent, for the purpose of defrauding him; that the assignees had taken a decree for the full amount of the notes; and prayed that he might be decreed the one-third thereof, and also \$30 additional which one P. L. Wilson had left in L. H. Keenan's hands for the benefit of petitioner. The Keenans appeared, demurred, and filed their answers to the petition, in which they denied the fraud charged, and claimed the transaction was in good faith, with the knowledge and assent of the petitioner, who no longer had any interest in the notes, as he had consented that L. H. Keenan should apply the proceeds, when collected, on attorney's fees owed him by the petitioner individually and as a member of the firms of Hazeltine & Hall and Hazeltine & Erb, both of which firms and the petitioner were insolvent, and the amount due, being in excess of the amount claimed by Hazeltine, could not be realized otherwise than out of the same. The demurrer to the petition was overruled. This is alleged as error, first, because the petition was filed after a final decree ending the suit; second, because of ample remedy at law. As the fund was still under the control of the court, even after final decree, any claimant thereof, not a party to the original suit, had the right to intervene by petition for the purpose of settling the true right to the same. *B. & O. R. Co. v. Vanderwerker*, 33 W. Va. 191, 10 S. E. 280. The petition sets up a right to the fund, but it does not make out a clear case of attempted fraud. It admits that L. H. Keenan was entitled to receive the fund as an attorney, and it does not al-

lege he was either insolvent or irresponsible, but leaves these matters to be inferred from the allegation of fraud. If disposed to be technical, the court might well hold that petitioner's remedy at law was full and adequate. The failure of an attorney to pay over money collected by him is a matter of legal, and not equitable, jurisdiction; and there can be no breach of trust on the part of an attorney authorized to collect a fund until he has actually received it, and refused to pay on demand, or within six months after receipt thereof, without good and sufficient reason. Section 11, chapter 119, Code 1899.

Waiving this question, and passing on to the merits of the controversy, it appears from the evidence, which is somewhat conflicting, that the fraud charged in the petition is wholly without foundation; that Hazeltine knew of the assignment of the notes made by L. H. Keenan, and was present, without making objection thereto, when the assignees obtained judgments on the notes; that Hazeltine & Erb and Hazeltine & Hall were indebted to L. H. Keenan for legal services rendered in an unsettled amount, which Keenan claims will much more than cover the amount in controversy; that Hazeltine individually was under obligation to pay these fees; and that Hazeltine and both the firms were insolvent. It is true that Hazeltine claims he is able and willing to pay these fees, when properly ascertained, yet, when interrogated as to the solvency of the firms, which necessarily involves the solvency of the individuals thereof, he refuses to answer. The proof otherwise in the case undoubtedly establishes insolvency. Partnership debts are both joint and several, and the individual partner and his property are liable for the payment thereof. *Lee v. Hassett*, 41 W. Va. 368, 23 S. E. 559; 2 Tuck. Bl. Com. 141; *Courson v. Parker*, 39 W. Va. 524, 20 S. E. 583. Such being the case, L. H. Keenan, without even the assent of Hazeltine, had a lien on the notes in controversy, as long as they were in his possession and control, to secure the payment of attorney's fees owed by Hazeltine individually or as a partner with some one else, as all partnership obligations are both joint and several. *McCoy v. Jack*, 47 W. Va. 201, 34 S. E. 991; 3 Am. & Eng. En. Law (2d Ed.) 454. A court of equity will not interfere to deprive an attorney of such lien, especially when the client has consented that the attorney should collect and disburse the proceeds of such notes, and when he would have the right to apply such proceeds to the payment of his fees. The notes, though assigned, are shown to be still under the control and in the custody of Keenan.

The petition in this case is in the nature of a bill for specific execution of a verbal arrangement regarding a pecuniary transaction, and, the petitioner having failed to show fraud, insolvency, or any other just cause for equitable interference, but it appearing that

there exists a doubtful controversy as to the ownership of the fund, the parties should be remitted to their legal remedies. The only real question in controversy between the parties is the determination of the amount of the attorney's fees, and there appears to be a suit already pending for this purpose. The decree should therefore be reversed, and the petition dismissed, without prejudice to the legal rights of the parties.

Decree affirmed.

(54 W. Va. 597)

BELINGTON & N. R. CO. v. TOWN OF ALSTON.

(Supreme Court of Appeals of West Virginia. Feb. 9, 1904.)

RAILROADS—ASSENT FROM TOWN COUNCIL—REPEAL—INJUNCTION.

1. Assent from town council to a railroad company authorizing the occupation of the streets of such town under section 10, c. 52, Code 1899, is not a franchise within the meaning of chapter 29, p. 82, Acts 1901.

2. An injunction is not the proper remedy to prevent the council of a town from repealing orders granting assent to the occupation of the streets of the town.

3. Where a railroad company has lawfully laid its track through the streets of a town, an injunction will lie to prevent the town authorities from tearing up or removing such track. (Syllabus by the Court.)

Appeal from Circuit Court, Barbour County; John Homer Holt, Judge.

Bill by the Belington & Northern Railroad Company against the town of Alston. Decree for plaintiff, and defendant appeals. Reversed in part.

W. B. Maxwell and J. B. Ware, for appellant. Fred O. Blue, for appellee.

DENT, J. The town of Alston appeals from a decree of the circuit court of Barbour county perpetuating an injunction awarded at the instance of the Belington & Northern Railroad Company inhibiting the officers of such town from repealing certain orders of the common council of said town granting the plaintiff a right of way through certain of its streets, and from tearing up and removing the tracks of the plaintiff, put down in pursuance of such right of way. Appellant insists that such orders are void, because the notice required by chapter 29, p. 82, Acts 1901, was not given before such orders were entered, and that by reason of their void character the appellant has the right to repeal them, and the right to tear up and destroy appellee's tracks as a nuisance.

The first and most important question presented in this case is as to whether the assent of the corporate authorities of a town to occupy its streets, required by section 10, c. 52, Code 1899, given to a railroad company, is a franchise within the meaning of chapter 29, p. 82, Acts 1901. The chapter consists of but one section, and is as follows: "No franchise shall hereafter be granted by

the county court of any county, or other tribunal acting in lieu thereof, or by the council of any city, town or village incorporated under the laws of this state, where the application for such franchise has not been filed at least thirty days prior to the time when it is to be acted upon, by such county court or council, with the clerk of such court or council, and notice of such application, stating the object of such franchise, shall have been given by publication for thirty days in some newspaper of general circulation published in such county or city wherein such franchise is to be granted. Nor shall such franchise be granted within thirty days after the application has been filed, nor until an opportunity has been given any citizen or corporation interested in the granting or refusing of said franchise to be heard. Nor shall any franchise hereafter be granted by any county court, or other tribunal acting in lieu thereof, or by any council of any city, town or village incorporated under the laws of this state, for a longer term than fifty years; provided, however, that nothing in this act shall prevent the renewal of any such franchise for a term not exceeding fifty years, when the same shall have expired. No franchise hereafter granted for any longer term than fifty years shall be of any force or validity." A franchise is an incorporeal hereditament, and not the tangible property necessary in the exercise thereof. Tuckahoe Canal Co. v. Tuckahoe, etc., R. Co., 11 Leigh, 78, 36 Am. Dec. 374; Bridgeport v. New York, etc., R. Co., 36 Conn. 286, 4 Am. Rep. 63. An action to test the authority of a railroad company to use a public street does not involve a franchise. Parlin v. Mills, 11 Ill. App. 396; Mills v. Parlin, 106 Ill. 60. Assent by a town to use of its streets by a railroad company is no more a franchise than the grant of a right of way through his lands by a landowner. C. C. R. Co. v. The People, etc., 73 Ill. 541. It is an easement in corporeal property, and not a franchise. 3 Elliott on R. Roads, § 632. The limitation in the act that no franchise shall be granted for a longer term than 50 years shows that it was not intended to apply to the assent of the council to the passage through its limits of a railroad or perpetual highway, whose franchises are without limit as to time. It would be a strange thing at the end of 50 years to see immense lines of railway cut into useless sections by reason of the authorities of the various villages, towns, and cities through which they pass refusing their assent to the continuance of its so-called "local franchise." Instead of being a franchise, its right of way through the streets is an easement, and the council's assent thereto is a license or grant thereof. Hence the act referred to does not govern or have any application to the plaintiff's rights acquired from the council. No notice thereof was necessary, and the orders of the council complained of are valid. Nor have the abutting property owners any right to object

thereto. If their property is injured, but not taken, their remedy is to be had in an action for damages. *Spencer v. Point Pleasant & O. R. R. Co.*, 23 W. Va. 406. The orders granting assent to the plaintiff being valid, gives plaintiff no right to enjoin the repeal thereof. The plaintiff would not be injured thereby.

The defendant's council is clothed with limited legislative, judicial, and executive or administrative functions under the supervision and control, when the rights of persons and property are involved, of the superior judicial tribunals of the state, without the necessity of an appeal to equity, unless irreparable injury is threatened and the legal remedies are inadequate. If the council improperly annulled its orders or ordinances assenting to the plaintiff's occupancy of its streets, the plaintiff could treat such annulment as void, or it could have the same reviewed and reversed by proper judicial method of review. If, however, the council should repeal such valid orders, and then threaten and undertake to tear up and destroy plaintiff's road, and eject it from the streets, the plaintiff is entitled to an injunction, for such injury would be irreparable. 2 Elliott on Railroads, § 632; *Easton, etc., Pass. Ry. Co. v. City of Easton*, 133 Pa. 506, 19 Atl. 486, 19 Am. St. Rep. 658; *Asheville St. Ry. Co. v. City of Asheville*, 109 N. C. 688, 14 S. E. 316.

The decree complained of must be reversed and annulled in so far as it enjoins "the defendants, the town of Alston and the members of its common council and its mayor and recorder, from attempting to or repealing the said three orders or resolutions mentioned in plaintiff's bill," and in all other respects it is affirmed, with costs to the defendants, because their appeal was made necessary by the illegally excessive injunction obtained.

Reversed in part and affirmed in part.

(54 W. Va. 563)

BOSLEY v. BALTIMORE & O. R. CO.

(Supreme Court of Appeals of West Virginia.
Feb. 9, 1904.)

CARRIERS—SHIPMENT OF CATTLE—DELAY—
LIMITATION OF LIABILITY—VALIDITY
—EVIDENCE—APPEAL.

1. B. shipped 24 head of cattle at Rollyson Station, in Braxton county, over the Baltimore & Ohio Railroad, to Baltimore, Md. On the day of shipment, B. and the company made and signed a contract which, among other things, provided, "that in the event of any unusual delay or detention of said live stock, caused by the negligence of the said carrier, or its employees, or its connecting carriers, or their employees, or otherwise, the said shipper agrees to accept as full compensation for all loss or damage, sustained thereby, the amount actually expended by said shipper, in the purchase of food and water for the said stock while so detained."

Held, that the company cannot, by said contract, or any of the provisions thereof, exempt itself from any liability for loss or damage occasioned to the plaintiff which was in any degree caused by the negligence or misfeasance of itself or its servants.

2. On proof of a delay in the delivery of the cattle by the company at the place of their destination, a prima facie case was made out against it, and the burden of proof then rested upon it to show that it was not responsible for the delay; and the question as to the reasonableness and sufficiency of the excuse which the carrier made for the delay was for the jury.

3. Where a case has been fairly submitted to a jury, and a verdict fairly rendered, it ought not to be interfered with by the court, unless manifest wrong or injustice has been done, or unless the verdict is plainly not warranted by the evidence.

(Syllabus by the Court.)

Error to Circuit Court, Braxton County; W. G. Bennett, Judge.

Action by J. H. Bosley against the Baltimore & Ohio Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

W. E. Haymond, for plaintiff in error.
Dulin & Fox and Edward A. Brannon, for defendant in error.

MILLER, J. A civil action was commenced by J. H. Bosley, the defendant in error, before a justice of the peace within and for the county of Braxton, against the Baltimore & Ohio Railroad Company, now plaintiff in error, for the recovery of money alleged to be due for damages for a wrong, in which action the plaintiff demanded judgment for \$300, with interest and costs according to law. The demand of the plaintiff is based upon the alleged unreasonable delay by the defendant, which is claimed to be negligence, in the transportation of 24 head of cattle belonging to plaintiff from Rollyson Station, on said railroad, in the said county, and in the delivery thereof in the city of Baltimore, Md.—a distance stated in one of the briefs, and not denied, to be 870 miles. On the trial of the action before the justice, the plaintiff recovered a judgment against the company for \$10, with interest thereon from the 10th day of November, 1902, the date thereof, and costs. From this judgment the defendant company appealed to the circuit court, wherein, on the 1st day of May, 1903, upon a trial of the action on the appeal, the plaintiff recovered a judgment against the defendant company for \$120, with interest thereon from that date until paid, and costs. On this trial the company excepted to various rulings of the court, and made its exceptions parts of the record.

The evidence, as certified, shows that on Monday, September 22, 1902, plaintiff shipped on defendant's railroad, at Rollyson Station, 24 head of cattle, to be delivered in Baltimore; that he put them in the cattle pens at that point near 8 o'clock that morning, to be loaded in the car; that the car with the cattle arrived over the road at Weston at 5:50, on the evening of the same day (a distance of 32 miles from Rollyson); that they left Weston at 9 p. m. the same day, and arrived at Clarksburg (a distance of 25 miles from Weston) at 11:45 p. m. the same day; that they

left Clarksburg at 3:05 a. m. next day, and arrived at Grafton at 5:20 the same morning (a distance of 23 miles from Clarksburg); that they left Grafton at 11:20 a. m. the same day, and arrived at Cumberland, Md., at 8:05 the evening of the same day; that they left Cumberland at 11:45 p. m. that day, and arrived at Brunswick 6:15 a. m. next day; that they left Brunswick at 9:50 a. m. same day, and arrived at Baltimore at 3:50 p. m. on Wednesday, 11 hours and 50 minutes late. It is further proved that Wednesday is the stock market day at Baltimore, and that plaintiff's object was to have his cattle there in time for the Wednesday market of that week; that when the cattle arrived the market had closed; that the stock sales are made on the market from 7 a. m. until 1 p. m.; that the cattle had had neither food nor water from Monday morning until Wednesday evening, after they arrived in Baltimore, and that they were tired and almost worn out; that plaintiff then engaged a live stock dealer to sell them, who did sell them the same evening, but for a less price than they would have brought on the market. The dealer swears that he sold other cattle, about equal in quality, on the market the same day, for a quarter to three-eighths of a cent more on the pound. It is also shown that the cattle, when shipped, weighed about 27,700 pounds, and, when sold, about 24,000 pounds. Plaintiff swears that he was damaged \$200 by injury to, and loss in the weight of, his cattle, and by reason of extra expenses for transportation of himself. Another witness puts the loss to the cattle at \$125. There is evidence that plaintiff urged the railroad officials in charge of the train to permit him to unload and feed and water his cattle on the way, but that he was not allowed to do so; that he also urged those in charge of the transportation to send the cattle forward; that the train dispatcher at Grafton assured the shippers that they would be put into Baltimore at 6:30 Wednesday morning; and there is also evidence that officers of the company knew of the desire of plaintiff to reach the Wednesday market; but there is no proof of any special contract of the company that it would put the cattle in Baltimore in time for that or any other market. It is further shown by plaintiff that he is a shipper of stock; that he has had experience in shipping stock from Rollyson, Roanoke, and other points on the railroad; that his cattle should have reached Baltimore on Tuesday evening; that Tuesday would have been a reasonable time for the railroad to have put the cattle into Baltimore, and that another load of cattle shipped from Roanoke by him on Monday over defendant's road, put into the stock pens after the cattle in question were penned, reached Baltimore about 4 o'clock on Tuesday evening. Roanoke is shown to be 20 miles nearer to Clarksburg than is Rollyson, and on the same line of railroad. Plaintiff says it is the practice to load cattle at the points named, on

Monday, to reach the Wednesday market in Baltimore, and that he always loaded on Monday to get the Baltimore market on Wednesday. It was proved by the defendant that the said cattle were taken from Rollyson on Monday by train No. 7 (a mixed train, but a first-class train, upon which passengers were carried); that it left Rollyson at 3:32 p. m.; that it is due at Weston at 5:20 p. m.; that a local freight leaves Rollyson at 2:25 p. m., but that No. 7 runs around it, before reaching Weston; that a passenger train passes Rollyson in the direction of Weston at 11:52 a. m.; that the regular stock trains on the main line passing Clarksburg and going east are No. 98, due at Clarksburg at 4:22 p. m., and No. 94, due at the same place at 12:40 a. m.; that the cattle in question were moved from Clarksburg to Grafton on No. 94, and were then sent east on No. 82, which was run as an extra from Grafton; there being no schedule for such trains from that point east. It is further shown by the defendant company that no train carrying stock passed Clarksburg, earlier than No. 94, after the said train from Weston arrived there with the cattle, and that No. 98 had passed Clarksburg before that time. It is further shown that at that particular time there was quite a congestion of freight, both in the yards and on the road, east of Clarksburg, and that it was difficult for even the passenger trains to get over the road, on account of it. Defendant's witness, an assistant trainmaster, testified that it was unusual to have a delay of stock for six hours at Grafton; that train No. 82, which took the stock from Grafton, should have left there at 5:42 p. m., and was due at Baltimore at 2:30 next day; that the "specials" were the regular freight trains, run on extra time; that there was no regular time for them; that they just keep out of the way of regular trains, and get in when they can. "We move these trains just as soon as we can get the engines to move them with." Lee Jack, a witness, states that he has shipped from south of Weston over the defendant's road for the Wednesday market at Baltimore; that he usually loaded his stock for that market day at Rollyson on Monday morning, to have it ready for the train which sometimes came along about 11, and sometimes about 2, o'clock; that he did this so as to connect with the train at Clarksburg; that stock loaded on Monday morning at 11 o'clock ought to get to Baltimore at any time from 5 p. m. on Tuesday until midnight; that if stock were loaded at Rollyson Station on Monday morning, which did not reach Baltimore until 3:50 Wednesday evening, that would be an unusual delay; that such delay would damage the stock; that, if the stock did not reach the Wednesday market, it would bring a less price, because there would be less buyers.

There is, in the record, as part of the evidence, a contract made between and signed

by the defendant company and the plaintiff, bearing date on the 22d day of September, 1902, relating to the shipment, transportation, and delivery of said 24 head of cattle, which stipulates and agrees that said company had received said stock, for itself and on behalf of connecting carriers, for transportation, subject to the official tariffs, classifications, and rules of the said company, and upon the "following terms and conditions, which are admitted and accepted by the said shipper as just and reasonable, viz.: That said shipper or consignee is to pay freight thereon to the said carrier at the rate of 22c per 100 lbs. which is the lower published tariff rate based upon the express condition that the carrier assumes liability on the said live stock to the extent only of the following agreed valuation, upon which valuation is based the rate charged for the transportation of the said animals, and beyond which valuation neither the said carrier nor any connecting carrier shall be liable in any event whether the loss or damage occur through negligence of the said carrier or connecting carriers or their employees or otherwise. * * * If cattle or cows, not exceeding seventy-five dollars each. * * * That in the event of any unusual delay or detention of said live stock, caused by the negligence of the said carrier, or its employees, or its connecting carriers, or their employees, or otherwise, the said shipper agrees to accept as full compensation for all loss or damage sustained thereby the amount actually expended by said shipper, in the purchase of food and water for the said stock while so detained."

The case presents two principal questions: Was there such delay in the transportation and delivery of the cattle, under the circumstances, as amounts to negligence on the part of the defendant? If there was negligence, does the contract aforesaid between plaintiff and defendant release defendant from liability for all loss or damage sustained by the plaintiff thereby, except the amount actually expended by the plaintiff in the purchase of food and water for his cattle while so detained?

In *McGraw v. B. & O. R. Co.*, 18 W. Va. 361, 41 Am. Rep. 696, it is held that, "when a common carrier undertakes to convey goods, the law implies a contract that they shall be carried and delivered at the place of destination safely and within a reasonable time. * * * What is 'reasonable time,' within which goods are to be delivered, cannot be defined by any general rule, but must depend upon the circumstances of each particular case." This is a well-considered case, and the conclusions reached therein by the court are supported by a great many decisions of other states. *Elliott on Railroads*, vol. 4, § 1483, says: "There is no fixed rule of law determining what will or will not constitute an unreasonable delay in all cases. The carrier is in all instances

bound to use ordinary care and diligence to avoid unreasonable delay, but many elements must be taken into consideration in determining whether there was or was not unreasonable delay in the particular instance. The fact that there was unusual delay does not always show a breach of duty.

* * * Where the delay is an unusual one, and is not explained, it is held to be prima facie evidence of negligence, but that in a case where there is only a slight delay the rule is different."

During the trial, plaintiff was permitted to testify, over the objection of defendant, that the car load of cattle, the delay in the transportation of which, he claimed, occasioned the damages sought to be recovered in the action, reached the city of Baltimore (the place of destination) too late for the market on Wednesday, and that, by missing the market on that day, he was obliged to sell the cattle for less money than he would have gotten, had they reached their destination in time for the market. This evidence and objection thereto constitute defendant's bill of exception No. 1. It is true that there was no contract by the company with the plaintiff that the cattle should be delivered at Baltimore for Wednesday's market, or any other market; but there was evidence before the jury showing the time of the shipment of the cattle, and the delays in the delivery thereof in Baltimore, and also tending to prove that such delays were unusual and unreasonable, and that one of the results thereof, entering into plaintiff's damage, was the failure of the cattle to reach the Wednesday market. The evidence was admitted as tending to prove negligence, and as tending to show how the loss or damage to the plaintiff was a result of the alleged negligence. It was proper for the purpose, and it was not error to allow it.

Bill of exceptions No. 2 certifies that, after the plaintiff had introduced all of his evidence in chief on the trial of the case, and before the defendant had introduced any evidence, the defendant moved the court to exclude the evidence of the plaintiff from the jury; but the court overruled said motion, and refused to exclude said evidence, or any part thereof, from the jury, to which ruling the defendant excepted. The question whether the delay in the transportation to, and delivery of the cattle in, Baltimore, was reasonable or unreasonable, was one peculiarly for the jury. "The question as to what is a reasonable time for the transportation, and as to the reasonableness and sufficiency of the excuse which the carrier makes for delay, is for the jury." 6 Cyc. 449; 5 Am. & Eng. Enc. Law (2d Ed.) 247; *Johnson v. Railroad Co.*, 25 W. Va. 571. By the statement of facts, it appears that the plaintiff had established, at the least, a prima facie case before the jury, when defendant made its motion to exclude plaintiff's evidence as aforesaid. "A motion by defendant to ex-

clude the plaintiff's evidence upon the ground that it is not sufficient to warrant a verdict in his favor will not be granted if there be any evidence which tends in any degree, however slight, to prove the plaintiff's case. If it tends to prove the plaintiff's case in any degree whatever, the case cannot be withdrawn from the jury. The motion can never prevail or be sustained merely because the court may think the weight of evidence is against the plaintiff. *Smith v. Parkersburg Co-operation Ass'n*, 48 W. Va. 239, 37 S. E. 645; *Carrico v. W. Va., C. & P. R. Co.*, 35 W. Va. 389, 14 S. E. 12; *Ketterman v. Railroad Co.*, 48 W. Va. 606, 37 S. E. 683. We think the motion to exclude the plaintiff's evidence was properly refused.

After all of the evidence had been given to the jury, and before they retired to consider of their verdict, the defendant asked the court to give to the jury the following instructions, to wit:

"(1) The court instructs the jury that the plaintiff is not entitled to recover in this action anything but the amount actually expended by him in the purchase of food and water for the stock while detained, if they believe it was detained by unusual delay in shipment.

"(2) The court instructs the jury that the contract of shipment between plaintiff and defendant dated September 22, 1902, read in evidence, is a valid and binding contract on both parties thereto, and the plaintiff is not entitled to recover in this action any damages against the defendant which he by the said contract agreed to waive.

"(3) The court instructs the jury that if they believe from the evidence that the stock of plaintiff was taken by defendant by first scheduled train passing after the cattle were loaded, and that, at the points at which changes of divisions and schedule occurred, the car containing the cattle was taken by first train scheduled for the purpose of moving stock after said cars arrived at such point, then the fact that the arrival of the cattle at destination was after the timescheduled for the arrival of the train carrying them is not of itself sufficient to establish negligence of the defendant.

"(4) The court instructs the jury that the defendant could not be bound to deliver the cattle of the plaintiff for any particular market unless it, by special contract, agreed to do so.

"(5) The court instructs the jury that, under the contract of shipment between the plaintiff and defendant, the plaintiff was required to load his cattle, and the defendant could not, under the evidence, be held responsible for delay in loading from cattle pens at Rollyson."

And the court gave to the jury said instructions Nos. 3 and 5, but refused to give Nos. 1, 2, and 4, to which ruling the defendant excepted.

The court also gave, at the instance of the plaintiff, the two following instructions:

"(2) The court instructs the jury that the defendant in this case could not lawfully stipulate by special contract or otherwise for exemption from responsibility for the negligence of itself or its servants; and if the jury believes from the evidence that there was an unreasonable delay in transporting the cattle referred to in this cause from Heater Station to the city of Baltimore by the defendant, and that such delay was caused by the negligence of the defendant or its servants, they should find for the plaintiff.

"(3) The court instructs the jury that if they believe from the evidence that there was such unreasonable delay on the part of the defendant or its servants in transporting said cattle to the city of Baltimore, they should find for the plaintiff; and, if they further believe from the evidence that the plaintiff was damaged by said delay, in assessing such damages they should take into consideration all damages naturally and proximately resulting from such delay."

To the giving of these instructions the defendant objected.

After the verdict was found by the jury, and before judgment was rendered thereon, the defendant moved the court to set it aside, and grant to defendant a new trial, on the ground that said verdict was contrary to the law and the evidence, and contrary to the instructions of the court, which motion was also overruled, and thereupon judgment was rendered in accordance with the verdict, and the defendant again excepted.

Rejected instruction No. 4 was properly refused, because there was no evidence in the case upon which to base it. It was not contended for, or attempted to be proved by plaintiff, that the defendant had agreed or was bound to deliver the cattle in Baltimore for any market. *Carrico v. W. Va. C. & P. R. Co.*, supra. The instruction would have been misleading. As there was no special contract of delivery, the defendant was required by law to deliver the cattle in Baltimore in a reasonable time. The evidence tended to show that by a compliance with the law, the defendant could have delivered them there in time for the Wednesday market. If the evidence was sufficient to establish that fact—of which the jury were the sole judges—then the instruction would have been contrary to law.

Rejected instructions 1 and 2 offered by defendant, and said instructions 2 and 3 given at the instance of the plaintiff, involve the question of the legal effect of the contract, portions of which are hereinbefore set out, and will all be considered together. "A railroad carrier is liable for loss caused by unreasonable delay in transporting goods unless the delay is attributable to some cause which exonerates a common carrier from

liability." Elliott on Railroads, vol. 4, § 1482. "The attempt, on the part of carriers, to limit their liability as against their own negligence or that of their servants, has been particularly persistent where the contract of transportation is with reference to live stock; but such limitations have been universally held ineffectual." 6 Cyc. 391, and cases there cited. "A carrier may contract with the owner of live stock against liability for losses arising from inherent nature, vice, or propensity of the animals themselves, but not from its own negligence in running its trains, or the like." Elliott on Railroads, supra, § 1511. "It is urged by the authorities in favor of the extension of the carrier's right to contract for a complete exemption from liability, that men must be permitted to make their own agreements, and that it is not a matter of public concern on what terms an individual consents to have his goods carried for him. But this argument, however plausible it may be made, is unsound, and has never received the sanction of the courts outside of one or two jurisdictions. It overlooks the inequality in the respective positions of the carrier and the shipper, and the advantage and quasi monopoly by the former. It leaves out of consideration the principle, now of universal recognition, that railroad and express companies are quasi public institutions, owing a duty to the public which they cannot avoid by private contract, and which public policy forbids they should escape. It is therefore held by the great weight of authority that a carrier cannot make a contract by which it is to be exempt from liability for any loss resulting from its own negligence or that of its servants. Such a contract is void, as being against public policy, and affords the carrier no protection." 5 Am. & Eng. Enc. Law (2d Ed.) 307, 308; 6 Cyc. 392, and cases cited; also Parker v. Atlantic Coast Line R. R. Co. (N. C.) 45 S. E. 658; 3 Thomp. on Neg. § 3328. Some courts which have been inclined to recognize the validity of contracts relieving carriers from liability for negligence, have drawn a distinction between ordinary negligence and gross negligence, and have sustained exemptions so far as they did not exonerate the carrier from gross or willful neglect or fraud on his part or on the part of his servants. This assumed distinction is by the best authorities unequivocally repudiated, and all attempted exemptions from liability on account of negligence, whether gross or ordinary, are held to be ineffectual. 6 Cyc. 391. At page 388 of the same book it is said: "Outside of New York the current of authorities is almost unbroken that for reasons of public policy, carriers cannot exempt themselves by any contract, notice or stipulation from liability for the consequence of their own negligence." To the same effect generally have been the decisions of

this court. In B. & O. R. R. v. Rathbone, 1 W. Va. 87, 88 Am. Dec. 664 (decided in 1865), it was, among other things, held that "it is competent for a common carrier to diminish and restrict his common-law liability by special contract; and he may absolve himself in this manner from all liability resulting from any degree of negligence, however gross (if it fall short of misfeasance or fraud), provided the terms and language of the contract are so clear and definite as to leave no doubt that such was the understanding and intention of the parties." In B. & O. R. R. Co. v. Skeels, 3 W. Va. 559 (decided in 1869), it is held that "common carriers may restrict their common-law liability by special contract." In the opinion it is said: "It seems well agreed that by express stipulation in the contract to that effect they may at least exonerate themselves from all liability that does not arise from the want of ordinary care and diligence on their part." In Maslin v. B. & O. R. R. Co., 14 W. Va. 180, 35 Am. Rep. 748 (decided in 1878), it is held that a railroad company is a common carrier of cattle, and "that a common carrier for hire by special contract, based on a valuable consideration, may exempt itself from loss or damage resulting from inevitable accident, though such accident was not the result of the act of God, or of the public enemy, provided the common carrier or its servants in no manner contributed to such accident; but it cannot exempt itself from loss or damage which has in any degree been caused by the negligence or misfeasance of itself or its servants." Judge Green, who delivered the exhaustive and masterly opinion in that case, says in part: "It seems to me highly unreasonable that a common carrier for hire should in any case be permitted by special contract to exempt himself from responsibility from losses arising from his own negligence. And it is no less unreasonable to permit him by special contract to exempt himself from losses which result from the carelessness or negligence of his servants; for the main object of the common law in making common carriers insurers was to secure the most exact diligence and fidelity on the part of the servants of the common carrier. As corporations can only act through servants, to hold that as common carriers they may, by special contract, exempt themselves from all liability for losses arising from the negligence of their servants, is really to hold that they may exempt themselves from all liability as common carriers. And as a very large portion of the transportation of the world is now carried on by railroad companies as common carriers, and as they almost always in the transportation between different places have practically a monopoly of the business, so that, if they insist that such special contracts be made, the passenger or shipper has practically no choice but to submit to entering into such

special contracts, or to forego his journey or the sending off of his freight, the result would be practically the abolition of the whole law of common carriers, and all corporations would become substantially private carriers on their own terms, instead of common carriers, as designated by their charters. Indeed, they would not have placed on them even the responsibilities of private carriers, for neither they nor any other party ought to be permitted by special contract to avoid the responsibility of answering for losses the direct result of their own carelessness or negligence. Judge Redfield, in his work on Carriers and other Bailees, well says (section 156): "There is something very incongruous and not a little revolting to the common sense that a bailee for hire should be allowed to stipulate for exemption from the consequences of his negligence, ordinary or extraordinary. A laborer, domestic, or mechanic who should propose such a stipulation would be regarded as altogether unworthy of confidence in any respect; and the employer who would submit to such a condition must be reduced to extreme necessity, one would suppose." In *Brown v. Adams Express Co.*, 15 W. Va. 812, it is again held that "a common carrier for hire by special contract based on a valuable consideration may exempt himself from his common-law responsibilities in some respects, but cannot exempt himself from loss or damage which may in any degree be caused by the negligence of himself or his servants." In the recent case of *Beatty Lumber Co. v. Western Union Telegraph Co.*, 52 W. Va. 412, 44 S. E. 310, Brannon, J., who delivered the opinion of the court, says: "It is a well-established rule that a common carrier cannot make any contract or stipulation with one dealing with it, by which it can screen itself from liability for loss arising from its negligence. This court recognizes this doctrine in *Brown v. Adams Express Company*, 15 W. Va. 812." See, also, *Va. & Tenn. R. R. Co. v. Sayers*, 26 Grat. 328. The later decisions of this court do not regard the case of *B. & O. R. R. Co. v. Rathbone*, supra, as the law of this state.

To demonstrate that such a contract as the one under consideration is both unreasonable and unjust, it is only necessary to make a practical application of it to the case before us. The plaintiff on Monday shipped 24 head of cattle, weighing at the time of shipment, as plaintiff testified, about 27,700 pounds. According to the evidence, if they had been transported and delivered at Baltimore without unreasonable delay, their drift would have been approximately 60 pounds per head, or 1,440 pounds, leaving 26,260 pounds to have been put upon the market. It is shown that the cattle, when sold on Wednesday evening, weighed 24,000 pounds, a loss of 3,700 pounds, instead of 1,440 pounds, the ordinary drift thereof had they been delivered without unusual delay.

Plaintiff swears that the cattle ought to have sold for five cents per pound, but did not bring so much, because of their bad condition, resulting from their long confinement on the trip without feed or water, and because upon their arrival in Baltimore the market had closed for the week, and the buyers were mostly gone to other markets. Plaintiff says the cattle sold for \$4.35 per hundredweight. They brought in market, on that assumption, \$1,044. They should have sold for \$1,313; thus showing an actual loss of \$269, not including the extra expenses to the shipper for himself while delayed, which he says were \$10. The reduction on the freight conceded to the shipper by the company in consideration of the agreement is not shown by the contract, or otherwise in the case. As the freight on the car load of cattle, under the contract, was not a large sum—22 cents per hundredweight, making about \$61—the part of the schedule tariff released to the shipper was probably not more than \$15 or \$20. The commission merchant who sold the cattle says that from the time they were shipped they ought to have arrived a day earlier, and that plaintiff was damaged by the heavy loss of weight on the cattle, and by the absence of buyers and their competition on the market.

The contract provides: "That in the event of any unusual delay or detention of said live stock, caused by the negligence of the said carrier, or its employes, or its connecting carriers, or their employers or otherwise, the said shipper agrees to accept as full compensation for all loss or damage sustained thereby, the amount actually expended by said shipper, in the purchase of food and water for the stock while so detained." In this case it has been ascertained and determined by the jury and trial court that by the unreasonable delay and negligence of defendant or its servants damage resulted to the plaintiff. It is proved that part of that damage was the result of the failure to feed and water the cattle on the trip; and that no opportunity was given to the plaintiff by the defendant company to either feed or water his cattle, although he asked permission of the person in charge of the train so to do, during the journey. Therefore plaintiff expended nothing for food or water, and under the agreement, if valid, the company was liable to pay him nothing, although his cattle were damaged by this neglect. Under the contract, according to its contention, the company may refuse permission to the shipper to feed and water his cattle, and thereby impair their condition, decrease and destroy their value, and then escape the payment of all damages; or it may delay the delivery, without limit of time, until the market be over, and the buyers gone, or until the condition of the cattle renders them of little or no value on the market; the measure of damage in such case being the amount actually expended by the shipper in the pur-

chase of food and water for his stock if he has been granted an opportunity by the company to so expend any sum while so detained, and the consideration for such an arbitrary agreement and privilege being the small concession and release to the shipper on his freight. The company would be liable for such expenditure for feed and water in the absence of a special contract to the contrary. *Elliott on Railroads*, vol. 4, § 1553; *Hutch. on Carriers*, §§ 322-324. Thus, by its agreement, upon the small consideration aforesaid, to pay what the law would require it to pay in the absence of such agreement and the reduction in tariff, the defendant seeks to shield itself of all other damage to the shipper occasioned by all and every kind and degree of the negligence of itself and its servants. *Zouch v. Ches. & Ohio Ry. Co.*, 36 W. Va. 524, 15 S. E. 185, 17 L. R. A. 116, has been mentioned as having some bearing upon the case before us. That was an action of trespass on the case, brought by Zouch against the railroad company claiming \$175 damages for the loss of a horse delivered to the defendant as a common carrier, and which was alleged to have been killed by reason of the negligence of defendant. The facts in the case show that the actual cash value of the horse was \$175; that the horse was killed, and never delivered to the consignee. The bill of lading or shipping contract contains the usual stipulations as to a reduced rate of freight and the clause agreeing that the shipper would not hold the carrier responsible in any manner for the care and safety of the stock, or of the persons traveling therewith, unless arising from fraud or gross negligence, as specified. The shipper further agreed, for the consideration of a lower freight rate, that he would in no event hold the carrier responsible for any loss, damage, or injury whatever to said stock which might occur beyond its own line, and in case of any loss or damage on its line for which the party of the first part might be responsible under the contract such responsibility should be and was thereby limited to \$100. The circuit court gave judgment in favor of the plaintiff against the defendant for \$175, and the case was brought to this court on a writ of error, wherein the judgment of the circuit court was reversed, this court holding that: "A common carrier may, by special agreement, just and reasonable in itself, and fairly made between it and the consignee of a horse at the time of shipment, fix the value of such horse, upon consideration that the rate of charges for transportation shall be commensurate with the value of the horse thus ascertained, and may also limit its liability in the case of loss to the amount thus agreed upon, even though the loss may be the result of negligence on the part of the carrier, provided said negligence be not gross, wanton, or willful; but it cannot wholly exempt itself from liability for loss resulting from negligence." There ap-

pears to have been some contrariety of opinion in that case. One of the judges concurring said, among other things: "If, however, to obtain a lower rate, he [the shipper] chose to enter into a fair contract limiting the liability, but not wholly exempting the carrier from liability for negligence, he is bound by his contract." It is not stated, however, to what extent the carrier may be thus exempted, or from what kind or degree of negligence he may in this way relieve himself. Another one of the judges dissented, and filed a vigorous opinion, supported by *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, and other authorities, in which he fully discusses the question of the liabilities of common carriers. 4 *Elliott on Railroads*, § 1510, says: "The general rule is well established by the weight of modern authority, in accordance with reason, that a fair bona fide valuation of goods as a basis for the carrier's charges is binding upon the shipper, and that a valid contract may be made limiting the liability of the carrier to that sum, where it is supported by a sufficient consideration, such as a reduced rate of freight. There can be no question, we think, as to the justice of the rule as above stated. Where, however, the valuation is an arbitrary one, made by the carrier, or the latter thus seeks to escape liability for its own negligence beyond the amount fixed, and such amount is obviously much less than the true value of the goods, a different question arises." 6 *Cyc.* 400; *Hutch. on Carriers*, § 237. *Zouch v. Ches. & Ohio Ry. Co.*, *supra*, is not applicable to this case, the main question therein decided being entirely different from the one under consideration here. There the court gave effect to the contract by which the parties beforehand had fixed the amount of money to be paid by the defendant to the owner of the horse upon the future loss thereof, if loss should afterward happen, instead of requiring the company to pay the full value of the horse as otherwise proved.

Upon reason and the great weight of the authority we hold that the defendant company cannot, in this case, by its contract, or any of the provisions thereof, exempt itself from any liability for loss or damage occasioned to the plaintiff which has in any degree been caused by the negligence or misfeasance of itself or its servants. It follows, therefore, that the court did not err in giving to the jury said instructions Nos. 2 and 3 asked for by plaintiff, nor in refusing to give to the jury instructions Nos. 1 and 2 asked for by defendant.

Is the judgment right upon the evidence? Did the defendant deliver the cattle at the place of destination safely, and within a reasonable time? An unusual delay in their delivery having been proved, it devolved upon the defendant to show that the delay was from a cause for which it was not responsible. "It seems, however, that on proof of a

delay in delivery a prima facie case is made out against the carrier, and the burden of proof rests upon it to show that it was not responsible. It rests on the carrier for the additional reason that such facts are peculiarly within the knowledge of the carrier, and not easily ascertained by the shipper." 5 Am. & Eng. Enc. Law (2d Ed.) 254; 2 Green. Ev. § 219; Parker v. Atlantic Coast Line R. Co. (N. C.) 45 S. E. 659; Brown v. Express Co., supra; Hutch. on Carriers, § 766. The question as to what is a reasonable time for the transportation, and as to the reasonableness and sufficiency of the excuse which the carrier makes for delay, is for the jury. 6 Cyc. 449, and cases cited; 5 Am. & Eng. Enc. Law (2d Ed.) 270; Elliott on Railroads, vol. 4, § 1520; Hutch. on Carriers, § 843. It is the peculiar province of the jury to determine the credibility of the witnesses and to weigh the evidence, and a verdict will not be set aside merely because the court, if trying the question of fact, would have found differently. A verdict must be manifestly and palpably wrong to justify a new trial. 14 Ency. Pl. & Pr. 722. The weight of the evidence is for the jury, and, unless it plainly preponderates against the verdict, it will not be disturbed. Scott v. Ches. & Ohio Ry. Co., 43 W. Va. 484, 27 S. E. 211. Where a case has been fairly submitted to a jury, and a verdict fairly rendered, it ought not to be interfered with by the court, unless manifest wrong and injustice have been done, or unless the verdict is plainly not warranted by the evidence or facts proved. State v. Yates, 21 W. Va. 761; Miller v. Insurance Co., 12 W. Va. 116, 29 Am. Rep. 452; Grayson's Case, 6 Grat. 712; Smith v. N. & W. Ry. Co., 48 W. Va. 69, 35 S. E. 834. Where a motion for a new trial is on the ground that the verdict was contrary to the evidence, and the motion is denied, the opinion of the trial court is, on such point, entitled to great respect in the appellate court, which will grant such new trial only in case there has been a plain deviation from right and justice. Smith v. Parkersburg Co-operative Ass'n, 48 W. Va. 232, 37 S. E. 645; Sigler v. Beebe, 44 W. Va. 587, 30 S. E. 76.

The questions of fact involved in this case were fairly submitted to the jury, and a verdict fairly rendered thereon in favor of the plaintiff. The court also heard the evidence, refused to interfere with that verdict, and overruled the motion of defendant to set it aside. We are of opinion that the circuit court did not err in so refusing.

For the reasons hereinbefore stated, the judgment aforesaid is affirmed.

(119 Ga. 538)

COFFEE et al. v. COFFEE.

(Supreme Court of Georgia. Feb. 15, 1904.)

WILL—REVOCATION—EVIDENCE—HARMLESS ERROR.

1. A will cannot be revoked by mere declarations, made by the testator after the date of his will, indicating an intention on his part to

revoke it, nor by such declarations made by him in connection with the execution of deeds conveying a portion of the property covered by the will. See Civ. Code 1895, §§ 3341-3345.

2. The evidence in the present case demanded a finding that there was no revocation of the will offered for probate; and, this being true, the errors, if any, committed by the trial judge in charging the jury as to this branch of the case, do not afford cause for a new trial.

3. No material error was committed in instructing the jury as to the law relating to the appointment of an administrator with the will annexed, and no reason appears for setting aside their verdict.

(Syllabus by the Court.)

Error from Superior Court, Dodge County; B. D. Evans, Judge.

Action between J. B. Coffee and others and Isabella Coffee. From the judgment, Coffee and others bring error. Affirmed.

De Lacy & Bishop, for plaintiffs in error.
E. D. Graham, for defendant in error.

TURNER, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 557)

WILKINSON et al. v. HOLTON.

(Supreme Court of Georgia. Feb. 16, 1904.)

EQUITY—EXECUTION—EXCESSIVE LEVY—RELIEF—TENDER OF DEBT—RES JUDICATA.

1. A plaintiff who asks the aid of a court of equity to relieve him from an alleged unjust and oppressive levy, but admits that part of the sum covered by the execution is justly due by him to the defendant, must, to prevail, offer to do equity by paying into court the amount admitted to be due.

2. A debtor who has had his day in court will not be heard, after judgment, to attack the levy of the execution on the ground that his debt was infected with usury.

3. An execution in rem against specific property may properly be levied on the entire property covered thereby, though the value of the property greatly exceed the amount of the execution. Aliter as to a sale under such a levy, where the property is susceptible of division.

(Syllabus by the Court.)

Error from Superior Court, Wilcox County.

Action by T. L. Holton against W. H. Wilkinson and others. Decree for plaintiff, and defendants bring error. Reversed.

J. L. Bankston and Hal Lawson, for plaintiffs in error. T. L. Halton and E. D. Graham, for defendant in error.

CANDLER, J. The plaintiff below brought an equitable petition in Wilcox superior court to enjoin the defendants, one of whom was the cashier of a bank, and the other the sheriff of the county, from "selling, offering for sale, or advertising for sale" certain property which had been conveyed by the plaintiff to the bank cashier as security for a debt, and which had been levied on to satisfy judgments obtained for the unpaid balance of that debt. The petition also prayed that Wilkinson, the cashier, be required to account to the plaintiff, and for a judgment

¶ 1. See Execution, vol. 21, Cent. Dig. § 512.

against him for damages on account of the levy. The grounds on which equitable interference was asked were that the debt to secure which the property levied on was conveyed to Wilkinson was infected with usury, and that the levy was grossly excessive. The plaintiff admitted that he owed an unpaid balance on his debt amounting to more than \$400, but his petition contained no offer to do equity by paying into court the amount admitted to be due. The defendants demurred generally and specially. At the hearing, evidence was introduced on both sides, and the court "ordered that defendants be restrained and enjoined from proceeding to advertise and sell said property levied on, upon the ground that said levy is excessive. Further ordered that the defendants may dismiss said levy, and levy upon a sufficiency of said property and sell same to pay said execution, provided said levy shall not be excessive." The defendants excepted.

There can be no doubt that the judgment complained of was erroneous. Coming into court, as he did, with the admission of an unpaid indebtedness by him to Wilkinson, the plaintiff could only properly invoke the aid of equity after an offer to do equity and pay off that indebtedness. It is unnecessary to cite authority to sustain the well-established proposition that he was precluded by the judgment against him from setting up usury in the debt covered by those judgments. The court below seems to have based the judgment rendered on the sole ground that the levy was shown to have been excessive, but in the present case that furnished no reason for the grant of an injunction. We know of no provision of law by which a levy can be made on a part only of property which has been conveyed by deed to secure a debt. The contract between the parties, as well as the statute governing it, contemplates that the entire property pledged shall be liable for the payment of the debt. In *Vickers v. Hawkins*, 111 Ga. 120, 36 S. E. 493, it was held "that an execution in rem against certain specific property may properly be levied upon that property, and that the levy will not be void for excessiveness, though the value of the property be far greater than the amount of the execution." We would not be understood as holding that upon a sale under the levy it would be necessary to sell the entire property levied on. On the contrary, in a case like the present, where the property is easily susceptible of division, it would be the duty of the sheriff to expose it for sale in parcels, in such a way as to discharge the amount due on the executions with as little loss to the plaintiff in the present action as possible. This, however, is a matter not now before us. The judgment complained of was erroneous, and must be reversed.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 527)

FUSSELL v. HEARD & FULLINGTON.

(Supreme Court of Georgia. Feb. 15, 1904.)

TROVER—EVIDENCE—VERDICT—INSTRUCTIONS.

1. In an action of trover to recover personal property sold by the plaintiff to the defendant, part of the purchase price having been paid, and a note given for the remainder, which reserved title to the property in the seller, and which was not paid when due, a verdict finding "for plaintiff for full amount of note," \$250 principal, and interest * * * at 8 per cent. per annum," will not be set aside as contrary to law; the finding being clearly authorized by the evidence.

2. The verdict was not for a greater amount than was warranted; the charge as to express and implied warranty was not open to the objection urged against it; and upon none of the grounds of the motion which were argued before this court should a new trial have been granted.

(Syllabus by the Court.)

Error from Superior Court, Irwin County; D. M. Roberts, Judge.

Action by Heard & Fullington against W. B. Fussell. Judgment for plaintiffs, and defendant brings error. Affirmed.

E. H. Williams, for plaintiff in error. J. H. Martin, for defendants in error.

CANDLER, J. The motion for a new trial presents numerous points raised on the trial of the case in the court below, but in the argument here, which for the plaintiff in error was by brief, nearly all of these points were abandoned; and, under the well-settled practice of this court, they will not now be considered. This was an action of trover to recover certain live stock which it appeared had been sold by the plaintiffs to the defendant at an agreed price of \$500; the defendant paying \$250 in cash, and giving his note for the balance, in which title to the stock was reserved in the plaintiffs. The note was not paid. In the petition the value of the animals was alleged to be \$275. The jury returned a verdict "for plaintiff for full amount of note, \$250 principal, and interest from May 19, 1898, at 8 per cent. per annum." By consent the court passed an order which in effect amended the verdict so as to make the interest begin on June 19, instead of May 19, 1898; the order reciting that the last-named date was put in the verdict by mistake.

We have no hesitation in holding that the complaint in the motion for a new trial as to the form of the verdict is without merit. "When, in a trover suit for the recovery of personalty sold, of which the seller had reserved the title, and which had been partly paid for, the plaintiff elects to take a money verdict, the proper amount to be recovered is the unpaid balance of the purchase money, with interest thereon, embraced in one aggregate sum." *Ross v. McDuffie*, 91 Ga. 121, 16 S. E. 648 (3); *O'Neill Mfg. Co. v. Woodley*, 118 Ga. 114, 44 S. E. 980. It is true that in the present case the jury, in their verdict,

did not combine the principal and interest of the note in a lump sum, and that interest was not recoverable *eo nomine*, but merely as damages for the conversion of the property; but the plain spirit of the law having been followed, and the verdict, in its substance, being exactly in accordance with the principle of law announced in the case above cited, a reasonable intendment will be given it, and a technical defect in its formal wording will not require the grant of a new trial.

There is no merit in the contention that the verdict was for a greater amount than the sum sued for. Strictly speaking, the suit was not for a sum of money at all, but for the possession of the property in dispute; and, the plaintiff having elected to take a money verdict, the measure of his recovery was, as before stated, the face of the note for the unpaid balance of the purchase price of the property, with interest thereon. The defendant, having relied on a plea of breach of warranty, cannot complain that the judge erred in charging on that subject, and this ground of the motion likewise discloses no reason for the grant of a new trial.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 491)

CITY OF ALBANY v. LYNCH.

(Supreme Court of Georgia. Feb. 13, 1904.)

MECHANIC'S LIEN—PUBLIC PROPERTY—JUDGMENT.

1. In this state a mechanic is not entitled to a lien for work done on property belonging to a municipal corporation, and used for public purposes.

2. In the absence of such a lien, the mechanic cannot recover a general judgment against the city for money due him by the contractor; there being no privity of contract between him and the city.

(Syllabus by the Court.)

Error from Superior Court, Dougherty County; W. N. Spence, Judge.

Action by M. Lynch, Jr., against the city of Albany. Judgment for plaintiff. Defendant brings error. Reversed.

D. F. Crosland, for plaintiff in error. J. T. Mann, for defendant in error.

CANDLER, J. Lynch brought suit in Dougherty superior court against Joyce and the city of Albany; the material allegations of his petition being, in brief, as follows: In March, 1901, the city of Albany contracted with Joyce to bore an artesian well on described property belonging to it, and in the city limits. The plaintiff, in turn, contracted with Joyce to work as a mechanic on the well at an agreed compensation of \$4 per day, and, in compliance with his contract, did work thereon for 471 days, entitling him to \$1,884. Joyce has paid him only \$646.80, and refuses to pay the balance of \$1,237.20 due. "Petitioner claims a lien on the afore-

said well and premises, and in compliance with the law did on the 1st day of October, 1902, within three months after the completion of the contract, file such lien in the office of the clerk of the superior court of [Dougherty] county." Joyce is insolvent. The city has appropriated sums sufficient to pay Joyce for boring the well, and is now indebted to him in a sum more than sufficient to pay plaintiff's claim against Joyce. Plaintiff has no adequate remedy at law by which he can recover the amount due him, and, unless Joyce is enjoined, he will collect the amount due him by the city, and leave plaintiff without recourse. The prayers of the petition were for (1) a temporary restraining order, directed to Joyce, enjoining him from collecting the amount due him by the city until the further order of the court; (2) a decree against defendants for principal and interest "on said principal due your petitioner as aforesaid"; and (3) process. The city demurred on the grounds, first, that, so far as the petition seeks to set up and claim a mechanic's lien, it cannot be maintained, because the artesian well referred to, and the premises on which it is situated, are public property used by the city for public purposes, and not subject to a mechanic's lien; and, second, that, so far as the petition seeks to recover a general judgment against the city, it sets forth no cause of action, because it affirmatively shows that there was no privity of contract between the city and the plaintiff, and that the plaintiff was in no sense an employé of the city. The court overruled the demurrer, and the city excepted.

1. Although the petition contained no prayer for a foreclosure of the plaintiff's alleged lien against the property of the city, or for a special judgment against that property, it was treated by counsel for both the plaintiff and the city as a suit to foreclose such a lien; and we will therefore decide the case upon the questions made in the demurrer, and argued in the briefs of counsel in this court. So treating it, we are clear that the court below erred in not sustaining the demurrer to so much of the petition as sought to enforce a mechanic's lien on the municipal property. "There can be no mechanic's lien on public property, unless the statute creating such lien expressly so provides, since such a lien would be contrary to public policy, and would also be incapable of enforcement; public property not being subject to forced sale." *Boisot on Mech. Liens*, § 208. "It is clear that property owned by a municipal corporation, and used for public purposes, cannot be sold by virtue of an execution issued on a judgment rendered against the corporation. As one of the results of this general rule, there is no right to a mechanic's lien against such property." 2 Dill. Mun. Corp. (4th Ed.) § 577. While we are not aware of any Georgia case directly involving the question whether or not public property of a city is subject to a mechan-

¶ 1. See *Mechanics' Liens*, vol. 34, Cent. Dig. § 14.

le's lien, the whole trend of the decisions of this court in cases of similar character supports the view that such a lien does not exist. *Leake v. Lacey*, 95 Ga. 747, 22 S. E. 655, 51 Am. St. Rep. 112, was a case where a creditor of a contractor sought to garnish a city, and subject to his debt an amount due the contractor by the city, the work for which the contractor was engaged having been completed. Mr. Justice Lumpkin, delivering the opinion, recognized a distinction between cases where garnishment was served upon the city pending the work being done for it, and those where the work had been completed, and all that remained to be done was the payment of the contractor, but added: "We are decidedly of the opinion that public policy forbids that a municipal corporation should be subjected to garnishment in any case where its indebtedness arose on account of the exercise by it of governmental functions, which include, of course, the prosecution of public works and improvements for the benefit of the body politic. It is not to the municipal authorities, after the work has been completed, a matter of the slightest concern to whom the money due for the work should be paid. The municipality has no interest in aiding a creditor to collect his debt, or in shielding the debtor from paying it; and therefore there is no reason why it should be drawn into litigation pending between these parties, but many good reasons why it should not." In *Morgan v. Rust*, 100 Ga. 346, 28 S. E. 419, a judgment creditor of a man to whom the county of Fulton was indebted in the sum of \$500 for services as an expert accountant sought to require the county to pay that amount into the registry of the court, and to have it adjudged to be subject to the plaintiff's execution. In the headnote to that case the following language, which would seem to be decisive of the point now under consideration, was used: "The same public policy which exempts a county from the process of garnishment forbids that it should in any manner be interfered with in settling for necessary public work, even after the same has been completed."

2. In the absence of a right to a lien, it is, of course, apparent that the plaintiff could not, under the allegations of his petition, recover a general judgment against the city. There was no privity of contract between him and the city. He dealt alone with Joyce, and to Joyce he must look for the payment of this debt.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 458)

HARRELL v. NICHOLSON.

(Supreme Court of Georgia. Feb. 12, 1904.)

GIFT—VALIDITY—DELIVERY.

1. The payee of a note, a short time before his death, sent for the maker, and directed him

to look in a certain box in the house for the note, and to take it and keep it. Upon being informed that the note could not be found in the box, he told the maker to look in his private file at the bank, where he would find the note, and to keep it when he found it. The maker was unable to find the note at the bank or elsewhere. After the payee's death a third person found the note in the house, and turned it over to the administrator. *Held*, that the transaction did not constitute a gift; there being no actual delivery of the note to the maker, and nothing which the law would accept in lieu thereof.

(Syllabus by the Court.)

Error from Superior Court, Stewart County; Z. A. Littlejohn, Judge.

Action by S. J. Harrell, administrator of D. B. Harrell, against D. W. Nicholson. Judgment for defendant, and plaintiff brings error. Reversed.

Blalock & Cobb and B. F. Harrell & Son, for plaintiff in error. J. B. Hudson and E. A. Hawkins, for defendant in error.

COBB, J. This was an action by the administrator of D. B. Harrell against D. W. Nicholson upon a promissory note signed by the defendant, and made payable to D. B. Harrell. The only questions with which we find it necessary to deal arise out of a plea that the intestate, shortly before his death, gave the note to the defendant, intending thereby that the debt should be canceled. The plea set up that the intestate "canceled and surrendered" the note to the defendant in consideration of past services rendered by him, but that the note itself could not be found, though diligent search was made for it, at the request of the intestate, both at the bank where he kept some of his papers and at his home; that the intestate thought the note was at the bank, and instructed the defendant to go there and get it and keep it. There was evidence for the defendant to the effect that while the intestate was ill, and a short time before his death, he told the defendant to get his private box, and to look in it and get his note. Upon being told that the note could not be found in the box, the intestate told the defendant that the note would be found in his private file at the bank, and that he had intended taking it to defendant. The defendant afterwards looked through this private file, but could not find the note. Some months after the intestate's death the note was found in his house, and turned over to his administrator.

The evidence shows a gift *inter vivos*, if gift at all. There was nothing to show that the intestate intended the gift to be absolute only in the event of death, and hence it could not be a gift *mortis causa*. The distinction between the two will be found stated in *Burt v. Andrews*, 112 Ga. 466, 37 S. E. 726. This distinction is, however, unimportant in this case. All are agreed that, to constitute a gift, there must be a present intention to give, and this intention must be accompanied with delivery. Actual manual delivery is not essential in all cases. Con-

¶ 1. See *Gifts*, vol. 24, Cent. Dig. § 53.

structive and symbolical delivery has been held to be sufficient under certain circumstances. If the property is bulky, and the present intention to give is clear, and the donee, as soon thereafter as practicable, reduces the property to possession, and exercises dominion over it, the gift will be upheld. 14 Am. & Eng. Enc. L. (2d Ed.) 1021, 1022; Thornton on Gifts, § 140. And it has been held that the delivery of a key to a chest or trunk is sufficient, if all the other elements are present. 14 Am. & Eng. Enc. L. (2d Ed.) 1021, 1022; Thomas' Adm'r v. Lewis (Va.) 15 S. E. 889, 18 L. R. A. 170, 37 Am. St. Rep. 848. It has also been held that the gift was complete where the donor pointed out to the donee several places where money was buried; the donee afterwards going to the places thus indicated, digging up the treasure, and reducing it to possession. Waite v. Grubbe (Or.) 73 Pac. 206.

Our Code, which is but a codification of the common law on the subject, states the rule thus: "To constitute a valid gift, there must be the intention to give by the donor, acceptance by the donee, and delivery of the article given, or some act accepted by the law in lieu thereof." Civ. Code 1895, § 3564. There must be in every case a delivery of some sort—such a delivery as would put it beyond the power of the donor to revoke the gift. He must relinquish all dominion and control over it as owner, and part absolutely with the title. Evans v. Lipscomb, 31 Ga. 71 (3); Mims v. Ross, 42 Ga. 121 (2); Smith v. Peacock, 114 Ga. 691, 40 S. E. 757 (1), 88 Am. St. Rep. 53. In Burt v. Andrews, 112 Ga. 465, 37 S. E. 726, a woman, during her last illness, and a short time before her death, said to her sister: "There is the china washstand set, and you may have them." No actual delivery of the property was made, and after the owner's death her husband sold the articles. In a suit brought by the sister against the purchaser, the gift was held to have been incomplete. The rule as to delivery is not so strictly applied to transactions between members of a family living in the same house, the law in such cases accepting as a delivery acts which would not be so regarded if the transactions were between strangers living in different places. See Thorn. Gifts, § 169. Accordingly, in Moore v. Cline, 115 Ga. 405, 41 S. E. 614, a gift of a horse from a son to his mother was upheld, where it appeared that both lived in the same house, that there was but one horse lot on the place, that the horse remained in the stable, that no actual delivery of it ever took place, but that the mother accepted the gift, and exercised rights of ownership and control over the horse. The fact that the subject-matter of the gift may be lost or inaccessible at the time the intention to give is expressed can make no difference, if nothing equivalent to delivery takes place. Thornton on Gifts, §§ 140, 157. In Appeal of Horner, 2 Penny. 289, the payee and holder

of promissory notes, a few days before his death, said to a third person that he did not want the maker to pay them. Within 48 hours of this time he sent for the maker to draw his will. He directed that the notes be deducted from an estimate of his personality, and told the maker that the notes were his, that they were in a drawer in another room, and that the key to the drawer was in a secretary in the room where he lay, and told him to get the notes. After the departure of the maker, the payee told his housekeeper that he had given the notes to the maker, naming him. Four or five days after his death, the maker took possession of the notes. It was held that there was no delivery of the notes sufficient to render the gift complete.

As title to a promissory note may pass by delivery, it needs no written assignment of a note to make a gift of it complete. But in this case no actual delivery of the note has been shown, and nothing which the law would accept in lieu of such delivery. Nothing more than a present intention to give was shown. The note was not found, and the gift was not completed. The defendant was told to get the note and keep it, but he never did this. He made an effort to do so, but the fact remains that he never exercised any dominion or control over the paper. The plea setting up the gift was bad in substance, in that it failed to aver with certainty a delivery of the note, actual, constructive, or symbolical; and the verdict, which merely found that this plea, which was bad in law, was true in fact, should have been set aside. See, in this connection, Crew v. Hutcheson, 115 Ga. 533, 534, 42 S. E. 16.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 486)

HAYGOOD v. McKENZIE.

(Supreme Court of Georgia. Feb. 12, 1904.)

ATTORNEY AT LAW—COLLECTIONS—FAILURE TO ACCOUNT—SUMMARY PROCESS.

1. An attorney at law who retains in his hands money which he has collected for his client is liable to rule, if, after demand, he fails to account therefor. Civ. Code, §§ 4416, 4771. But he is not liable, under this summary process, for money received by him, not in his professional capacity, but merely as the agent of another, to be remitted to a third person. See 3 Am. & Eng. Enc. Law, 413; 4 Cyc. 976, and authorities cited.

(Syllabus by the Court.)

Error from Superior Court, Macon County; Z. A. Littlejohn, Judge.

Action by W. W. McKenzie against J. W. Haygood. Judgment for plaintiff. Defendant brings error. Reversed.

Eldridge Cutts, for plaintiff in error.
Greer & Felton, for defendant in error.

§ 1. See Attorney and Client, vol. 4, Cent. Dig. § 287.

TURNER, J. Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness, and FISH, P. J., disqualified.

(119 Ga. 463)

HAYGOOD v. HADEN.

(Supreme Court of Georgia. Feb. 12, 1904.)

ATTORNEY AND CLIENT—RULE TO PAY MONEY—ASSOCIATE COUNSEL.

1. The right to enforce payment of money by rule is penal in its nature, and must be strictly construed.

2. The right to rule an attorney, for money alleged to be in his hands as such, depends upon the existence of the relation of attorney and client, and is limited to the client.

3. Associate counsel cannot by rule enforce a contract for the equal division of fees; and where a proceeding was brought by the defendant in error against the plaintiff in error, alleging that they were associate counsel, and seeking by rule to enforce such an agreement, a demurrer thereto should have been sustained.

4. In *Smith v. Goode*, 29 Ga. 185, there was no attempt to enforce the remedy now incorporated in Civ. Code 1895, § 4416; but the motion was ancillary to a bill then pending, to which the clients were parties, and amounted to the summary enforcement of the lien of attorneys against money of the client then in the hands of an officer of the court.

(Syllabus by the Court.)

Error from Superior Court, Macon County; Z. A. Littlejohn, Judge.

Petition by O. J. Haden for a rule on J. W. Haygood to show cause why he should not pay over certain money. From an order granting the writ, Haygood brings error. Reversed.

Haden brought a petition in Macon county, alleging that on the 26th of July, 1900, he delivered to Haygood a number of papers and documents in the matter of a claim of Wilson, involving certain real estate in Irwin county; that these papers were receipted for by Haygood as attorney at law, and received under an agreement between himself and Haygood that the fees in the case should be divided equally; that the suit was brought in Irwin county, and the plaintiff recovered; that Haygood collected the fees, and now has in his hands \$300, being the portion belonging to plaintiff; and that demand has been made on Haygood, and payment thereof refused. Haden thereupon asked for a rule nisi calling upon Haygood to show cause why he should not pay over the money aforesaid, or, in default, be attached for contempt. Haygood demurred on the ground that the petition set out no cause of action, that the plaintiff's remedy was by action at law, and that the relation of attorney and client did not exist between plaintiff and defendant, and therefore defendant is not subject to a rule, there being no law authorizing one attorney to rule another attorney to determine a division of the fees. The judge overruled the demurrer, and Haygood excepted.

Eldridge Cutts, for plaintiff in error. O. J. Haden and J. A. Edwards, for defendant in error.

LAMAR, J. Attorneys who retain in their hands the money of their clients are liable to rule. Civ. Code 1895, § 4416. The remedy is penal in its nature, and must be strictly construed. *Banks v. Cage*, 1 How. (Miss.) 293. The right grows out of the relation of attorney and client, and the remedy is expressly limited to the client, not being available to the client's assignee. Nor can the attorney rule the client, though the latter has possession of the fund created by the counsel's services, and for which he has a lien. *Whittle v. Newman*, 34 Ga. 378. Nor is a rule intended as a means of enforcing the attorney's lien. *Id.* Here the proceeding was brought by one attorney against his associate for the purpose of compelling a division of the fee collected, there being between counsel an agreement that it should be equally divided. The client is not proceeding, and it is not alleged that the defendant "retained the money of the client," so as to bring the case within the terms of the Civil Code of 1895, § 4416. Nor is the case within the provisions of the Civil Code of 1895, § 4047, par. 4, that "every court has power to control, in the furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it in every matter appertaining thereto." For here not only had the litigation ended, but the rule was instituted in the superior court of Macon county, whereas the suit in which the collection is alleged to have been made was prosecuted and terminated in Irwin county.

The only authority relied on by the defendant in error to support the proposition that one attorney can rule another for his fee is what was said in *Smith v. Goode*, 29 Ga. 185. That case was decided before the Code, and is apparently opposed to the ruling in *Whittle v. Newman*, 34 Ga. 377, in so far as it permits anything in the nature of a rule by the attorney against the client. But the facts there were essentially and materially different from those in this case. That was in a proceeding in equity still pending, and the motion was treated as ancillary to the main bill. The money was still the property of the client. The attorney holding the same had never refused to deliver the fund to the client or to the associate counsel. He was not in contempt, nor had he done any act warranting the summary and drastic remedy provided for by the Civil Code of 1895, § 4416. Nor did he resist the motion to distribute, nor the right of the associate thus to collect the fee. The clients were made parties, and alone made a defense. An analysis of the decision will show that the court, during the pendency of the bill in equity, in effect allowed the attorneys a speedy and summary enforcement of their liens on the fund raised by the litigation, and then in the

§ 2. See Attorney and Client, vol. 5, Cent. Dig. §§ 367, 371.

hands of one of the counsel, who was willing to surrender the same to the clients or to associates, as directed by the chancellor, after notice and an opportunity to the real parties to be heard.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness, and FISH, P. J., disqualified.

(119 Ga. 494)

McGOWAN et al. v. BROOKS et al.

(Supreme Court of Georgia. Feb. 13, 1904.)

TRIAL—DIRECTING VERDICT.

1. When this case was before this court at the March term, 1901, it was held that the evidence failed to disclose any facts in support of the plaintiffs' contention that they were entitled to invoke the doctrine of "conventional subrogation," as against the claim of prior lien asserted by the defendants, and for that reason a new trial was ordered. See, 39 S. E. 115, 113 Ga. 532, 537. When the new trial was had, the plaintiffs showed by uncontradicted evidence that there was, in point of fact, an express agreement which entitled them to the equitable relief for which they prayed. This being the only question involved, and the evidence demanding a finding in their favor, the trial judge properly directed a verdict against the defendants.

(Syllabus by the Court.)

Error from Superior Court, Decatur County; W. N. Spence, Judge.

Action by A. H. Brooks and others, executors, against C. M. McGowan and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

B. B. Bower and Bower & Bower, for plaintiffs in error. A. L. Townsend, for defendants in error.

TURNER, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 425)

WILLIAMS v. STATE.

(Supreme Court of Georgia. Feb. 12, 1904.)

CRIMINAL LAW—NEW TRIAL—RULINGS ON EVIDENCE—MURDER—PUNISHMENT.

1. It is not apparent from the evidence that the main witness for the state in this case was an accomplice, and, if he were an accomplice, he was sufficiently corroborated by other evidence.

2. The refusal of the court below to rule out as evidence, on motion of the defendant, a paper purporting to be the statement of the accused before the coroner's jury, is not cause for a new trial; it appearing from a note made by the trial judge that defendant's counsel expressly consented to the admission of the paper when it was offered, and it not appearing that counsel acted under any misapprehension as to the nature or contents of the paper, or upon what ground the motion to rule it out was based.

3. "The jury, in the trial of one who is charged with murder, if they find the accused guilty, are invested by law with the power of fixing the punishment, by recommendation to life imprisonment. Whether they will so recommend or not is a matter solely in their discretion, which

is not limited or confined in any case." Cohen v. State, 42 S. E. 781, 116 Ga. 573. The trial judge correctly so informed the jury in the present case.

(Syllabus by the Court.)

Error from Superior Court, Dooly County; Z. A. Littlejohn, Judge.

Seymore Williams was convicted of crime, and brings error. Affirmed.

Crum & Jones, for plaintiff in error. F. A. Hooper, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

TURNER, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 471)

CRUM v. HARGROVE, Ordinary, et al.

(Supreme Court of Georgia. Feb. 12, 1904.)

PUBLIC ROAD—ALTERATION—JUDGMENT—COLLATERAL ATTACK.

1. The order or judgment of an ordinary, making or establishing an alteration in a public road, stands until set aside, and cannot be collaterally attacked in mandamus proceedings, under the act approved August 17, 1903 (Acts 1903, p. 41), to require the county officials having jurisdiction and supervision of public roads to put the road so altered in the condition required by that act.

(Syllabus by the Court.)

Error from Superior Court, Dooly County; Z. A. Littlejohn, Judge.

Application of D. A. R. Crum for writ of mandamus against J. D. Hargrove, ordinary, and others. From a judgment denying the writ plaintiff brings error. Reversed.

Crum & Jones, for plaintiff in error. J. T. Hill, for defendants in error.

FISH, P. J. Under the provisions of the act approved August 17, 1903 (Acts 1903, p. 41), D. A. R. Crum applied to the judge of the superior courts of the Southwestern circuit for a mandamus against J. D. Hargrove, ordinary of Dooly county, and W. B. Matthews, B. B. Pound, and M. M. Doyle, road commissioners of the Cordele district of that county, and S. R. Bolton, road overseer for such district, to compel them to have a designated portion of a public road of that district worked "up to that standard now required by the existing laws of this state, embodied in sections 512, 513, and 533 of volume 1 of the Code of 1895, so that ordinary loads, with ordinary ease and facility," could be continuously hauled over that portion of such public road. The answer of the respondents was to the effect that the road in question had been altered upon the application of Crum, and that he, in order to get a favorable report from such road commissioners as to the public utility of the alteration, agreed with them to put the new portion to be made by the alteration in lawful condition, and that he,

¶ 1. See Highways, vol. 25, Cent. Dig. § 251.

for the purpose of procuring the order from the ordinary, making and establishing such alteration, made a similar agreement with him; that Crum failed to comply with his agreements, and that the condition of the road, of which he complained in his petition for mandamus, was due solely to the nonperformance of his agreements so made. There was a demurrer to the answer on the ground that it was immaterial and irrelevant. The case was submitted to the court by consent, to be decided upon the pleadings and the evidence. Both sides submitted affidavits. Those submitted by the defendants tended to prove the allegations in their answer; the commissioners deposing that they would not have recommended the alteration as being of public utility, and the ordinary that he would not have granted the order establishing the alteration, but for the agreements of Crum to put that portion of the road made by the alteration in lawful condition; the ordinary further deposing that the failure to embody such agreement in his order was due to an oversight. Crum, in his affidavit, said that he had agreed with the road commissioners before they made their report, and with the ordinary before the order was granted, that he, at his own expense, would open the new portion of the road made by the alteration, and put it "in reasonably passable condition," and that he had complied with such agreements. All the proceedings to have the alteration made in the road were in evidence. The report of the road commissioners, that the alteration would be of public utility, was in the usual form, except that the words "after applicant putting road in lawful condition" were added to the report. With this exception, all the proceedings were regular. The order or judgment of the ordinary making or establishing the alteration was absolute and unconditional. The judge refused to grant a mandamus absolute, and to this ruling Crum excepted.

Our Civil Code of 1895 states the doctrine, which is universally recognized, that "the judgment of a court of competent jurisdiction can not be attacked in any other court for irregularity, but shall be taken and held as a valid judgment until it is reversed or set aside." Section 5368. And again: "A judgment that is void may be attacked in any court, and by anybody. In all other cases judgments can not be impeached collaterally but must be set aside by the court rendering them." Section 5373. Our Constitution (article 6, § 6, par. 2; Civ. Code 1895, § 5853) declares that "the courts of ordinary shall have such powers in relation to roads, bridges, * * * and other county matters as may be conferred on them by law." Civ. Code 1895, § 4233, provides: "The ordinary, when sitting for county purposes, has original and exclusive jurisdiction * * * in establishing, altering, or abolishing all roads, bridges, and ferries, in conformity to law." "The ordinary also has authority (1) to sit at any time

as a court for county purposes and for the exercise of any power he possesses as a quasi corporation contra-distinguished from his power as a court." Section 4240. The Code also provides that proceedings before the ordinary, when sitting for county purposes, must be in writing; that he must keep a docket; that, when individuals are to be affected by any order or judgment of his, they shall have reasonable notice of the time and place of hearing; that he shall cause to be kept a minute of such proceedings; that he shall have power to punish for contempt under the same rules and regulations as are provided "for other courts"; and that amendments shall be allowed as provided "in other courts." Sections 4263 to 4268, inclusive. It is clear, therefore, under the Constitution and statutes above referred to, that the ordinary, when exercising his jurisdiction in the establishment and alteration of public roads, performs judicial functions, and is a court. The rule that a judgment of a court of competent jurisdiction cannot be collaterally attacked in any other court for irregularity has been applied by many courts to the orders of county officers, exercising their statutory authority in proceedings for the laying out of a public highway or the location of a private way. See the authorities cited in 1 Freeman on Judgments, § 251, note 4; Elliott on Roads & Streets (2d Ed.) § 346, note 3, and note 1, page 358.

When the inferior court had jurisdiction of roads, it was held, in *Nichols v. Sutton*, 22 Ga. 371, "The inferior courts have power to make and alter roads, and when a road is once made or altered agreeably to law, * * * and the order or judgment of the court in respect thereto is unreversed, or not revoked according to law, the road so made or altered must stand established." In *Sullivan v. Robbins*, 109 Iowa, 235, 80 N. W. 340, it was held that the fact that one was induced, through fraud, to sign a petition to the county board for the vacation of a highway, was not cause for a collateral attack upon the action of the board in vacating the highway. We conclude that as the ordinary was clothed with original and exclusive jurisdiction, and exercised judicial powers and duties in relation to the matter of the alteration of the public road in question, his order or judgment making and establishing such alteration must stand until set aside, and that it could not be attacked upon the application for mandamus by showing that the applicant for the alteration had agreed to put the new portion of the road in lawful condition, and had failed to do so. It was not disputed that the condition of that portion of the road was not up to the standard required by the Political Code of 1895, §§ 512, 513, 533, so that ordinary loads, with ordinary ease and facility, could be continuously hauled over it. It follows that, under the provisions of the above-cited act of 1903, and the undisputed facts of the case, the court was bound to grant a

mandamus absolute, and hence his refusal to do so was erroneous.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 427)

HARTMAN v. STATE.

(Supreme Court of Georgia. Feb. 12, 1904.)

VAGRANCY—EVIDENCE.

1. The evidence for the state was consistent with that for the accused, which made out a good defense, and the verdict finding her guilty should have been set aside on motion for a new trial.

(Syllabus by the Court.)

Error from City Court of Columbus; J. L. Willis, Judge.

Angelina Hartman was convicted of vagrancy, and brings error. Reversed.

J. H. Lewis and A. W. Cozart, for plaintiff in error. Peter Preer, Sol., for the State.

CANDLER, J. Angelina Hartman was convicted in the city court of Columbus under an accusation charging her with vagrancy. The date named in the accusation was September 7, 1903, and three counts were laid, as follows: (1) That she led an idle, immoral, and profligate life, being able to work, and not working, and having no property to support her; (2) that she had no visible and known means of a fair, honest, and reputable livelihood, being able to work, and having no property to support her; and (3) that, having a fixed abode, and no visible property to support her, she lived by stealing, and by trading and bartering stolen property. There was no evidence whatever to sustain the last count, and it will be treated as having been abandoned by the state. Briefly stated, the material evidence introduced on the trial was as follows: The prosecutor testified that he saw the accused several times during every afternoon from the 1st to the 7th of September, 1903, and that whenever he saw her she was doing no work at all. He added, however, that he had no positive recollection of having seen her on the 1st, 2d, or 3d of September. He testified that she was a lewd woman, that she hung around saloons, and that he had seen her drinking beer in grocery stores. Of his own knowledge, he could not say whether the accused had any property to support her or not, but she had no visible and known means of a fair, honest, and reputable livelihood, that he knew of. Another witness testified that the house in which the accused lived had the reputation of being a lewd house, that she had seen men and women going into it at all hours of the day, and that it was the worst house she ever saw. Witness had seen her do some work, but since August 17, 1903 (the date of the approval of the Calvin amendment to the vagrancy law of this state), she had not done enough work

to support her. This constituted the state's case. The accused proved by witnesses who were not impeached or contradicted that from July 17, 1903, up to the date of her arrest, she had been employed as a cook, receiving for her services 75 cents per week, and board for herself and her two children, and that between August 17, 1903, and September 7, 1903, she had also worked as a washerwoman.

What is known as the "Calvin Act" (Acts 1903, p. 46) is merely an amendment to the vagrancy laws of this state as they existed at the time of its passage, enlarging the definition of the term "vagrant," and prescribing a new method of apprehending and punishing such persons as come within its provisions. It will be observed that under both the old law and the amendment the gist of the offense of vagrancy is the failure or refusal of the offender to work when work is necessary to support himself or his family. As was said of the old law in *Daniel v. State*, 86 S. E. 293, 110 Ga. 916, so it may be said of the amendment: "The statute was enacted to prevent men able to work from idling and wandering about the community, and becoming drones or thieves or charges upon the public." Keeping a lewd house, drunkenness, and kindred vices, such as were proved against the accused in the court below, are made penal by other statutes covering each. It must be borne in mind that the accused was not tried under any such law, and that, to authorize her conviction on the charge of vagrancy, proof of immoral conduct alone will not suffice. It must appear that, having no visible and known means of a fair, honest, and reputable livelihood, and being able to support herself by means of her own labor, she failed to work, lived in idleness, and was, or threatened to become, a drone or a charge on the public. The evidence in this case fails to come within this rule. That introduced by the state was entirely consistent with that offered by the accused, which established the fact that the accused worked sufficiently to earn a support, however meager, for herself and her children. The conviction was therefore unwarranted by the evidence, and should have been set aside on motion for a new trial.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 431)

JENKINS v. STATE.

(Supreme Court of Georgia. Feb. 12, 1904.)

CRIMINAL LAW—EVIDENCE—CONFESSION.

1. Where, in the trial of a criminal case, a witness testifies that a confession was freely and voluntarily made to him by the accused, who was at the time under arrest, the evidence of the confession is admissible; and it is not incumbent on the state to show, as a condition

precedent to the admission of the evidence, that such confession was not the result either of inducements or threats made by the officer having the accused in custody. *Price v. State*, 40 S. E. 1015, 114 Ga. 855.

2. The verdict was warranted by the evidence. (Syllabus by the Court.)

Error from Superior Court, Colquitt County; R. G. Mitchell, Judge.

Jim Jenkins was convicted of murder, and brings error. Affirmed.

J. A. Wilkes and W. F. Way, for plaintiff in error. W. E. Thomas, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

COBB, J. The accused was convicted of murder, and sentenced to be hanged. He complains of the action of the court in refusing him a new trial. The ruling in the first headnote disposes of the only special assignment of error. The evidence fully warranted the verdict. There is no reason for reversing the judgment.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 430)

JENKINS v. STATE.

(Supreme Court of Georgia. Feb. 12, 1904.)

CONSTITUTIONAL LAW—SEED COTTON—TRANSPORTATION—POLICE POWER.

1. It was within the province of the General Assembly of this state, in the exercise of its police powers, "to make it unlawful to transport seed-cotton in or from the county of Harris, or from one place to another in said county, between the hours of sunset and sunrise, except when carried from the field where picked to the place of storage on the premises of the owner, and to prescribe a penalty for the violation" of the act of October 24, 1887, wherein the legislative will as to this matter was declared. Acts 1886-87, p. 878. This act is not, as contended by the plaintiff in error, "unconstitutional, in that it was never submitted to a vote of the qualified voters of the county," or because it "is special legislation, and is opposed to and subversive of private rights," or for any other reason assigned in the demurrer to the accusation in this case.

(Syllabus by the Court.)

Error from City Court of Hamilton; J. B. Burnside, Judge.

Ed Jenkins was convicted of crime, and brings error. Affirmed.

B. H. Walton, for plaintiff in error. R. A. Russell, Sol., for the State.

TURNER, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 495)

CHASON v. ANDERSON.

(Supreme Court of Georgia. Feb. 18, 1904.)

ERROR—BILL OF EXCEPTIONS—PARTIES—HUSBAND AND WIFE—APPLICATION OF PAYMENTS—NEW TRIAL.

1. The rule that all persons interested in sustaining the judgment complained of must be

made parties to the bill of exceptions cannot apply to a person not a party to the case in the trial court.

2. A creditor of a husband and wife, respectively, who is paid money by the husband, with instructions to apply it to his debt, has a right to assume that the money belongs to the husband; and, even though the money in fact belongs to the wife, she cannot recover it, or have it applied to her debt, without showing that the creditor knew at the time of the payment that the money was hers.

3. If the creditor knew that the money was the wife's, it was his duty to apply it to her debt; and evidence that he had such notice is admissible in the trial of a proceeding arising under an affidavit of illegality filed by the wife, the sole ground of which was that the execution had been paid off and discharged.

4. Objections to the form of a judgment cannot properly be made in a ground of a motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Decatur County; W. N. Spence, Judge.

Action by D. L. Bryant against Mason Anderson and Feriba Anderson. Judgment for plaintiff. Dio Chason, as transferee of the execution, sought to enforce it, and Feriba Anderson filed affidavit of illegality. Verdict of illegality, and Chason brings error. Reversed.

A. L. Townsend, for plaintiff in error. R. R. Terrell and Z. D. Harrison, for defendant in error.

COBB, J. An execution for \$52.95, principal, was issued in favor of D. L. Bryant against the goods and chattels, lands and tenements, of Mason Anderson and Feriba Anderson. Chason, as transferee of the execution, was seeking to enforce it, when Feriba Anderson filed an affidavit of illegality, setting up that the execution had been paid off and discharged. The issue thus raised came on to be tried before a jury in the superior court, and a verdict in favor of the illegality was rendered. Chason filed a motion for a new trial, which was overruled, and he excepted.

1. A motion was made to dismiss the writ of error on the ground that Mason Anderson was not made a party defendant in error to the bill of exceptions. Every party to a case in the trial court, who is interested in sustaining the judgment complained of, must be made a party defendant in error to the bill of exceptions, and be served with a copy thereof. Civ. Code 1895, § 5562. And failure to make such a person a party will result in a dismissal of the writ of error. *United States Leather Company v. National Bank*, 107 Ga. 263, 33 S. E. 31. If Mason Anderson had united with Feriba Anderson in filing the affidavit of illegality, the motion to dismiss would have been meritorious. We know of no law which required him to do this, even though the judgment and execution were issued against him and Feriba Anderson jointly. Not having been a party in the

court below, Mason Anderson would not have been a proper party to the bill of exceptions. The motion to dismiss will therefore be overruled.

2. Mason Anderson was the husband of Feriba Anderson. He owed Chason a debt for land. He paid Chason \$66.33, which Chason credited on the land debt. According to the testimony for the affiant in the illegality, this money belonged to her, and Mason Anderson requested Chason, at the time the money was paid, to apply it to the execution debt for which he and his wife were liable. Chason testified that he did not know the money belonged to Feriba Anderson, and that Mason Anderson requested that it be applied to his debt for the land. There was a sharp conflict between the parties on these points. The motion for a new trial complains of an extract from the charge of the court in the following language: "I charge you, gentlemen, that if you are satisfied from the evidence in this case that this money, at the time this receipt was given (\$66 and something); satisfied that that was funds arising from the sale of Feriba Anderson's cotton; that it belonged to Feriba Anderson; that it was her instruction to her husband (her husband acting as her agent) to pay it on the execution against her in the hands of Mr. Chason, the plaintiff—then she would be entitled to a credit on that execution. Especially would this be true if the plaintiff received this money with the knowledge of the fact that it was money arising from the sale of cotton that belonged to Feriba Anderson. If he knew that it was her money, or had reason to suspect that it was money arising from the sale of her cotton, he would have no right to appropriate it to a debt due by her husband. She would be entitled to recover it back, and in this suit she would be entitled to have it credited on her debt." This charge was susceptible of the construction that if the money paid by Mason Anderson to Chason belonged to Feriba Anderson, and she instructed her husband to apply it to the execution debt, she would be entitled to a credit of the amount on the execution, without more. The use of the word "especially" in the charge indicates that the foregoing proposition would be true, but would simply be given additional weight if it should appear that Chason knew that the money belonged to the plaintiff in the illegality. So construed, the charge was clearly erroneous. Unless Chason knew the money belonged to Feriba Anderson, he had a right to presume that it was Mason Anderson's, and to apply it to his debt, if instructed by him so to do. The burden was on the wife to show that Chason had notice that the money belonged to her. *Humphrey v. Copeland*, 54 Ga. 543. The error thus committed was on a vital issue in the case, and a new trial should have been granted on account of it.

3. Complaint is also made in the motion for a new trial that the court erred in "sub-

mitting" to the jury at all the question as to whether Chason had notice that the money paid by Mason Anderson belonged to his wife, the only issue raised by the illegality being whether the execution had been paid off and discharged. Even if the assignment of error in this ground was sufficiently specific, we do not think it is meritorious. The issue thus submitted was pertinent to the general question whether the execution had been discharged. If Chason knew the money belonged to the wife, he could not apply it to Mason Anderson's debt, even though she consented to it. If he had such notice, he was, in law, bound to apply the money to the execution; and it was competent for the wife to show payment of the execution by showing that it was her money paid to Chason, and that he knew it.

4. Another ground of the motion complains of the form of the judgment entered up on the verdict. Such an objection cannot be made the ground of a motion for a new trial. *Berry v. Clark*, 117 Ga. 964, 44 S. E. 824 (4). Other than as above indicated, the assignments of error are without merit.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 501)

SHIRLING v. KENNON.

(Supreme Court of Georgia. Feb. 13, 1904.)

LANDLORD'S LIEN—CROPS—EXEMPTIONS—CERTIORARI.

1. The landlord's special lien for rent upon the crops raised on the rented premises is superior to an exemption set apart in such crops under the provisions of Civ. Code 1895, § 2866 et seq.

2. Assignments of error and recitals of fact in a petition for certiorari not affirmatively verified in the answer cannot be considered.

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Action by J. H. Kennon against Fannie Shirling. Judgment for plaintiff. Defendant brings error. Affirmed.

Hendricks & Harrison, for plaintiff in error. J. Z. Jackson, for defendant in error.

COBB, J. 1. In three cases it has been held that the landlord's special lien for rent upon the crop raised upon the rented premises was for a debt so in the nature of the purchase money that it would be superior to an exemption set apart in such crop under the provisions of the Constitution of 1868. *Davis v. Meyers*, 41 Ga. 95; *Tallaferro v. Pry*, 41 Ga. 622; *Harrell v. Fagan*, 43 Ga. 339. Under the provisions of Civ. Code 1895, § 2873, which is a codification of an act passed in 1874, property set apart under the statutory or short homestead law is made subject to "sale for the purchase money." The

¶ 1. See Exemptions, vol. 23, Cent. Dig. § 24.

language of the act of 1874 is substantially that of the Constitution of 1868. The principles at the foundation of the decisions above cited would seem to be applicable in cases where the short homestead is involved.

2. For the reason stated in the second headnote, no other question than the one just disposed of is before us for decision.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 475)

GINN et al. v. CANNON.

(Supreme Court of Georgia. Feb. 13, 1904.)
APPEAL—REVIEW—FINDINGS OF CHANCELLOR
—JURISDICTION—RESIDENT OF COUNTY.

1. In view of the language of the deed, it was necessary to resort to parol evidence to determine where the proposed strip was to begin and end, and where the bed of the track was to lie. The evidence on this subject was conflicting, and the case falls within the well-established rule that this court will not interfere with the chancellor's finding on disputed questions of fact.

2. There was sufficient evidence to sustain the finding that one of the defendants was subject to the jurisdiction of the superior court of Rabun county; it appearing that he was unmarried, had no fixed abode, and had been in Rabun county for 18 months. Under the Civil Code of 1895, § 1825, he could, as to third persons, be treated as a resident of the county in which he was temporarily domiciled.

(Syllabus by the Court.)

Error from Superior Court, Rabun County; J. J. Kimsey, Judge.

Action by R. E. Cannon against Gus Ginn and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Cannon, in consideration of \$1, and the benefits to accrue to him from the construction of the road, granted to the Tallulah Falls Railway, not an easement, but a defeasible fee, to a strip 100 feet wide. He contends that at the time he signed the deed there had been two surveys of the route—one east and the other west of his residence—and that he supposed the road would be over one or the other of these lines. The defendants insisted that at the time of the delivery of the deed the locating pegs had been staked on a line between the house and barn, and that Cannon well knew that such was the proposed line. The instrument itself defined the land conveyed as being "a strip * * * of the width of 100 feet; fifty feet each way from the center of the bed of the track which the said party of the second part is about to build on said land, from the point where said road enters said land to the point where it leaves the same."

J. J. Bowden and H. H. Dean, for plaintiffs in error. J. W. H. Underwood, W. S. Paris, W. A. Charters, and L. E. Bleckley, for defendant in error.

LAMAR, J. The petition for injunction was brought, not against the company claim-

ing to be the owner of the strip, but against the persons actually engaged in the work of blasting and digging. Its deed, therefore, ought not to be construed in a case to which it is not a party, unless such construction is necessary to determine the question raised on the application for temporary injunction. It is enough to say that an inspection of the deed shows that it was necessary to resort to parol evidence to determine what land was conveyed, by fixing the point where the road was to enter and leave the land of Cannon, and also where the bed of the track was to lie. The evidence on this issue being conflicting, the case comes within the well-settled rule that this court will not interfere with the finding of the chancellor on disputed facts.

The same is true as to the finding that Ginn was a resident of Rabun county. While he claimed to live in Bartow, there was evidence that he was unmarried; that he had no fixed place of abode, and was engaged in a business which caused a frequent change of residence. It appeared that the partnership property had been returned for taxation in Rabun, and that Ginn for some reason was there charged on the books with a poll tax. This was sufficient to support a finding that he was a transient person, within the meaning of Civ. Code 1895, § 1825, and might, as to third persons, be deemed temporarily domiciled in Rabun county. *Watson v. R. & D. R. Co.*, 91 Ga. 223, 18 S. E. 306.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 431)

ROOKS v. STATE.

(Supreme Court of Georgia. Feb. 12, 1904.)

HOMICIDE—EVIDENCE—INSTRUCTIONS.

1. It is error to give to the jury a charge not authorized by the evidence; and where, in a criminal case, the evidence introduced by the accused would, if believed by the jury, have warranted his acquittal, and the effect of such a charge was necessarily to give to the state the benefit of a theory to which it was not entitled, a new trial should result.

(Syllabus by the Court.)

Error from Superior Court, Jasper County; H. G. Lewis, Judge.

J. B. Rooks was convicted of homicide, and brings error. Reversed.

Greene F. Johnson, for plaintiff in error. J. E. Pottle, Sol. Gen., and Jno. C. Hart, Atty. Gen., for defendant in error.

CANDLER, J. With one exception, we find no error in any of the rulings of the trial court of which complaint is made. The judgment overruling the motion for a new trial is reversed solely because of a charge of the court which is in the abstract perfectly sound, but which, in our opinion, was not adjusted to the evidence, and the ten-

dency of which, under all the circumstances, was necessarily prejudicial to the accused.

The evidence in the record as to the immediate circumstances of the tragedy under investigation is very confused, and leaves much to conjecture. It appears that on the night of the homicide a party of negroes, including the accused, the deceased, and Mary Standifer, a woman who was described by some of the witnesses as the sister of the deceased, but by herself and others as his cousin, had been to church. Presumably their way home led along a railroad track in the vicinity. The accused and the deceased left the church in different groups of negroes, and proceeded up the railroad track, but whether the deceased preceded the accused, or vice versa, and what distance separated them in their walk, are matters which it is almost, if not quite, impossible to determine from the record. The accused became involved in a quarrel with Mary Standifer, and fired two shots at her without effect. Naturally, Mary ran. Shortly thereafter (how long, the record does not disclose) the accused shot and killed the deceased. The state introduced only one eyewitness to the homicide, who testified that at the time he was shot the deceased was running, but whether he was running towards or from the accused the witness did not state. There was not a line of evidence to show any connection, except in point of time, between the killing of the deceased and the firing of the shots at Mary Standifer, or to indicate that the deceased was killed while attempting to protect his sister, or cousin (whichever she was), from bodily harm. We therefore conclude that it was error for the court to give to the jury the following charge: "I charge you, under the law as applicable to the evidence in the case, that a prother has the right to protect his sister, and may justify any defense made by him for the purpose of protecting her life. In order to justify himself for a homicide in defense of his sister, it must not be for the purpose of avenging any wrong that had been perpetrated upon his sister. Apply this principle of law to the case. If you conclude from the evidence that the deceased made an assault upon the defendant for the purpose of protecting the life of this sister, and it was necessary for him to do so to save the life of his sister, he would be justified under the law; and what was justifiable on the part of the deceased in defending his sister cannot be legal provocation to the defendant, and would not justify him in taking the life of the deceased." Clearly, this charge gave to the state the benefit of a theory which was not authorized by the evidence, and the evidence of the guilt of the accused was not so convincing as that it can be said that the charge set out was harmless. While the state made out its case, the accused on his part introduced evidence which, if believed by the jury, would

have authorized his acquittal. This being true, the error pointed out in the charge which has been quoted will require a reversal of the judgment overruling the motion for a new trial.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 461)

CASTELLOW v. BROWN et al.

(Supreme Court of Georgia. Feb. 12, 1904.)

APPEAL—REVIEW—DEED—RESCISSION—FRAUD.

1. This court will not consider an exception to the refusal of an amendment by the court below, where the amendment offered is neither set out in the bill of exceptions nor made an exhibit thereto.

2. When a deed to land is made for fraudulent purposes, neither the grantor therein nor his privies in estate can invoke the aid of the law to set the instrument aside and recover the land; and this is so though the deed was entirely without consideration, and the grantor remained in possession of the land until his death.

(Syllabus by the Court.)

Error from Superior Court, Lee County; Z. A. Littlejohn, Judge.

Action by Meta Castellow against S. B. Brown and others. Judgment for defendants, and plaintiff brings error. Affirmed.

J. R. Williams and Shipp & Sheppard, for plaintiff in error. D. H. Pope & Son, for defendants in error.

CANDLER, J. This was an action of complaint for land, a general demurrer to which was sustained in the court below. The plaintiff, besides excepting to the sustaining of the demurrer, also assigns error upon the refusal of the court to allow an amendment to her petition; but as the amendment was not set out in the bill of exceptions, and, being no part of the record, could not properly be brought up in the transcript, we cannot consider this assignment of error. *Moore v. Guyton*, 110 Ga. 330, 35 S. E. 339, and cases cited.

From the petition it appears that the plaintiff's father, Whitsett, at a date not definitely set out, made a deed to the land in dispute to his brother-in-law, Clegg, the sole purpose of the conveyance being to keep the land from being subjected to a judgment for alimony in an action then pending against Whitsett by his wife. The deed was entirely without consideration, and Whitsett remained in possession of the land until his death, at which time the plaintiff was a child. Clegg knew that the deed was fraudulent and void, and was a party to the fraud. Subsequently to the death of Whitsett, Clegg died, and his executrix sold the property to one of the defendants. An amendment to the petition, which was allowed, set up that Clegg took advantage of his relationship to Whitsett, and the very great influence which he exercised over him, and persuaded him

to separate from his wife, "and immediately upon the separation he began to work upon the fears of the said John T. Whitsett, and, as said John T. Whitsett was young and inexperienced, and had no one else to advise with him, the said V. A. Clegg finally accomplished his desire, and upon his assurance that everything would be all right, and that as soon as any trouble that might arise on account of the contemplated divorce proceedings was ended the property would be reconveyed to him," said John T. Whitsett, being entirely under the influence of said V. A. Clegg, deeded the property [in dispute] to said V. A. Clegg."

We are clear that the petition set out no cause of action, and was properly dismissed on demurrer. The plaintiff sues as the heir of her father, and to sustain her action she must make such a case as would entitle him to recover the land if he were in life. The petition itself shows that the deed from Whitsett to Clegg was a fraudulent transaction, the purpose of which was to defeat a possible judgment against Whitsett. It is not made to appear that Whitsett was of unsound mind, or that such duress or influence was exerted upon him as to render the deed not his voluntary act. It is a fundamental principle of law that courts will not lend their aid to relieve a man from the consequences of his own fraudulent act. In a suit involving fraud, where the parties are in *pari delicto*, the policy of the law is to keep hands off and leave the litigants where it finds them. This subject was treated fully in the case of *Parrott v. Baker*, 82 Ga. 365, 9 S. E. 1068, which has been cited approvingly many times, and which is closely analogous to the case under consideration. Counsel for the plaintiff, however, seek to differentiate the present case from the line of authorities announcing the principle to which we have referred, on the idea that, under the allegations of the petition in this case, there was not only an entire lack of consideration for the deed, but the grantor remained in possession of the land up to the time of his death; and several Georgia cases are cited in support of the contention that, for the reason stated, this case does not come within the rule. The cases cited, in our opinion, do not sustain this view. We are at a loss to understand how, as a matter of reason, the fact that an executed contract, admittedly fraudulent, was without consideration can affect the rule that, the parties being in *pari delicto*, the law will not relieve against its operation. The same may be said of the possession of the grantor, except that, as was held in *Harrison v. Hatcher*, 44 Ga. 638, if he had been sued in ejectment by the grantee, he might have defended by showing that the deed was fraudulent. This is in entire harmony with the rule laid down

in *Parrott v. Baker*, *supra*, and with the general scheme of the law that the machinery of the courts will not be used to aid in the consummation of a fraudulent design. In this case, after the death of Whitsett, possession of the land went into other hands, and his heir and privy in estate cannot now come into court and obtain relief against his fraud.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 426)

KING v. STATE.

(Supreme Court of Georgia. Feb. 12, 1904.)

CRIMINAL LAW—NEW TRIAL—APPEAL.

1. This court will not control the discretion of the trial judge in overruling a ground of a motion for a new trial, alleging that one of the jurors who tried the case was a resident of a county other than the one in which the trial was had, when the affidavits offered in support of the motion were contradicted by affidavits offered by the state, averring distinctly that the juror was, at the time of the trial, a resident of the county in which the trial was had.

2. The evidence was amply sufficient to warrant the verdict.

(Syllabus by the Court.)

Error from Superior Court, Madison County; H. M. Holden, Judge.

Cap King was convicted of crime, and brings error. Affirmed.

J. F. L. Bond, for plaintiff in error. D. W. Meadow, Sol. Gen., for the State.

COBB, J. King was tried and convicted, in Madison county, for the offense of pointing a pistol at another. The only special ground of his motion for a new trial set up that Pittman, one of the jurors, was a resident of Jackson county at the time of the trial. Several affidavits were offered in support of the averment made in this ground. The state offered, by way of counter showing, two affidavits of the juror, in which he averred distinctly and unequivocally that he resided in Madison county at the time the trial was had. Under these circumstances this court will not interfere with the discretion of the trial judge in overruling this ground of the motion. The rule is similar to that followed by this court in cases where the verdict is sought to be set aside on account of the disqualification of a juror for any other reason. See *Jones v. State*, 117 Ga. 710, 44 S. E. 877 (4); *Perry v. State*, 117 Ga. 719, 45 S. E. 77 (2). There was ample evidence to warrant the verdict, and the general grounds of the motion are therefore without merit.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 446)

JOHNSON v. STATE.(Supreme Court of Georgia. Feb. 12, 1904.)
CRIMINAL LAW—APPEAL—REVIEW—NEW TRIAL.

1. The circumstantial evidence having been sufficient to justify the judgment of conviction, and the trial judge, after a re-examination of the evidence, having declined to grant the motion for a new trial, this court will not control his discretion.

(Syllabus by the Court.)

Error from City Court of Moultrie; W. A. Covington, Judge.

Luke Johnson was convicted of crime, and brings error. Affirmed.

J. A. Wilkes, for plaintiff in error. T. W. Mattox, for the State.

COBB, J. The accused was convicted of the offense of adultery and fornication. His motion for a new trial is based upon the ground that the verdict was contrary to law and the evidence; the special assignment under this general complaint being that, while the evidence may have justified a finding that the accused and the woman were living in a state of adultery and fornication, it did not show that any specific carnal act had been committed between them. A witness for the state testified that the accused was married and the woman was unmarried; that on three different occasions within the year in which the accusation was brought the witness went to the house where the accused was living, knocked at the door, when the accused came to the door in his night clothes, opened it, and went back to bed; that the woman was in bed with the accused, both being covered up; that the last time when this occurred was early in the morning; that there was only one bed in the room; that no carnal act was committed in the presence of the witness. The witness admitted that he was at enmity with the accused, and was anxious for him to be convicted.

Notwithstanding this admission, the credibility of this witness' testimony was for the trial judge, who presided without a jury. Specific acts of sexual intercourse may be proved by circumstantial evidence. If direct evidence was required, it would be almost impossible to make out the offense. All that the law requires is that the evidence be such as to justify the inference, beyond a reasonable doubt, that the carnal act has been committed. If the testimony above abstracted was true, it came within this rule, and authorized the judgment of conviction. See *State v. Austin* (N. C.) 13 S. E. 219; *State v. Ean* (Iowa) 58 N. W. 898; *Com. v. Mosler* (Pa.) 19 Atl. 943 (4); *Com. v. Clifford* (Mass.) 13 N. E. 345 (1); *Blackman v. State*, 36 Ala. 295. The facts above set forth are stronger than those in *Elridge v. State*, 97 Ga. 192, 23 S. E. 832, and *Starke v. State*, 97 Ga. 193, 23

S. E. 832, in which cases a majority of the court upheld the conviction. The circumstances proved in *Weaver v. State*, 74 Ga. 376, and in *Weems v. State*, 84 Ga. 461, 11 S. E. 501, and especially in the former, did not afford such strong evidence of guilt as those in the present case. In both of those cases the conviction was set aside. In *Lawson v. State*, 116 Ga. 571, 42 S. E. 752, it was held that, under an accusation charging the offense of living in a state of adultery, mere proof of a single act of adultery would not be sufficient to convict. Counsel for the plaintiff in error in the present case draws from this decision the conclusion that, under an accusation for the specific act, proof of living together in a state of unlawful sexual intercourse would be insufficient. This reasoning is not sound. The greater includes the less, but the less does not include the greater. It is also argued that the testimony for the accused was sufficient to rebut the presumption of guilt arising from the evidence for the state. A physician testified that the accused was and had been for some time afflicted with tertiary syphilis, and that sexual intercourse by a man afflicted as the accused was would be very painful. He testified, however, that he would not say a man in this condition was unable to have sexual intercourse. The judge, who tried the case without a jury, was of opinion that the case was made out by the evidence for the state, and that the evidence for the accused was not sufficient to overcome the presumption arising therefrom. All these were questions for his determination, and, if he made an error in reaching this conclusion, he had an opportunity to correct it when the motion for a new trial was heard. Having, upon a re-examination of the evidence, approved the judgment of conviction, we cannot say that he has abused his discretion.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 552)

ARMITAGE-HERSCHELL CO. v. MUSCOGEE REAL ESTATE CO.(Supreme Court of Georgia. Feb. 16, 1904.)
CHattel MORTGAGE—FAILURE TO RECORD—PRIORITIES.

1. A mortgage executed in another state on personality subsequently brought into this state, but not recorded, in the county where the property is brought, within the six months provided by Civ. Code 1895, § 2728, is postponed to a purchase of the same property made in good faith, and without notice, under the foreclosure of a duly recorded junior mortgage, although the purchase was made before the expiration of the six months allowed by law for the senior mortgagee to record his incumbrance. *Hubbard v. Andrews*, 76 Ga. 177, and *Peterson v. Kaigler*, 3 S. E. 655, 78 Ga. 464, distinguished.

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; W. B. Butt, Judge.

Action by the Armitage-Herschell Company against the Muscogee Real Estate Company. Judgment for plaintiff, and both parties bring error. Judgment on main bill of exceptions affirmed, and on cross-bill dismissed.

Charlton E. Battle, for plaintiff in error.
L. F. Garrard, Frank Garrard, and Cecil Neill, for defendant in error.

CANDLER, J. The plaintiff below was the holder of a mortgage executed in New York on personalty which was subsequently removed to Georgia, where it was again mortgaged. The Georgia mortgage was promptly recorded. The New York mortgage was not recorded within the six months allowed by Civ. Code 1895, § 2726, for the record of mortgages on personalty outside this state which is afterwards brought in the state. Before the expiration of six months after the property was brought into Georgia, the Georgia mortgage was foreclosed, and the property was bought at the execution sale by the defendant without notice of the existence of the New York mortgage. The New York law provides that a mortgage shall convey title, and the plaintiff accordingly brought trover to recover the property. The trial judge directed a verdict for the defendant, and the plaintiff excepted. The defendant filed a cross-bill of exceptions, complaining of certain rulings on the admission of evidence.

The effect of the statute prescribing a time limit for the recording of instruments is that, if the instrument is recorded within that time, the record, and consequently the notice imported thereby, relates back to the time of the execution of the instrument. Record after the expiration of that time will not be invalid, but it is only notice from the time when the record is made, and does not relate back to the time of execution. 24 Am. & Eng. Enc. L. (2d Ed.) 96, 97; Anderson v. Dugas, 29 Ga. 442. Civ. Code 1895, § 2727, provides that mortgages not recorded within the time required remain valid as against the mortgagor, but are postponed to all other liens, created or obtained, or purchases made prior to the actual record of the mortgage. See, also, Toomer v. Dickerson, 37 Ga. 437; Wise v. Mitchell, 100 Ga. 614, 28 S. E. 382; Lytle v. Black, 107 Ga. 388, 33 S. E. 414; White v. Interstate B. & L. Ass'n, 106 Ga. 146, 32 S. E. 26. It would seem, therefore, that the failure of the plaintiff to record its mortgage in Georgia within six months after the time it was brought within the state was fatal to its claim against the defendant, which, while it bought within the six months period referred to, bought in good faith, and without any notice of a prior incumbrance on the property. Had the plaintiff recorded its mortgage within the six-month period, the notice implied by the record would have related back to the execution of the instrument, antedating the purchase by the defendant, and it would have of necessity pre-

valled in the present action. This, however, was not done; record notice was not given until long after the six-month period had elapsed; and the defendant is therefore protected as an innocent purchaser without notice.

The two cases of Hubbard v. Andrews, 76 Ga. 177, and Peterson v. Kaigler, 78 Ga. 464, 3 S. E. 655, cited and confidently relied on by counsel for the plaintiff in error, seem at first blush to hold contrary to what is laid down in the foregoing, but a closer examination of them discloses that the conflict is more apparent than real. In Hubbard v. Andrews it was held that "where a mortgage on personal property was regularly made and recorded in another state, and, the property having been brought into this state, the mortgagee followed it and foreclosed his mortgage in the county where the property was found, and caused it to be levied, which was done before the expiration of the time allowed for the registry of such a mortgage in this state, the foreclosure was valid as against a bona fide purchaser of the property without notice of the incumbrance, although the mortgage was not recorded in this state until after its foreclosure." It appeared, however, that the foreign mortgage was foreclosed in this state within less than 10 days after the property was brought in the state; and the effect of the decision rendered is nothing more or less than that such an assertion of the creditor's rights within the six-month period dispensed with the necessity of giving record notice of the existence of his mortgage. Such a state of facts is not presented by the record now before us. Peterson v. Kaigler is very similar in its facts to Hubbard v. Andrews, and rests squarely upon the decision in that case; but, even if that were not so, it was decided by only two justices, and of itself is not binding in this court. It will thus be seen that the peculiar circumstances of those cases take them out of the rule of law applicable to the case now under consideration. Under the facts as presented by the record, no other verdict than one for the defendant would have been authorized by law, and it was accordingly not error for the court to so direct.

As the judgment on the main bill of exceptions is affirmed, the cross-bill will, in accordance with the usual practice, be dismissed.

Judgment on main bill of exceptions affirmed; cross-bill dismissed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 363)

COLUMBUS R. CO. v. DORSEY.

(Supreme Court of Georgia. Jan. 13, 1904.)

NEGLIGENCE—ELECTRIC LIGHT WIRE—CONTRIBUTORY NEGLIGENCE.

1. Where a lineman of a telephone company, of experience, aged 19 years, was killed by contact with a wire of an electric lighting company,

which had been strung on the poles of the telephone company, and from which wire the insulation had worn off near the pole which he had climbed, and for several feet on each side of the pole—he knowing, or being able to know by ordinary diligence, that the wire was so exposed—his mother cannot recover from the electric lighting company the value of his life.

(Syllabus by the Court.)

Error from City Court of Columbus; J. L. Willis, Judge.

Action by Susie Dorsey against the Columbus Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

L. F. & Frank Garrard, J. H. Martin, and Cecil Neill, for plaintiff in error. W. R. Hammond and John D. Little, for defendant in error.

TURNER, J. Mrs. Dorsey brought a suit against the Columbus Railroad Company, a corporation having its principal office in the city of Columbus, alleging that the defendant had injured and damaged her in a large sum. Her petition, as amended at the trial, set forth averments to the following effect: The defendant was the owner of an electric lighting system in the city of Columbus, and was operating an electric lighting plant. In the operation of its business, on a day named, the defendant was engaged in manufacturing and generating currents of electricity, and transmitting them along wires strung upon poles in that city, which currents were of sufficient strength to be dangerous to human life. On said day a son of the plaintiff was in the employ of the Southern Bell Telephone & Telegraph Company, and was performing the duties of a lineman for said last-named company. As such lineman, he ascended one of the poles of the telephone company for the purpose of performing some duty in connection with the stringing of the wires of that company on said pole, or fastening a crossbeam for said purposes; and while in the performance of his duty he came in contact with one of the wires of the defendant, which was charged with electricity, and, by reason of said contact, received a heavy and dangerous charge of electricity through his body, by means of which he was instantly killed. Plaintiff's son was acting with proper prudence and precaution, and was without fault on his part in coming in contact with said wire. This wire which was charged with the current of electricity which caused his death was the property of the said defendant, and was in use by said defendant at the time in the transmission of one of its currents of electricity in the transaction of its business; and the same was, or should have been, an insulated wire, but the insulation of the wire had become worn off at a point near the pole, and for several feet on either side of the same, so as to leave said wire exposed, and making it dangerous at that point. The defendant was negligent in allowing the insulation of said wire to be

worn off, and said wire to remain exposed, so that a person climbing said pole would be in danger of coming in contact with an exposed wire heavily charged with a dangerous current of electricity. Said wire of the defendant was strung upon the pole of said telephone company with the consent of said telephone company, and it was the duty of the defendant to protect said wire so that the operatives of the telephone company, whose duties it was to ascend the poles of said company in and about their duties in connection with their work for it, would not be exposed to the danger of coming in contact with a wire heavily and dangerously charged with electricity, and the defendant was negligent in not doing so. The plaintiff further alleged in her petition that she had been dependent upon her son for a support, and that he had, at and before the time of his death, contributed to her support; that he left neither wife nor children, never having been married; and that at and before his death he was able to earn, and did earn, the sum of \$2 per day.

To this petition the defendant demurred generally, on the ground that no cause of action was therein set forth, and also demurred specially because (1) the plaintiff did not allege that the defendant company strung its wire upon the pole of the telephone company, or that it was strung on its pole, with the knowledge and consent of the defendant company; and (2) because the plaintiff did not aver that her son did not know of the fact that said wire was attached to the pole of the telephone company, and had become defective by reason of the insulation being worn off.

The court below overruled these several demurrers, and the defendant excepted. In the argument upon these demurrers before this court, it was conceded by counsel for the defendant in error that it was to be presumed that this unfortunate lineman did know that the wire of the plaintiff in error was strung upon the pole of the telephone company, and that he also knew that at or near this pole, and for several feet on each side of it, the wire was naked or without necessary insulation. It seems, also, that he was a young man of experience in his business, earning \$2 a day. Under these circumstances, if there was a safe way to pass this dangerous wire, it was incumbent on the lineman to avoid the danger, and his failure to do so would demonstrate negligence on his part. On the other hand, if it was unsafe to undertake to pass this dangerous wire, the lineman should not have attempted it. In either view, he did not observe ordinary care, and his mother is not entitled to recover. Civ. Code 1896, § 3530. The general allegation in her petition that he was acting with proper prudence and precaution, and was without fault on his part, seems to be rebutted by the facts and circumstances recited in the petition. We

therefore think the demurrers should have been sustained.

Judgment reversed. All the Justices concurring.

(119 Ga. 514)

T. L. SMITH & CO. v. C. S. HIRSH & CO.

(Supreme Court of Georgia. Feb. 13, 1904.)

**ERROR—DISMISSAL—SERVICE—ENTRY—
AFFIDAVIT OF CLERK.**

1. The motion to dismiss must be sustained, there being no entry of service and no acknowledgment of service entered upon or attached to the bill of exceptions.

2. An affidavit of the clerk of the superior court, attached to the brief of counsel for plaintiff in error, setting forth reasons why there had been no service of the bill of exceptions, cannot be considered in answer to a motion to dismiss.

(Syllabus by the Court.)

Error from Superior Court, Echols County; R. G. Mitchell, Judge.

Action between T. L. Smith & Co. and C. S. Hirsch & Co. From the judgment Smith & Co. bring error. Dismissed.

G. A. Whitaker, for plaintiffs in error. E. K. Wilcox and Barrs & Bryan, for defendants in error.

LAMAR, J. There is no entry of service of the bill of exceptions indorsed thereon or annexed thereto; and for this reason, and on the authority of *Akerman v. Neel*, 70 Ga. 728, *Crow v. State*, 111 Ga. 645, 86 S. E. 858, and *Hewell v. State*, 117 Ga. 752, 45 S. E. 76, the motion to dismiss must be sustained. Attached to the brief of counsel for the plaintiff in error is an affidavit of the clerk of the superior court, giving reasons why there had been no service or acknowledgment of service. The cases above cited show that such affidavit cannot be considered in answer to a motion to dismiss.

Writ of error dismissed. All the Justices concurring, except **SIMMONS, C. J.**, absent on account of sickness.

(119 Ga. 426)

SCOTT v. STATE.

(Supreme Court of Georgia. Feb. 12, 1904.)

LARCENY—EVIDENCE.

1. The recent possession of the stolen property, coupled with the false statement as to the person from whom the defendant had obtained the same, was sufficient to make out a prima facie case of larceny; and there being no contradictory evidence, and no error of law assigned, the judgment refusing a new trial is affirmed.

(Syllabus by the Court.)

Error from City Court of La Grange; F. M. Longley, Judge.

Major Scott was convicted of larceny, and brings error. Affirmed.

E. T. Moon, for plaintiff in error. Henry Reeves, for the State.

LAMAR, J. Personal property was stolen, and found in the possession of a witness, who testified that he had obtained it from the defendant shortly after it was missed by the owner. The defendant claimed that he purchased it from one S., which the latter on oath denied. Another witness testified that he saw the defendant with the same soon after the loss, endeavoring to sell it for very much less than the real value. The recent possession of the stolen property, coupled with the false statement of the accused as to the person from whom he had obtained it, and the absence of any testimony contradicting that offered by the state, was sufficient to sustain the verdict; and, there being no error of law assigned, no reason is presented why a new trial should be granted.

Judgment affirmed. All the Justices concurring, except **SIMMONS, C. J.**, absent on account of sickness.

(119 Ga. 521)

SOUTHERN RY. CO. v. HARRELL.

(Supreme Court of Georgia. Feb. 13, 1904.)

RAILROADS—KILLING STOCK—EVIDENCE.

1. On the trial of an action in a justice's court, against a railway company, for damages for the killing of an animal by the running of its train, when there was no evidence tending to contradict, in any material particular, the positive testimony that the company's employes could not, by the exercise of all ordinary care and diligence, have prevented the casualty, a verdict against the company was without evidence to support it, and should for that reason have been set aside on certiorari.

(Syllabus by the Court.)

Error from Superior Court, Dodge County; D. M. Roberts, Judge.

Action by W. W. Harrell against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

De Lacy & Bishop, for plaintiff in error. J. E. Wooten, for defendant in error.

FISH, P. J. W. W. Harrell sued the Southern Railway Company, in a justice's court, for damages for the killing of his cow by the running of defendant's train of cars. There was a verdict for the plaintiff. The defendant's certiorari having been overruled, it excepted. One of the assignments of error made in the petition for certiorari was that the verdict was without evidence to support it. The evidence showed that the cow was killed by the running of the defendant's train, and that she was worth \$50, the amount of the verdict. Several witnesses testified in behalf of the plaintiff, but none of them saw the train kill the cow. Three of them testified that they were familiar with the track where the cow was killed. One of them swore that the cow "could be seen by the engineer in his cab anywhere in the cut at least seventy-five yards; possibly more." The other two testified that in their opinion the engineer could have seen a cow for at least 75 yards on the track at the point where

the animal in question was killed. It was shown that the fireman who was on the engine which killed the cow was inaccessible, and that his testimony could not be procured by the defendant. The engineer who was on the engine at the time the cow was killed testified that he and the fireman were properly looking ahead at the time; that when he first saw the animal it was on his side, to the right of the track, about 15 feet from it, on the edge of a cut, and about 75 feet ahead of the engine; that from the top of the cut to the track the distance was about 15 feet; that the cow ran very rapidly down the side of the cut directly toward the track, and that she and the engine reached the point on the track where she was struck at the same time; that there was a curve in the track where the casualty occurred, and it was impossible for him to have seen the cow on the edge of the cut, where she was when he first saw her, a greater distance than 75 feet; that as soon as he discovered her the brakes were "jammed down," but she was struck before they could have any effect on the speed of the train, which consisted of six loaded passenger cars, and was running down grade at about 35 miles an hour; that it was absolutely impossible to prevent the train running over the cow. He further testified that had the cow been on the track he could have seen her for a distance of about 150 feet. As the cow was not standing on the track, but was killed as soon as she reached the track from the top of the cut, the evidence of the plaintiff's witnesses, that she could have been seen on the track or in the cut at that point, by the engineer, for at least 75 yards, though in conflict with the engineer's testimony, that he could not have seen her on the track at that point for more than 150 feet, was not material; and as the engineer's uncontradicted testimony showed that it was impossible, in the exercise of all ordinary care and diligence, to have prevented the train from running over the cow, the presumption arising against the defendant, upon proof of the killing of the animal by the running of the train, was successfully rebutted. It follows that it was erroneous to overrule the certiorari, as there was no evidence to support the verdict.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 517)

CITIZENS' BANKING CO. et al. v. PARIS.

(Supreme Court of Georgia. Feb. 13, 1904.)

CERTIORARI—PETITION—ASSIGNMENT OF ERROR.

1. A petition for certiorari which does not "plainly and distinctly set forth" an assignment of error on any ruling, decision, or judgment of the inferior judiciary is void; and, being void, no renewal thereof can be had within six months.

(Syllabus by the Court.)

Error from Superior Court, Dodge County; T. A. Parker, Judge.

Money rule by B. S. Paris, administrator, against Rogers, sheriff. The Citizens' Banking Company intervened. Judgment for Paris and Rogers, and the banking company brought certiorari. Writ dismissed, and defendants bring error. Affirmed.

J. E. Wooten and W. M. Clements, for plaintiffs in error. J. P. Highsmith, for defendant in error.

COBB, J. Paris, administrator, was plaintiff, and Rogers, sheriff, defendant, and the Citizens' Banking Company, intervener, in a money rule brought in the city court of Eastman. The judgment was in favor of Paris. Rogers and the banking company sued out a petition for certiorari. At the hearing in the superior court this petition was dismissed "because insufficient in law, there being no proper assignment of error." Within less than six months after the dismissal the plaintiffs in certiorari undertook to renew under the provisions of Civ. Code 1895, § 3786. When the second petition came on for a hearing, a motion was made to dismiss it upon various grounds; one among them being, in substance, that the first petition was not such a one as that a renewal thereof could be had under the statute. The court dismissed the petition "upon the general grounds that plaintiffs did not make out a case entitling them to certiorari," and to this judgment exception has been taken.

Civ. Code 1895, § 3786, provides that "if a plaintiff shall be nonsuited, or shall discontinue or dismiss his case, and shall recommence within six months, such renewed case shall stand upon the same footing, as to limitation, with the original case." This section has been held to apply to certiorari cases, and has been uniformly treated as being applicable to dismissals other than those which are voluntary. See the cases cited *infra*. It is settled that, if the first petition be void for any reason, no renewal can be had under the statute. *Southern Railway Co. v. Goodrum*, 115 Ga. 689, 42 S. E. 49; *Hill v. State*, 115 Ga. 833, 42 S. E. 286. This, of course, results from the fact that, if the first petition is an absolute nullity, there is no suit, and nothing to be renewed. The question, therefore, to be determined, is whether a petition for certiorari which contains no assignment of error, or, what is the same thing, no proper assignment of error, is absolutely void. The statute relating to bills of exceptions in the Supreme Court provides that the "bill of exceptions shall specify plainly the decision complained of, and the alleged error." Civ. Code 1895, § 5527. It has been held that a bill of exceptions which contains no assignment of error, or an insufficient assignment of error, presents nothing for decision by the Supreme Court, and must be dismissed. *Sewell v. Conkle*, 64 Ga. 436; *Smith v. Frost*, 74 Ga. 842; *Williams v. Railroad Company*,

98 Ga. 392, 25 S. E. 557; Dismukes v. Bainbridge State Bank, 99 Ga. 179, 25 S. E. 181; Wheeler v. Worley, 110 Ga. 513, 25 S. E. 639; Jackson v. Fitzpatrick, 114 Ga. 364, 40 S. E. 234; Neal Loan & Banking Company v. Wright, 116 Ga. 895, 42 S. E. 715. The certiorari statute provides that the petition "shall plainly and distinctly set forth the errors complained of." Civ. Code 1895, § 4637. The requirement of this statute is very similar to that for bills of exceptions, and the principle of the decisions above cited would apply to petitions for certiorari. A petition for certiorari which contains no assignment of error with which the court can deal is an absolute nullity. It is so much waste paper, and the court has no authority to decide any question which is sought to be raised therein, and can only strike the petition from its files. Being void as a suit, no renewal of it can be had under the two decisions first above cited. Inasmuch as the plaintiffs in certiorari acquiesced in the dismissal of their first petition on the ground above stated, we are bound to assume that the superior court was right in adjudging that such petition contained no sufficient assignment of error on any ruling or judgment of the city court.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 442)

STINCHCOMB v. STATE.

(Supreme Court of Georgia. Feb. 12, 1904.)

CRIMINAL LAW—INDICTMENT—ALIAS—MISNOMER—PLEA.

1. Where an accused person is indicted, with an alias, under more than one name, a special plea of misnomer, to be good, must aver unequivocally that the accused has never been known by either of the names set out in the indictment, and that neither is his true name.

(Syllabus by the Court.)

Error from Superior Court, Walton County; R. B. Russell, Judge.

William Stinchcomb was convicted of crime, and brings error. Affirmed.

Hal. G. Nowell, for plaintiff in error. C. H. Brand, Sol. Gen., for the State.

CANDLER, J. The sole object of description of the person of an alleged offender in an indictment is to identify the person to be tried as the one indicted, and usually one may be indicted by any name which will serve the purpose of identification. 10 Enc. Pl. & Pr. 505. If the offender is known by more than one name, or if the grand jury is uncertain which of the several names is the real name of the person, he may be indicted under an alias dictus; and a plea of misnomer to such an indictment must, to prevail, set out clearly that the accused has never been known by any of the names therein set out. These are familiar principles of criminal procedure, and need no elaboration.

Hence, when one is indicted as Gus Stinchcomb, alias Bud Stinchcomb, and his real name is William Stinchcomb, in order to take advantage of the alleged misnomer he must, in his special plea, aver unequivocally that he has never been known as either Gus Stinchcomb or Bud Stinchcomb. This is not done when he pleads "that he has never been known and called by the name of Gus Stinchcomb, alias Bud Stinchcomb; that his name is not Gus Stinchcomb, alias Bud Stinchcomb, as alleged in the bill of indictment, * * * but his true name is, and ever has been, William Stinchcomb." Such a plea is not sufficient in law, and a demurrer thereto on the ground that it failed to aver that the accused was not known by the name of Bud Stinchcomb, and that he was never known by any other name than William Stinchcomb, was properly sustained.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 441)

ANDERSON et al. v. STATE.

(Supreme Court of Georgia. Feb. 12, 1904.)

HOMICIDE—EVIDENCE.

1. There was no error of law requiring the granting of a new trial. The evidence as to one of the accused was sufficient to warrant the verdict, but as to the other it was not.

(Syllabus by the Court.)

Error from Superior Court, Harris County; W. B. Butt, Judge.

Jerry Anderson and one Walker were convicted of murder, and bring error. Reversed as to Anderson, and affirmed as to Walker.

J. R. Terrell and R. A. Russell, for plaintiffs in error. S. P. Gilbert, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the state.

COBB, J. Walker and Anderson were convicted of murder in taking the life of Hudson. The evidence is voluminous and conflicting, and of such a character that it is difficult to determine what is the truth of the case. There is evidence, however, which supports the verdict so far as Walker is concerned; it being shown that he fired a pistol at the deceased under circumstances which did not afford sufficient justification, that the ball struck the deceased, and that his death resulted from the wound thus inflicted. The case is different as to Anderson. While there is evidence that he fired at the deceased, there is no evidence that the shot struck the deceased. Anderson, therefore, could not have been legally convicted, unless there was evidence to show a conspiracy between him and Walker to take the life of the deceased. The evidence is not sufficient for this purpose. The special grounds of the motion for a new trial disclose no reason which required the granting of a new trial. The court erred in overrul-

ing the general grounds of the motion so far as they related to Anderson, but committed no error in so far as Walker was concerned.

Judgment reversed as to Anderson, and affirmed as to Walker. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 556)

PHILLIPS v. SMITH et al.

(Supreme Court of Georgia. Feb. 16, 1904.)

DIRECTING VERDICT—ASSENT TO DEVISE.

1. The assent of an executor to a devise will be presumed after the lapse of more than 30 years; and where a finding that such assent was given will necessarily constrain a verdict for the defendant, and the plaintiff fails to rebut the presumption of assent, it is not error to direct a verdict for the defendant.

(Syllabus by the Court.)

Error from Superior Court, Montgomery County; D. M. Roberts, Judge.

Action by W. M. Phillips, administrator, against J. F. Smith and others. Judgment for defendants, and plaintiff brings error. Affirmed.

J. B. Geiger and Jas. K. Hines, for plaintiff in error. F. H. Saffold, A. C. Wright, and R. J. Williams, for defendants in error.

CANDLER, J. This was an action of ejectment, originally instituted by Salter, as executor of Micajah Phillips, against Smith, to recover land in Montgomery county. Salter died pendente lite, and William Phillips was appointed administrator with the will annexed and made a party plaintiff. On the trial the plaintiff introduced a grant from the state to Micajah Phillips conveying the land in dispute, and proved the value of the land and his right to sue as administrator. The defendant relied on three defenses: (1) Title under a sheriff's sale of the premises as the property of Micajah Phillips; (2) that the title to the land had been adjudicated against the plaintiff in a former litigation between Phillips and others, suing as heirs at law, and Rentz Bros. & Roberts, under whom the defendant claimed; and (3) title out of the plaintiff by reason of the fact that with the assent of the executor the land had passed from him to the legatees under the will of Micajah Phillips. In the view we take of the case it is only necessary to pass upon the questions presented by the last of these defenses, the judge having directed a verdict for the defendants, and it not being material to the decision now made to pass upon the complaints as to the admission of evidence arising under the other defenses set up.

When the litigation touching this case was before us on a former occasion (*Phillips v. Rentz*, 106 Ga. 249, 32 S. E. 107, wherein W.

M. Phillips and others, as heirs at law of Micajah Phillips, were suing Rentz Bros. & Roberts to recover damages in trespass), it was held that "where the plaintiff in a suit to recover for damages to realty relies upon his right as an heir at law, and upon the trial it appears from the evidence of the defendant that the ancestor of the plaintiff died testate, and that the land which is claimed to have been damaged was devised, but the record does not disclose who was the devisee, it is not error to direct a verdict in favor of the defendant." It is clear that if title passed out of the executor by reason of his assent to the vesting of the legacy in the will of his testator, his successor, the administrator with the will annexed, cannot recover the land in an action of ejectment. Under Civ. Code 1895, §§ 3319, 3320, no devise or legacy passes title until the assent of the executor is given to such devise or legacy; but the assent of the executor may be presumed from his conduct as well as his expressed consent. We think the evidence in this case conclusively shows that Salter, the executor, assented to the devise of the land in dispute to the persons named in the will of Micajah Phillips, and that, taking the testimony all together, there is really no conflict on this point. A casual reading of the evidence might give rise to the impression that there was some evidence which, if believed, would tend to disprove this assent; but, taking the testimony of the different witnesses all together, in no case is the contention that assent was given really disputed. Even in the absence of a showing that the executor expressly consented to the devise, however, it is clear that his assent will be presumed from the length of time—more than 30 years—which elapsed after the death of the testator before the suit was brought. *Flemister v. Flemister*, 83 Ga. 79, 9 S. E. 724. This presumption may be rebutted, it is true; but the burden is on the party denying assent to overcome the presumption arising from the lapse of time, and in this case the burden was not sustained. See, on this subject, *Coleman v. Lane*, 26 Ga. 515; *Jourdan v. Miller*, 41 Ga. 51; *Thursby v. Myers*, 57 Ga. 155; *Vanzant v. Bigham*, 76 Ga. 759.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 437)

THORNTON v. STATE.

(Supreme Court of Georgia. Feb. 12, 1904.)

CRIMINAL LAW—PRINCIPAL IN SECOND DEGREE.

1. To constitute one a principal in the second degree, he must not only be present when the crime is committed, but must aid and abet the actual perpetrator of the crime. One who is present when a crime is committed, but neither assists in its commission, nor shares in the crim-

¶ 1. See *Executors and Administrators*, vol. 22, Cent. Dig. § 1154.

¶ 1. See *Criminal Law*, vol. 14, Cent. Dig. § 28.

inal intent of its perpetrator, is not guilty as a principal in the second degree.

(Syllabus by the Court.)

Error from Superior Court, Chattahoochee County; W. B. Butt, Judge.

Wilborn Thornton was convicted of murder, and brings error. Reversed.

J. B. Hudson, C. C. Minter, Graham Forrester, and Hatcher & Carson, for plaintiff in error. S. P. Gilbert, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

FISH, P. J. Dan Amos and Wilborn Thornton were indicted for the murder of Sam Gordon. In one count they were both charged as principals, and in another count Thornton was charged as principal in the second degree. Upon the trial of Thornton, it appeared that Amos, Thornton, Gordon, and others attended a dance at the house of one Wilson, in Chattahoochee county, and that, some time between 10 and 1 o'clock of the night of the dance, Thornton loaned Amos a pistol. Ben Gordon, a witness for the state, testified: "I saw the defendant [Thornton] give Amos something. Amos came up to him and told him he wanted to get his riprap, meaning his pistol. Said Sam Gordon had been taking money away from him when they met, and if he took any more he was going to kill him. Thornton told him to take it and kill him if he took any more. He gave him his pistol." It appeared that Dan Amos shot Sam Gordon next morning about 7 o'clock, in an old field, about 100 yards from Wilson's house. Ben Gordon further testified: "When shooting took place, Thornton and Amos were pretty close together—about five feet—talking. Dan told Sam he owed him a dime. He was standing, talking, and Sam was sitting down. Sam told him he didn't owe him any dime. He said, 'Yes, you do.' Sam says, 'If I owe you a dime, I will pay your dime; and I am going to make some of you boys shoot me with these little guns you are carrying around here.' Sam had no weapon in his hand, and done nothing to Amos when he shot him. Amos was standing up. Thornton gave Amos the pistol before day; can't say exactly what time; the morning before day he was shot. It was about a hundred yards from the place he gave him the pistol to where killing took place. * * * I do not say now that they played cards that night before they went out in the field, and Sam won their money. They didn't do it, and they didn't play cards out in the field next morning. They had just got out there, and they were not playing at night. * * * They were sitting down, talking; did not have anything with them; had no cards, no dice; just sitting around. I was not sitting down. Johnnie Gordon and Wilborn Thornton were there. The fuss started between my brother and Dan, about a dime Dan said he owed him; didn't say about what. * * * Wasn't

any row going on there at all; everybody seemed to be in good humor until Dan told my brother that; and the first I knew of it was the shooting. * * * I told him [Sam Gordon] about Dan borrowing the pistol from Wilborn." Arthur Denson, a witness for the state, testified: "Was at Wilson's house where he [Amos] got the pistol. Was out doors, and Dan Luther [Amos] came out, and Wilborn he came out, too, and Dan Luther says, 'Wilborn, lend me your riprap;' he says, 'Sam Gordon has been robbing me in every game I get into with him, and, if he robs me to-night, I will kill him.' So he let him have it. Wilborn says, 'Take it and kill the damn son of a bitch if he robs you.' Wilborn was present, standing out there, when this fellow shot him. I don't know how close he was standing to him. I was not close up myself. * * * I was not there when the difficulty occurred. I was going out there, but hadn't got there, good, before the pistol fired. I don't know how the difficulty started. * * * Couldn't say what the trouble was about. I was not there, and didn't see it. All I saw taking a hand in it was Dan shooting, and the other man fell, and then Dan run. Dan held pistol on him until Sam fell. I didn't see anybody else do anything, except scatter. * * * I could not say what they were doing; did not see them. Some were standing up, and some sitting down. * * * I believe I saw one card. After the difficulty I saw one, but what they were doing I don't know. I saw the trey of clubs where they had been sitting around, but what they were doing I could not say. * * * Did not see Dan Amos playing cards." Thornton was found guilty, and sentenced to the penitentiary for life. He moved for a new trial upon various grounds, one of which was that the verdict was contrary to the evidence, and without evidence to support it. A new trial was refused, and he excepted.

"A person may be principal in an offense in two degrees. A principal in the first degree is the actor or absolute perpetrator of the crime. A principal in the second degree is he who is present, aiding and abetting the act to be done, which presence need not always be an actual, immediate standing by, within sight or hearing of the act; but there may be also a constructive presence, as when one commits a robbery or murder, or other crime, and another keeps watch or guard at some convenient distance." Pen. Code 1895, § 42. Thornton was not a principal in the first degree, as he was not the actor or absolute perpetrator of the crime. Was he, under the evidence, guilty as principal in the second degree? Under the evidence for the state, he was present at the commission of the crime, but mere presence is not sufficient to render one an aider and abettor (*Lowery v. State*, 72 Ga. 649), though it has been held that, if special circumstances or relations create a duty to interfere, mere inactive presence

may amount to a criminal participation (2 Am. & Eng. Enc. L. 83). And it has also been held that presence, companionship, and conduct before and after the offense are circumstances from which one's participation in the criminal intent may be inferred. *Id.* For one to be guilty as principal in the second degree, it is essential that he share in the criminal intent of the principal in the first degree. The same criminal intent must exist in the minds of both. Thus, where A. told B., who was going to a house 50 yards distant, to get a pistol in a certain place in the house and shoot C., who was in the house, and promised B. a reward for so doing, and B. did as A. directed, while A. remained at the place where these instructions were given, A. was a principal in the second degree. *Collins v. State*, 88 Ga. 347, 14 S. E. 474. And where A., B., and C. were in a room together, and A., having furnished B. with a knife, told him to stab C., and B. then and there did so, A. was principal in the second degree to the crime thus committed. *Washington v. State*, 68 Ga. 570. In these cases the aider and abettor had the same criminal intent as the actual perpetrator of the crime. In *Brown v. State*, 28 Ga. 200, it was held: "Presence and participation in the act of killing a human being is not evidence of consent and concurrence in the perpetration of the act by a defendant charged with aiding and abetting in the killing, unless he had a felonious design, or participated in the felonious design of the person killing. If the person charged with murder in the first degree commit the assault on the deceased with a deadly weapon, but his intention to assault him with a deadly weapon was unknown to the person charged in the same indictment as principal in the second degree, and he intended to participate in an assault and battery only, and in no design to kill, he is guilty of manslaughter only." If Thornton had given his pistol to Amos, with instructions or advice to kill Sam Gordon with it, and Amos had done so when Thornton was present, and nothing more had appeared, then Thornton would have been guilty as principal in the second degree. The evidence for the state shows, however, that when Thornton loaned his pistol to Amos he told or advised him to kill Gordon with it, if he should again rob Amos at cards. His advice or instruction to kill Gordon was therefore conditional or dependent upon the event that Gordon should again rob Amos at cards. Even granting that there was enough in the evidence to authorize the jury to infer that Amos and Gordon had, subsequently to the loan of the pistol, engaged in playing cards, we think there is nothing in the evidence from which the jury could fairly infer that Gordon had robbed Amos in such a game, or that the killing was in consequence of such robbery. Of course, we do not use the words "robbed" and "robbery" here in their limited legal sense, but

as including cheating in a game of cards played for money. The evidence shows that Amos stated to Gordon that he owed him a dime. This Gordon denied, but paid it, saying at the time that he would make some of them shoot him, whereupon Amos immediately shot and killed him. From these facts we do not think it can be successfully contended that the evidence shows that at the time of the homicide there was in the mind of Thornton the same criminal intent and felonious design that was in the mind of Amos. The common intent and purpose in the minds of both at the time that Thornton furnished Amos with the pistol was that Amos should kill Gordon if the latter should again rob him at cards. There is nothing in the evidence to show, or to authorize the jury in finding, that Thornton ever had any other criminal intent. If Amos, after procuring the pistol from Thornton, had casually met Gordon, and immediately shot him, without any provocation whatever, certainly Thornton would not have been guilty of murder as a principal in the second degree, although he had been present on the occasion of the homicide, if he did nothing then to aid or abet the commission of the crime. It follows from what we have said that the court should have granted a new trial upon the ground that there was no evidence to support the verdict.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 498)

BELL v. FELT.

(Supreme Court of Georgia. Feb. 13, 1904.)
ASSIGNMENT OF ERROR—EXCLUSION OF EVIDENCE—NEW TRIAL—POSSESSORY WARRANT.

1. The rule requiring the assignment of error to show what answer was expected, the materiality of the excluded evidence, and that the judge was informed thereof at the time of the ruling, does not apply to the examination of hostile witnesses, or to pertinent questions on cross-examination, where the party making the inquiry cannot be expected to know what the witness would testify.

2. The judge rightly sustained the certiorari, and properly granted a new trial generally; nor was the same restricted to a grant on special grounds by subsequent recitals in the bill of exceptions.

(Syllabus by the Court.)

Error from Superior Court, Worth County; W. N. Spence, Judge.

Action by H. F. Bell against C. H. Felt. Verdict for defendant. From an order granting certiorari to the justice court, plaintiff brings error. Affirmed.

The evidence is conflicting, but, taking that excluded and admitted most favorably for the prevailing party, it appears that Felt was agent for the Indiana Fruit Company, and as such sold a pair of mules to Bell; that some time afterwards Bell desired to exchange the same for a pair of gray mules

belonging to the company; that Felt expressed himself as willing to make the exchange if the bay mules were in as good condition as when they were sold, and, having to be absent, notified Arnold, overseer and agent of the company, to examine the bay mules, and, if they were as when sold, receive them in exchange for the grays; that a day or two later Bell brought the bays to the company's farm, when the agent declined to receive them, because one was badly injured; that thereupon Bell urged the agent to let him have the grays, as he was greatly in need of them, promising to see Felt on his return, and, if he did not make it all right, Arnold could come and get the grays. The agent complied with this request, and on Felt's return he disapproved of what had been done, and told Arnold to go and get the mules. On the same day, and shortly thereafter, Arnold, the agent of the company, took the bay mule to the wagon of Bell in which the grays were hitched, and told the driver that he had come after the mules. The driver said nothing. The mules were unhitched and carried off, the bays being tied to a tree near the wagon. During the same day Bell sued out a possessory warrant. On the trial the judge refused to allow any question to be asked of Bell as to the circumstances under which he obtained the mules from the agent of the company, or as to the terms of the exchange, or as to whether it would not be subject to Felt's approval, or, if Felt did not approve the exchange, Arnold might come and get them. He also excluded questions addressed to Arnold of the same character. It does not appear what the answer of either witness would have been to the questions asked, though the counsel stated that the purpose of the questions addressed to Bell was to show substantially what is above indicated, that Arnold had notified Bell of Felt's dissatisfaction with the exchange, and he had got possession of the mules after this conversation, in pursuance of the agreement, and without fraud or violence, and that Arnold had the consent of the plaintiff to take the mules as he did. The sheriff testified that he seized the mules at the Indiana Fruit Company's farm under the possessory warrant; that the defendant was manager for the company, and that Arnold, the overseer was in charge at the time the warrant was served. One witness testified that he had heard the defendant say that he had the mules. The defendant testified that he never owned or claimed the mules; that whatever possession he had before or since the issuance of the warrant was for the company; that he had instructed Arnold not to exchange them unless the bays were all right; that Arnold was overseer, and had no authority, so far as selling or swapping was concerned; and when he learned of the exchange he immediately instructed Arnold to go and get the gray mules back. Arnold was not allowed to testify as to the circum-

stances under which the exchange was made, but did swear that he used no fraud or violence. The justice found in favor of the plaintiff. Felt's certiorari was sustained, and a new trial awarded generally, on July 22, 1903. In the bill of exceptions, dated August 20, 1903, and served on August 24, 1903, it was recited that the order granting a new trial was based solely on the justice's refusing to allow Bell and Arnold to answer questions relating to the terms and conditions on which the exchange was made; and the plaintiff in error contends that, as it does not appear what would have been the answers to these questions, no error was shown in the petition for certiorari, and the grant of a new trial was error, and should be reversed, even though this was the first grant of a new trial.

Claude Payton and Sam. S. Bennet, for plaintiff in error. Perry & Tipton, for defendant in error.

LAMAR, J. The assignment of error on the judge's refusal to permit Arnold, a witness for the applicant, to answer the questions propounded, cannot be considered, because it nowhere appears what his testimony would have been, nor whether the same would have been material or helpful. But this objection does not cover the assignment of error on the court's refusal to permit Felt's counsel to propound certain appropriate questions to Bell, the opposite party. The rule requiring a statement as to what the answer would have been does not apply to those asked of a hostile witness, or to inquiries on cross-examination where counsel is sifting a witness, laying the foundation for other evidence, or seeking to discover material facts indicated by the question, and where the attorney does not know, or cannot be expected to know, what the witness would testify. The assignment of error, therefore, in the present case, is well within the exception stated in *Griffin v. Henderson*, 117 Ga. 383, 43 S. E. 712. In fact, the petition for certiorari complies fully with the spirit of the rule, and states not only the purpose of the question, but what plaintiff in error expected to prove by his adversary. The evidence thus sought was material, tending, as it did, to show that Bell had agreed that if Felt did not approve of the exchange Arnold might come and get the mules, thus establishing as a fact that they had been taken in pursuance of a condition which made the subsequent act of Arnold lawful instead of unlawful, there being in fact no force or violence by Arnold in taking the mules. He made a claim—hardly a demand—for their possession, and that was immediately acceded to by the driver. Indeed, it appears that Bell in the first instance got possession of the mules by reason of the fact that the Indiana Fruit Company's agent exceeded his authority in making the exchange. Accord-

ing to Bell's contention, Arnold in like manner, without force or violence, got possession, because the driver voluntarily acceded to Arnold's request.

The judge of the superior court rightly granted a new trial generally. The statement in the bill of exceptions that he did so because of the exclusion of certain testimony does not modify the unrestricted terms of the order. Bell had no cause to complain of the judgment as entered. He did not know of the recital in the bill of exceptions for the 30 days in which he was allowed to except, nor, indeed, until after the time within which he could have presented a bill of exceptions. The case is not, therefore, as argued by the plaintiff in error, similar to the grant of a new trial on one ground, which is in legal effect a denial of all others. *Long v. Bullard*, 69 Ga. 678; *Singleton v. S. W. R. R.*, 70 Ga. 465, 48 Am. Rep. 574. In those cases the order on its face showed the single ground on which the new trial was granted. Here the judgment is general. It is claimed that it was restricted by the subsequent recital in the bill of exceptions. This could not be done. The case, therefore, is within the well-established rule that this court will not interfere with the first grant of a new trial in a justice's court, where it does not appear that the law and facts required a judgment in favor of the plaintiff below. Civ. Code 1895, § 5585.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 436)

BARNARD v. STATE.

(Supreme Court of Georgia. Feb. 12, 1904.)
CRIMINAL LAW—INSTRUCTIONS—REASONABLE DOUBT.

1. It is not ground for a new trial that the judge charged the jury as follows: "By a reasonable doubt is not meant some vague or fanciful doubt, but such a doubt as arises from the testimony in the mind of a reasonable man, and leaves it hesitating, unsettled, and undecided." Such a charge does not imply that a reasonable doubt may not arise as well from a lack of evidence as from facts brought to light which are consistent with the innocence of the accused, but is in accord with the law as heretofore laid down by this court. See *Jesse v. State*, 20 Ga. 156 (10), 168; *John v. State*, 33 Ga. 257; *Long v. State*, 33 Ga. 492 (8); *Peterson v. State*, 47 Ga. 525 (5); *Malone v. State*, 49 Ga. 211 (8); *Tarver v. State*, 21 S. E. 381, 95 Ga. 223 (2).

2. It was not error to charge the jury as follows: "You have heard the testimony, and it is for you to say whether this testimony connects the defendant with the commission of this crime; whether he is guilty or not; whether there is any rational theory upon which you can base your verdict other than that of his guilt. If there is any rational theory upon which you can base a verdict and acquit this defendant, it is your duty to do so; if not, then it is your duty to convict." This charge did not, in effect, "put the burden on the defendant to show his innocence"; nor is it open to the criticism that it "made the jury hunt some rational theory upon which a jury could base a verdict of acquittal, when they do not hunt the innocent in the trial of a case, but the guilty."

3. "Where evidence, partly competent and partly incompetent, was offered and objected to as a whole, the illegal portion not being specified nor objected to separately, admitting all of such evidence affords no legal cause of complaint to the objecting party." *Smalls v. State*, 25 S. E. 614, 89 Ga. 26 (2). See, also, *Maynard v. Association*, 37 S. E. 741, 112 Ga. 443; *Southern Ry. Co. v. Gilmore*, 42 S. E. 220, 115 Ga. 890; *Gully v. State*, 42 S. E. 790, 116 Ga. 527; *Kelly v. Strouse*, 43 S. E. 280, 116 Ga. 881; *Walker v. Neil*, 45 S. E. 387, 117 Ga. 739, and cit.

4. There being sufficient evidence to support the verdict of guilty, and the trial judge having approved the finding, this court will not overrule the judgment denying the accused a new trial.

(Syllabus by the Court.)

Error from Superior Court, Tattnall County; T. A. Parker, Judge.

D. R. Barnard was convicted of crime, and brings error. Affirmed.

H. D. D. Twiggs and W. T. Burkhalter, for plaintiff in error. B. T. Rawlings, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

TURNER, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 513)

GEORGIA SOUTHERN & F. RY. CO. v. YOUNG INV. CO.

(Supreme Court of Georgia. Feb. 13, 1904.)
RAILROADS—KILLING STOCK—INSTRUCTIONS—EVIDENCE—CERTIORARI.

1. On the trial of an action for damages against a railroad company for the killing of live stock, it is not error for the court to charge that, the killing being admitted, the defendant must, to escape liability, show "by a preponderance of evidence" that at the time of the killing it was in the exercise of all ordinary and reasonable care and diligence.

2. In the absence of a request for specific instructions on the subject, it is not error in such a case to fail to explain to the jury the meaning of the expressions "ordinary care" and "preponderance of evidence."

3. While the evidence for the defendant made out a good defense, that for the plaintiff, including the testimony of an eyewitness to the occurrence under investigation, contradicted that defense, and tended to prove that the employees of the railroad company were guilty of negligence at the time the plaintiff's cow was killed. It was therefore not error to rule, adversely to the contention of the petition for certiorari, that the verdict of the jury in the city court was contrary to law and the evidence.

(Syllabus by the Court.)

Error from Superior Court, Lowndes County; R. G. Mitchell, Judge.

Action by the Young Investment Company against the Georgia Southern & Florida Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

R. C. Jordon and Crauford & Walker, for plaintiff in error. W. E. Thomas and Wilcox & Johnson, for defendant in error.

CANDLER, J. Further than what is announced in the headnotes, it is only neces-

¶ 1. See *Railroads*, vol. 41, Cent. Dig. §§ 1576, 1578.

sary to add that this case does not come within the rules laid down in the cases cited in the brief of counsel for the plaintiff in error, which hold, in effect, that where there is no contradiction to the evidence of the employes of the railroad company that at the time of the occurrence under investigation they were in the exercise of all ordinary care and diligence, and that everything possible was done to stop the train in time to avoid an accident, but without avail, a verdict in favor of the plaintiff cannot stand. In the present case an eyewitness testified that the plaintiff's cow got on the track at least 100 yards in front of the train which struck her; that the track was straight at this point, and on a grade which the train was ascending; that the employes of the train knew of the presence of the cow on the track, as was evidenced by their giving the usual alarm to frighten stock off the track; and that the train did not slow up at all from the time the cow first got on the track, as it would have been impossible for it to have gone over the grade if it had done so. This was in direct conflict with the evidence of the engineer, to the effect that the cow came on the track about 30 or 40 feet in front of the engine, and that he made every effort possible to stop the train before striking her, but could not do so. The evidence for the plaintiff clearly established its right to recover. A jury of 12 men, under a fair charge from an able judge, weighed all the testimony, and resolved the conflict in favor of the plaintiff; their verdict and the rulings of the city court judge on the trial were reviewed and approved by the judge of the superior court; and we cannot say, as matter of law, that there was any error in refusing the certiorari.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 439)

WELBORN v. STATE.

(Supreme Court of Georgia. Feb. 12, 1904.)

VAGRANCY—EVIDENCE.

1. The act of August 7, 1903 (Acts 1903, p. 46), in relation to vagrancy, amends, but does not repeal, Pen. Code, § 453.

2. Under one count of the accusation a conviction was warranted, whether the evidence be referred to a date before or after the approval of that act.

3. There was positive testimony that the defendant, a grown woman, able to work, with no visible or known means of a fair, honorable, and reputable livelihood, was a streetwalker, who loitered around saloons and did no work. The fact that on two occasions she had earned small sums, wholly insufficient to support her, was no answer to the general state of idleness in which she was shown to live.

(Syllabus by the Court.)

Error from City Court of Columbus; J. L. Willis, Judge.

Fannie Welborn was convicted of vagrancy, and brings error. Affirmed.

J. H. Lewis and A. W. Cozart, for plaintiff in error. Peter Preer, for the State.

LAMAR, J. There was positive testimony that the defendant was grown and able to work; that she had no visible or known means of a fair, honest, or reputable livelihood; that she was a lewd woman and a streetwalker, who loitered around saloons and did no work. The fact that during one week she earned a dollar, and during another 25 cents, was no answer to the general state of idleness in which she was shown to live. *Cody v. State*, 118 Ga. 784, 45 S. E. 822. The act of August 7, 1903 (Acts 1903, p. 46), amends, but does not repeal, Pen. Code, § 453, and the conviction was warranted under one count of the accusation, whether the evidence be referred to a date before or after the approval of that act.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 530)

BENTLEY et al. v. McCALL.

(Supreme Court of Georgia. Feb. 15, 1904.)

DEED—EVIDENCE—FORGERY—BURDEN OF PROOF.

1. When a certified copy of a recorded deed is offered in evidence, and is met by the affidavit of forgery provided for in Civ. Code 1895, § 3623, the burden is upon the party offering the deed to show the existence and genuineness of the original, without reference to the fact that it appears to have been recorded. And this is true notwithstanding it appears from the certified copy that the original was more than 30 years old.

2. In such a case the existence and genuineness of the deed may be proven by circumstantial evidence.

3. The circumstances proven in the present case were not sufficient to establish the existence and genuineness of the original deed, and the court erred in admitting in evidence the certified copy.

(Syllabus by the Court.)

Error from Superior Court, Wilcox County; D. M. Roberts, Judge.

Action by W. H. Bentley and others against J. A. McCall. Judgment for defendant, and plaintiffs bring error. Reversed.

The certified copy deed referred to in the opinion was of a deed which purported to have been executed by M. A. Bentley to George K. Hamilton, dated May 23, 1846. The evidence offered in connection with this certified copy was in substance as follows: A chain of title to the land in dispute, beginning with a deed from Hamilton to Rowe, dated December 9, 1856, and ending with a deed from Conner to defendant, dated June 16, 1891. Certificate from the Secretary of State that David G. Saulsbury, who purported to have signed the original deed as a justice of the peace, was a justice of the peace from January 24, 1845, to January 1, 1849. Testimony of Allen W. Smith that he had seen the chain of titles to the land in dispute; that one Middlebrooks, the then own-

er of the land, was at witness' house with the titles in the month of January, though witness could not say in what year; that witness examined the deeds very closely, and there was no missing deed in them. Witness could not say whether any of them were certified copies or not, and did not recollect seeing the particular deed from Bentley to Hamilton, but supposed it was among the deeds, as he would probably have noticed its absence if it had been missing, witness having had a good deal of experience in examining titles. Affidavit from defendant that she did not have the original deed from Bentley to Hamilton, and believed it to have been lost or destroyed. J. M. McCall, defendant's husband, testified: "I believe I saw this line of deeds in Rochelle in Mr. Vaughn's possession before my wife bought it. There was an original deed out of M. A. Bentley in the bunch of papers. I do not know where it is, though I made efforts to get it. I acted as agent for my wife in buying the land, and saw this deed a short time before I bought the land. The deed has never come into my possession, power, or control. My recollection is that the deed purported to be properly recorded. I think there were two witnesses to it. My recollection is that one was David G. Saulsbury, who was the official witness. I could not detect any defects in it. The deed has been in Mr. Conner's hands and in Mr. Mitchell's hands. I told them to search for it. I have never been able to find it." On cross-examination the witness testified, among other things: "I never saw M. A. Bentley write. I never saw David G. Saulsbury write. It appears to be properly signed up; that is all I know about it being a genuine deed. I never knew Saulsbury or Bentley. I did not know whether it was the genuine signature of M. A. Bentley or not, or of Riley Monger, or of David G. Saulsbury. I took it to be a genuine deed." J. M. Mixon testified that he made the copy deed offered in evidence, and that it was a true and correct copy from the records. The witness also testified that the original book of records was lost, and that he could not find it. He then added: "I did not see anything irregular appearing on the face of that paper or the book when I copied it." Counsel for plaintiffs admitted that the certified copy deed offered in evidence was a correct copy from the record book.

J. W. Haygood and Eldridge Cutts, for plaintiffs in error. J. L. Bankston and J. H. Martin, for defendant in error.

COBB, J. This was an equitable action brought for the recovery of land. The jury returned a verdict in favor of the defendant, and the plaintiffs complain that the court erred in overruling their motion for a new trial.

The case as presented in this court depends upon the determination of one question, and

that is whether the court erred in admitting in evidence a certified copy of a deed under which the defendant claimed. When the certified copy was offered in evidence, one of the plaintiffs filed the affidavit of forgery authorized by Civ. Code 1895, § 3623. The effect of filing this affidavit is to place upon the party offering the copy deed the burden of proving the execution of the original. *McCall v. Bentley*, 114 Ga. 752 (2), 40 S. E. 768. The subscribing witnesses were not produced, nor was there any evidence as to the handwriting of the alleged grantor or of either of the witnesses. The defendant sought to prove the execution of the original deed by circumstantial evidence. This was permissible. *Payne v. Ormond*, 44 Ga. 514 (2); *Terry v. Rodahan*, 79 Ga. 294, 5 S. E. 38, 11 Am. St. Rep. 420. See, also, *De Vaughn v. McLeroy*, 82 Ga. 703, 10 S. E. 211. An abstract of the evidence which was introduced for the purpose of proving the execution of the original deed appears in the official report of the case. The general rule is that the existence, genuineness, and contents of a deed shown to be lost or destroyed may be proved by a certified copy of the record, if it has been properly and legally probated for record. *Eady v. Shivey*, 40 Ga. 684; *Hayden v. Mitchell*, 103 Ga. 431, 30 S. E. 287; *Crummey v. Bentley*, 114 Ga. 750, 40 S. E. 765; *Griffin v. Wise*, 115 Ga. 614, 41 S. E. 1008. As was pointed out, though, by Judge McCay, in *Eady v. Shivey*, 40 Ga. 687, this rule is not applicable in a case where an affidavit of forgery is filed. In such a case it makes no difference whether it is an original or a certified copy which is offered. The fact that the paper has been recorded goes for naught, and the actual proof of the genuineness of the original, as well as of its existence, if a certified copy is offered, must be made. When the certified copy is eliminated from the case, we do not think the other circumstances proven are sufficient to authorize a finding in favor either of the existence or of the genuineness of the alleged original deed. The fact that the original appeared from the certified copy to be more than 30 years old would not affect the matter, as the rule in reference to ancient documents applies only to original papers, and not to copies. See *Patterson v. Collier*, 75 Ga. 419, 427, 58 Am. Rep. 472, and cases cited; *McCall v. Bentley*, supra. The defendant did not carry the burden imposed upon her by the filing of the affidavit of forgery, and the court erred in admitting in evidence the certified copy. There is nothing in this ruling to conflict with the decision in *Payne v. Ormond*, supra. There was no affidavit of forgery in that case, and it was simply held that the circumstances detailed were admissible, and that a jury could consider them under proper instructions from the court. It was not held that these circumstances alone were sufficient to establish the existence and genuineness of the lost deed. In addition to

this, upon an examination of that case it will be seen that the decision really turned on the question of prescription.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness, and FISH, P. J., disqualified.

(119 Ga. 418)

CODY v. STATE.

(Supreme Court of Georgia. Feb. 12, 1904.)

CRIMINAL LAW—TRIAL BY JURY—WAIVER.

1. This case is controlled by the decision rendered in the case of *Baker v. State*, 45 S. E. 617, 118 Ga. 787.

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Hester Cody was convicted of vagrancy, and brings error. Affirmed.

J. W. Williams, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

CANDLER, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 508)

BUTLER & CO. v. McCALL.

(Supreme Court of Georgia. Feb. 13, 1904.)

CONTRACT—CONSIDERATION—PLEA—ACTION ON NOTE.

1. The consideration of a contract is always open to inquiry in a suit for its enforcement. The answer of the defendants, as amended, setting up that the note sued on was for the purchase price of certain sawmill timber, that part of the land conveyed had no timber on it at all, that as to other portions a paramount outstanding title existed in other parties, and that the defendants had never been in possession thereof, was good as a plea of failure of consideration, and should not have been stricken on demurrer.

(Syllabus by the Court.)

Error from Superior Court, Colquitt County; R. G. Mitchell, Judge.

Action by J. G. McCall against Butler & Co. Judgment for plaintiff. Defendants bring error. Reversed.

Shipp & Kline, for plaintiffs in error. J. G. & J. F. McCall and Z. D. Harrison, for defendant in error.

CANDLER, J. Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 474)

COLUMBIA DRUG CO. v. GOODMAN.

(Supreme Court of Georgia. Feb. 12, 1904.)

ACTION ON ACCOUNT—PLEA OF PAYMENT—VERIFICATION.

1. Where suit was brought in a county court upon an open account properly sworn to by the plaintiff, the judge erred in refusing to strike, on plaintiff's motion, a plea of payment which was not verified (Acts 1901, p. 55); and a cer-

tiorari assigning error upon such a ruling should have been sustained.

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Action by the Columbia Drug Company against W. B. Goodman. Judgment for defendant, and plaintiff brings error. Reversed.

Hendricks & Harrison, for plaintiff in error. Alexander & Goodman, for defendant in error.

FISH, P. J. Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 504)

STEPHENSON v. WARREN.

(Supreme Court of Georgia. Feb. 13, 1904.)

CITY COURT—JURISDICTION—DISPOSSESSION OF TENANTS—ISSUE OF WARRANT.

1. The city court of Moultrie has no authority to hear and determine an issue formed by a counter affidavit to a warrant issued against one as a tenant holding over. Acts 1901, p. 136, § 2. Exclusive jurisdiction over such a proceeding is by statute conferred upon the superior courts. Civ. Code, § 4816.

2. The judge of that city court has, however, under the express terms of section 12 of the act creating it, authority to administer oaths and take the necessary affidavits from persons entitled to apply for warrants to dispossess tenants holding over, as well as authority to issue such warrants.

3. It follows that, where a warrant issued by the judge of that court against one in possession of land is met by a counter affidavit, it is the duty of the officer serving the warrant to "return the proceedings to the next superior court of the county where the land lies," agreeably to the provisions of the section of the Code above cited, in order that "the fact in issue [may] be there tried by a special jury, as in case of appeal."

(Syllabus by the Court.)

Error from City Court of Moultrie; W. A. Covington, Judge.

Action between A. Stephenson and J. M. Warren. From the judgment, Stephenson brings error. Affirmed.

J. D. McKenzie and Shipp & Kline, for plaintiff in error. Humphreys & Humphreys, for defendant in error.

TURNER, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 476)

HENRY LEVIS & CO. v. PARROTT LUMBER CO.

(Supreme Court of Georgia. Feb. 13, 1904.)

DEED—CONSTRUCTION—RESERVATIONS.

1. Where A. grants to B. the sawmill and turpentine privileges on a given lot of land, but also provides that "all timber remaining [thereon] to revert" to A. after a period named, and afterwards, before the period expires, conveys the lot to C., with this provision following the description of the land, "all timber on above

[land] sold prior to this day reserved," the trees not removed by B. within the time limited will be the property of A., and not of C.

(Syllabus by the Court.)

Error from Superior Court, Dooly County: Z. A. Littlejohn, Judge.

Action by Henry Levis & Co. against the Parrott Lumber Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

J. L. Bankston and Hal Lawson, for plaintiffs in error. Whipple & McKenzie, for defendant in error.

TURNER, J. Henry Levis & Co. sued the Parrott Lumber Company, making the following case: On February 29, 1892, the Americus Investment Company conveyed to the plaintiffs certain tracts of land, including lot No. 166 in the Fifth district of Wilcox county. Previously, on June 30, 1890, the Americus Investment Company executed and delivered to J. C. Ausley and G. W. Parrott, as trustees for Ausley and McCaskill & Parrott Lumber Company, a certain writing, which will be hereinafter described. Under this last-mentioned writing, all right of said trustees expired on June 30, 1898. Said conveyance to the plaintiffs and said writing were attached as exhibits to the plaintiffs' petition. From these exhibits it appears that the deed to the plaintiffs conveyed certain lots of land, among them the lot already mentioned, in fee simple; the description of the lands conveyed being followed by these words: "All timber on above lots sold prior to this day reserved." The writing made by the Americus Investment Company to Ausley and Parrott, trustees, after stating the consideration, recited that "the above is consideration given by J. C. Ausley and G. W. Parrott, trustees, for sawmill and turpentine privileges for the space of (8) eight years from date on lots" described, including lot No. 166 "in the fifth district, Wilcox county. The said trustees are hereby given, free of charge, permission to run tramroads through above-named lots, all timber remaining on above lots to revert back to this company at eight years; the title to above premises being hereby warranted." The plaintiffs further averred that, after the expiration of the period of eight years mentioned in the deed made to Ausley and Parrott as trustees, the Parrott Lumber Company "cut out and removed the pine trees suitable for sawmill purposes from said lot of land," the value of the timber so cut and removed being \$800; that said pine trees were manufactured into lumber by the defendant company, the value of this lumber being \$2,500; and that "said cutting and removal of said timber by defendant was without the consent of plaintiffs." The plaintiffs prayed judgment against the defendant for the value of the lumber so manufactured. To this petition the Parrott Lumber Company filed a demurrer based on the grounds (1) that the facts set forth in the petition did not authorize a recovery for the

value of the manufactured lumber; (2) that the petition disclosed that the timber on lot No. 166 "was never sold to Henry Levis & Co., but was reserved by the Americus Investment Co., the petition also showing that the same had been sold by the Americus Investment Co. prior to the date of [its] deed to" plaintiffs, and could not possibly revert to them under the deeds attached to their petition; and (3) that said petition "does not set out who Levis & Co. is." By consent of the parties, the judge of the lower court considered the demurrer in vacation. After hearing argument thereon, he passed an order sustaining the first and second grounds of the demurrer, and to this order the plaintiffs excepted.

It may be assumed from the pleadings that the plaintiffs acquired their title to the land in question with notice of whatever rights the defendant company had under the writing exhibited and alleged to have been made by the Americus Investment Company to Ausley and Parrott as trustees. It may also be assumed that the plaintiffs' title to the lot was subject to whatever interest therein the defendant company claimed under that writing. The decision of the case therefore depends upon the construction to be given to those clauses of the papers attached to the petition which we have hereinbefore quoted. According to the great weight of authority, the defendant, under any transfer to it of the interest conveyed by the writing made to Ausley and Parrott as trustees, had no title to the timber which was removed from the lot after the expiration of the time mentioned in that writing within which the timber should be taken, if at all, from the land; that is to say, after June 30, 1898. See the authorities cited in *Morgan v. Perkins*, 94 Ga. 353, 355, 21 S. E. 574; *McRae v. Stillwell*, *Millen & Co.*, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 528, note 2. And it necessarily follows, we think, that all the timber remaining on the lot after that date reverted to and became the property of the grantor, the Americus Investment Company. At the date of the deed from that company to the plaintiffs, only two years of the period limited for the removal of the timber had, according to the terms of the grant previously made to Ausley and Parrott, trustees, elapsed, and on that date the Americus Investment Company did not own this timber. Six years remained in which it could be cut and removed by them. It is true that the right to this timber was limited as to time, but this limitation, by the terms of the writing in which it was stated, only had the effect to revert in the Americus Investment Company the title to such timber as remained on the land at the expiration of the term. This reversionary interest in the Americus Investment Company did not, under the conveyance made to the plaintiffs, pass into them, but was expressly excepted or reserved. According to the best definitions which we can find, the clause in

that deed which recited that all timber on the land which had been previously sold was thereby "reserved" amounted to a technical "exception." See 2 Devlin on Deeds (2d Ed.) §§ 979, 980, 989, and authorities cited. It is to be noted in this connection that, in conveying to the plaintiffs the property described in the instrument under which they claim, the Americus Investment Company did not in its deed merely recite that the property was sold subject to the rights of others to whom the timber privileges had previously been conveyed, but used apt language indicating a purpose on its part to except from the operation of its grant all timber which it had theretofore sold on conditions which gave it a reversionary interest in the same. We have accordingly reached the conclusion that, under the averments made in the petition, the plaintiffs did not show a right to hold the defendant to account for its alleged trespass. This being so, it is not necessary for us to undertake to pass on the merits of the first ground of the defendant's demurrer.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 539)

SAYER, Tax Collector, v. BROWN et al.,
County Com'rs.

(Supreme Court of Georgia. Feb. 16, 1904.)

APPEAL—REVIEW—QUESTIONS OF FACT—RECORD—CONSTITUTIONALITY OF STATUTE—COUNTY COMMISSIONERS—TITLE OF ACT—STATUTES—REPEAL—AMENDMENT—TAX COLLECTOR—INJUNCTION.

1. The disputed questions of fact in this case cannot be considered by this court, as the evidence submitted upon the trial in the court below is neither incorporated in the bill of exceptions, nor sent up, as a part of the record, in a brief of evidence approved and made a part of the record by the trial judge.

2. Affidavits and documents offered in evidence and ruled out, and amendments to pleadings offered and disallowed, form no part of the record of a case, and cannot be sent up to this court as such.

3. A mere general allegation that an act of the Legislature is unconstitutional because of the presence therein of a designated provision, without calling attention in any way to the particular provision of the Constitution with which it is claimed that it conflicts, is too vague and indefinite to invoke a decision upon the validity of the statute.

4. The act of July 30, 1903 (Acts 1903, p. 332), amendatory of the act of December 20, 1900 (Acts 1900, p. 168), creating a board of commissioners for the county of Douglas, does not violate that provision of the Constitution which prohibits the passage of any statute containing matter different from that which is expressed in the title thereof.

5. An allegation that a given statute is unconstitutional, in that it violates the constitutional provision which prohibits the passage of a special law in any case for which provision has been made by an existing general law, which fails to point out the general law which is claimed to cover the same subject as such statute, presents no question for decision by a court.

6. The above-mentioned act of July 30, 1903, did not repeal the act which it purported to amend.

7. An act creating an office may be amended by completely changing the powers and duties appertaining thereto, without destroying the office or removing therefrom the person who is lawfully filling the same.

8. The act of July 30, 1903, in question, went into effect upon its passage, except in so far as it provided for a change in the number of members of which the board of county commissioners should consist.

9. Under the powers conferred upon them by the act of July 30, 1903, the county commissioners of Douglas county have authority to bring the tax collector of that county to a settlement of his accounts with the county.

10. This authority is not confined to matters in the tax collector's office which have arisen since that act was passed, but embraces any accounts of such officer which have not been lawfully settled.

11. Whether or not the board of county commissioners have the power to punish the tax collector for contempt for a failure or refusal on his part to appear before the board with the books, receipts, etc., appertaining to his office, after being notified to do so, the fact that the commissioners threatened to impose such fine upon him affords no reason for enjoining them from so doing. If they have no such power, and should impose a fine upon him and attempt to collect it, his remedy at law is ample.

(Syllabus by the Court.)

Error from Superior Court, Douglas County; A. L. Bartlett, Judge.

Action by W. A. Sayer, tax collector, against J. W. Brown and others, county commissioners. Judgment for defendants, and plaintiff brings error. Affirmed.

J. S. James and Roberts & Hutcheson, for plaintiff in error. W. A. James and J. D. Kilpatrick, for defendants in error.

FISH, P. J. In considering this case we are necessarily confined to the pleadings and such facts as the allegations on the one side and the admissions on the other establish, as there is not a particle of the evidence which was introduced in the trial court, nor of that which it is alleged was offered and erroneously ruled out, properly before us.

1. An attempt has been made to send up, as parts of the record, both the evidence introduced and the evidence alleged to have been erroneously rejected. There is nothing to identify any of it as evidence which was introduced or offered upon the trial of the case. The trial judge simply certifies that the bill of exceptions "is true, and contains and specifies all of the evidence, and specifies all of the record material to a clear understanding of the errors complained of." No evidence whatever is contained in the bill of exceptions, and not an affidavit or document sent up as a part of the record is identified by the judge as evidence introduced, or evidence offered, at the hearing. Civ. Code, § 5528, provides: "If the case is not one in which a judgment on a motion for new trial is to be reviewed, the plaintiff in error * * * shall incorporate in the bill of exceptions a brief of so much of the written and oral evidence as is material to a clear understanding of the errors complained of, and shall specify therein such portions of the

record as are material to such understanding." Section 5529 provides: "If the plaintiff in error shall so elect, he may have such brief of so much of the evidence as is necessary to a clear understanding of the errors complained of, approved by the judge, and made a part of the record and sent up by the clerk as a part thereof, rather than have the same incorporated in the bill of exceptions." Neither of these methods of having the evidence which was introduced upon the hearing of the case sent up to this court was adopted by the plaintiff in error. No brief of the evidence was incorporated in the bill of exceptions, nor was any brief thereof approved by the trial judge and made a part of the record. Instead of pursuing either of these methods, the plaintiff in error simply specifies, as parts of the record necessary to a clear understanding of the case, various affidavits, and the clerk sends up what purport to be copies of such affidavits. As these affidavits were no part of the record originally, and were not made such by the judge in the way provided by law, the clerk could not send them up as such. There is nothing whatever which legally informs this court that they were ever used upon the hearing of the case. Indeed, we may add that the plaintiff in error does not, in his bill of exceptions, allege that they were so used, but contents himself with simply specifying them as parts of the record to be sent up by the clerk. *Hancock v. McNatt*, 116 Ga. 297, 42 S. E. 525, and *cit.*

2. Affidavits and documents offered in evidence and ruled out by the judge form no part of the record, nor could they form any part of a brief of the evidence upon which the case was tried. They should have been incorporated in the bill of exceptions. Besides, assignments of error upon the rejection or admission of evidence cannot be considered when they do not set out the evidence rejected or admitted. As this has been often decided, we simply cite the following cases: *Benton v. Baxley*, 90 Ga. 297, 15 S. E. 820; *W. U. Telegraph Co. v. Michelson*, 94 Ga. 436, 21 S. E. 169. If it was the intention of the plaintiff in error to assign error upon the ruling of the court in reference to the amendment referred to in the bill of exceptions as having been offered and disallowed, he failed to do so; and, even if he had assigned error upon such ruling, the assignment could not have been considered, because the proposed amendment is neither set out in the bill of exceptions nor attached thereto as an exhibit, but is sought to be brought up in the record, of which it formed no part. *Sibley v. Mutual Reserve Fund Life Association*, 87 Ga. 738, 13 S. E. 838; *Barnett v. Railway Co.*, 87 Ga. 767, 13 S. E. 904; *Moore v. Guyton*, 110 Ga. 330, 35 S. E. 339.

3. The main contention of the plaintiff in error is that the persons claiming to be the county commissioners of Douglas county and

acting as such are doing so without any authority of law; that the offices which they claim to fill have no legal existence in Douglas county. This contention is based upon the alleged unconstitutionality of the statute under which they were elected and the statute from which they claim to derive the power and authority which they seek to exercise. These statutes are the act of December 20, 1900 (Acts 1900, p. 168), creating a board of county commissioners for the county of Douglas, and the act of July 30, 1903 (Acts 1903, p. 332), amendatory thereof; the commissioners having been elected under the provisions of the original act, and claiming the powers conferred by the amendatory act. In the petition filed by the plaintiff each of these acts was alleged to be unconstitutional and void, but in the brief of his counsel filed in this court no allusion is made to the alleged unconstitutionality of the original act, the whole argument upon the constitutional question being directed against the amendatory act. We might, therefore, treat the allegation as to the invalidity of the act of 1900 as having been abandoned. It might well have been abandoned, as it was not made in such a way as to present any question for determination by the court. The petition alleged that this act was unconstitutional because of the presence therein of certain provisions, but failed to allege or indicate wherein the presence of such provisions renders the statute unconstitutional. A mere general allegation that an act of the Legislature is unconstitutional, without calling attention in any way to the particular provisions of the Constitution with which it is claimed it conflicts, is too vague and indefinite to invoke a decision of the court upon the validity of the statute. *Jones v. Oemler*, 110 Ga. 202, 35 S. E. 375; *Savannah Railway Co. v. Hardin*, 110 Ga. 437, 438, 35 S. E. 681; *Laffitte v. Burke*, 113 Ga. 1000, 39 S. E. 433.

4. One ground upon which the constitutionality of the act of July 30, 1903, is attacked is that "it sets out matter in the body of the bill that is not referred to in the title to the act nor in any way covered thereby." The title of this act is as follows: "An act to amend an act creating a board of county commissioners for the county of Douglas, defining their duties, etc., approved December 20, 1900, by providing for the monthly meetings of said board of commissioners for the transaction of county business, by reducing the number of said board from five to three, and by more particularly describing the power, jurisdiction, duty, authority of said board of commissioners, and for other purposes." In support of the contention that the body of the act contains matter different from that which is expressed in its title, it is contended that the title of the act is to amend the act of December 20, 1900, while the body of the act repeals "all the essential parts" of that act, and substitutes therefor "other leg-

islation, not referred to anywhere in the title of the amending act." In other words, the gist of the contention, as we understand it, is that the change wrought in the original act by the amendatory act is so great as to practically destroy the original act, and substitute entirely new and different legislation for it, and that this cannot be done by an act the title of which declares it is an act to amend the existing act. We need not stop to inquire whether the act of 1903, with its present title, would be constitutional if the effect of its provisions was to wholly repeal the act of 1900 which it purports to amend, for it is very clear that it did not repeal the act of 1900, even by implication. It did not abolish the board of county commissioners created by the act of 1900, nor interfere with the tenure of office of the commissioners elected under that act, nor change the terms of office of the county commissioners, or the times when or the manner in which they should be elected. All these matters, and others which need not be mentioned, were left as in the original act; and we shall presently see that the contention that the original act was repealed because the amendatory act declared that section 1 of the original act, which section provided for the creation of the board of commissioners, and section 10 thereof, which defined their duties, should be stricken, is without merit. It is true that the amendatory act does work a radical and sweeping change in the original act. By the original act the board of county commissioners was merely an advisory body to the ordinary as to designated county matters, and had no original jurisdiction whatever, while by the amendatory act the board is given exclusive jurisdiction as to these and as to other matters not covered by the original act. But though an amendatory act may radically change the provisions of the act which it amends, this does not render it obnoxious to that constitutional provision which prohibits the passage of an act which contains matter different from that which is expressed in its title. Whether it does or does not violate this provision of the Constitution must be determined, not by the extent to which it changes the original act, but by a comparison of its statutory contents with the scope of its title. If its provisions are fairly covered by its title, it is not unconstitutional because those provisions may radically change the statute which it amends.

In determining whether an amendatory statute contains matter different from that which is expressed in its title, the title of the original statute may be considered when, as in the present instance, it is recited, or substantially set forth, in the title of the later act, as it thereby becomes a part of the title of the latter; and whatever is within the scope of the title of the original act is within the scope of the title of the amendatory act, unless the title of the latter is otherwise

so limited and restricted as to forbid such a construction. *Newman v. State*, 101 Ga. 534, 28 S. E. 1005, and citations; *Dallis v. Griffin*, 117 Ga. 408, 43 S. E. 758. Indeed, this court decided in *Alberson v. Hamilton*, 82 Ga. 30, 8 S. E. 869, that "where the title of a third statute is to amend a second, and the object of the second was to amend the first, the title of the third is broad enough to comprehend the whole subject-matter of the first and second." The original act was entitled "An act to provide for the creation of a board of county commissioners for the county of Douglas, and to define their duties, and for the purposes therein stated." There is nothing in the amendatory act which is not germane to the creation of a board of county commissioners for the county of Douglas and the definition of their duties. The conferring upon the commissioners exclusive jurisdiction and control over specified county matters devolves upon them the duty of exercising such jurisdiction and control; and a definition of their powers and jurisdiction is a definition of their duties. "As the duties may be defined without limit, any duty defined is necessarily within the scope of the title and embraced in the subject-matter." *Churchill v. Walker*, 68 Ga. 686. When to this it is added that the title of the amendatory act declares its purpose to be, not only to amend an act with the title which we have been considering, but to more particularly describe "the power, jurisdiction, duty, and authority of said board of commissioners," it seems superfluous to say that the title of the amendatory act carried full notice of a purpose to deal with the power, jurisdiction, and authority of the county commissioners, and that any provision with reference thereto would be covered by the title.

5. Another ground upon which the act of 1903 is alleged to be unconstitutional is that it is a "violation of that clause in the state Constitution which is set forth in section 5732, Civ. Code Ga. 1895, * * * which provides, 'No special law shall be enacted in any case for which provision has been made by an existing general law,' etc.; for petitioner says there were existing general laws of this state covering the subject of said act, especially section 10, and for all the subject covered by said section 10 provisions had been made * * * by existing general laws in this state." The question here sought to be made was not properly presented to the court below, and hence is not properly before this court; for the petition fails to state or indicate what general laws are claimed to cover the subjects dealt with by section 10 of the act in question. If the question had been properly presented, we apprehend the contention of the petitioner could not have been sustained. Const. art. 6, § 19, par. 1 (Civ. Code 1895, § 5879), provides: "The General Assembly shall have power to provide for the creation of county commissioners in such counties as may require them, and to define

their duties." There is no general law upon the subject of the powers, duties, and jurisdiction of county commissioners, and, as was said by the present Chief Justice in *County of Pulaski v. Thompson*, 83 Ga. 274, 9 S. E. 1065, the Constitution does not require the Legislature to pass a general law defining the duties and powers of county commissioners. It was held in that case that "the Legislature has the power to pass separate and distinct acts for any counties which require county commissioners; and it is not necessary that these acts shall be uniform in their operation in all such counties." *Id.*, 83 Ga. 270, 9 S. E. 1065.

The petition further alleged that the act of 1903 "is void wherein it provides for the cancellation of tax *fi. fas.*" because "there is a general law of this state making provisions in such cases and fully covering the subject therein stated, and that provision is unconstitutional for the reason above stated." It also alleged that the part of this act which provides that the board of commissioners shall have the power to declare the office of county treasurer or the office of tax collector vacant, "under the conditions therein named, is void and violates the Constitution of Georgia, because the provision in relation to the removal of such officers * * * was, at the time of the passage of the act, covered by provisions in the laws of this state in the General Statutes thereof." Neither of these allegations presented any question for determination by the court, as they each failed to point out what general law was claimed to cover the subject dealt with in the portion of the act alleged to be unconstitutional. Even if both of these provisions of the act were unconstitutional, the validity of the whole act would not be affected, but these particular provisions thereof would simply be nugatory.

6. Another allegation of the petition is that the act of 1903 really repealed the act of 1900, which it purported to amend, and therefore the defendants, who were elected as county commissioners under the provisions of the act of 1900, went out of office upon the passage of the act of 1903. From the brief of counsel for the plaintiff in error it appears that this contention is based upon the fact that the act of 1903 provides that section 1 of the original act shall be stricken out and certain matter enacted in lieu thereof, and that a similar provision is made in reference to section 10 of the original act; section 1 providing for the creation of a board of county commissioners, and section 10 defining their duties. Even if section 1 of the act of 1900 were stricken therefrom and nothing substituted in its stead, it would seem that section 2 of that act would be sufficient to create a board of county commissioners for the county of Douglas; but, aside from this, a sufficient reply to the above contention, so far as it is based upon the alleged

repeal of section 1 of the original act, is that the section substituted therefor expressly provided that the commissioners in office when the amendatory act was passed should remain in office until the expiration of their terms, so that whatever powers were conferred upon the board of commissioners by the amendatory act were conferred upon the board as it was then constituted. Another complete reply is that abrogation and substitution were simultaneous, the section creating the board of commissioners being simultaneously stricken and re-enacted. No conceivable interval of time elapsed between the repeal and the substitution; hence the board of commissioners never, for a single instant, ceased to exist. It has been often held that where one statute expressly declares that an existing statute is repealed, and at the same time re-enacts its provisions, or declares that a portion of another statute is repealed and re-enacts such portion thereof, the re-enactment neutralizes the repeal, so far as the old law is continued in force. The old law operates without interruption, where the re-enactment takes effect at the same time as the repeal. *Suth. St. Const.* § 134; *Fullerton v. Spring*, 3 Wis. 667; *Laude v. Chicago Ry. Co.*, 33 Wis. 640; *Glantz v. State*, 38 Wis. 549; *Scheffels v. Tabert*, 46 Wis. 439, 1 N. W. 156; *Middleton v. New Jersey R. Co.*, 26 N. J. Eq. 269; *Merkle v. Bennington*, 68 Mich. 133, 35 N. W. 846; *Alexander v. Big Rapids*, 70 Mich. 224, 38 N. W. 227; *Moore v. Kenockee*, 75 Mich. 332, 42 N. W. 944, 4 L. R. A. 555; *Wright v. Oakley*, 5 Metc. (Mass.) 400, 406; *United Hebrew Ass'n v. Benshimol*, 130 Mass. 325; *Skyrme v. Occidental Mill Co.*, 8 Nev. 219; *Capron v. Strout*, 11 Nev. 304; *State ex rel. Birdsey v. Baldwin*, 45 Conn. 135. It is true that the new section substituted for the old changed the number of members of the board of commissioners from five to three; but, as it declared that the change was not to "go into effect until after the expiration of the term of office of each of the present members of the board as now constituted," the same board of five members, composed of the same persons, continued to exist.

7. Putting the contention of counsel for the plaintiff in error, in reference to the effect of the repeal of section 10 of the original act, in its strongest light, it is this: that inasmuch as that section alone defined the duties of the commissioners, when it was repealed the whole of the act of which it formed a part went with it. What the effect upon the original act would have been if the amendatory act had left the commissioners with no public duties to perform we need not inquire, for it did not do so. In this instance, as in the other, abolition and substitution were simultaneous, so that there was never a moment when the duties of the commissioners were not defined. An act creating an office may be amended by completely changing the pow-

ers and duties appertaining thereto, without destroying the office, or removing therefrom the person who is filling it.

8. The contention that the act of 1903 does not go into effect until January 1, 1905, is so obviously without merit as hardly to require discussion. The contention is based upon the provision therein that the change made in section 1 of the original act "shall not go into effect until after the expiration of the term of office of each of the present members of the board as now constituted." The change referred to was in the number of members of which the board should consist, section 1 of the original act providing for a board of five members, and section 1 of the act as amended providing for a board of three members. It was this change, and this change alone, which was not to go into effect until the time stipulated.

9. As the act of July 30, 1903, is not unconstitutional, it follows that the commissioners of Douglas county have lawful authority to call upon the tax collector of that county for a settlement of his accounts with the county. Section 10 of the act declares that the board of commissioners shall have exclusive jurisdiction and control "in supervising the tax collector's and receiver's books, and allowing the insolvent lists for said county; in settling all claims against the county, examining and auditing all claims or accounts of officers having the care, management, keeping, collecting, or disbursements of money belonging to the county or appropriated for its use and benefit, and bringing such officers to a settlement."

10. The contention that the act of 1903 is not retroactive is sound, but the contention that, because it is not retroactive, the county commissioners have no authority to call upon the tax collector for a settlement of his accounts for the year 1902, is unsound. It may be admitted that before the passage of this act the ordinary of the county alone had authority to bring the tax collector to a settlement of his accounts for the year 1902; but it does not follow from this that the ordinary, after the passage of that act, had such authority. His authority in the matter was taken away by the act and conferred upon the county commissioners. It does not make the act retroactive to hold that it gives the county commissioners authority to bring the tax collector to a settlement of accounts which came into existence before such authority was conferred upon them, and when it existed in the ordinary. The power of the county commissioners to bring the collector to a settlement with the county depends, not upon whether the acts of the collector to be brought under review were performed before such power was conferred upon the commissioners, but upon the question whether or not the collector had lawfully settled the accounts involved with the ordi-

nary before jurisdiction of the matter was conferred upon the board of commissioners. The tax collector does not allege that prior to the passage of the act of 1903 he settled his accounts for the year 1902 with the ordinary, but he alleges that the ordinary alone now has authority to call upon him to do so, and avers his willingness to submit to such officer "his books, receipts, and other vouchers or papers pertaining to his office, for inspection, and to fully settle and account for every dollar and cent that may have come into his hands as tax collector." If, as his petition clearly indicates, he has not settled his accounts for the year 1902 with the proper county official, then the county commissioners have the authority to require him to come to such a settlement with them. The ordinary now has no such authority, for his jurisdiction in the matter terminated upon the passage of the act of 1903, which gave exclusive jurisdiction in all such matters to the board of county commissioners.

11. Undoubtedly, the board of commissioners, when sitting as a court, has the power to punish for contempt. The act itself provides "that said board of commissioners shall have the same power and authority to punish for contempt of their court as other courts of said county." Whether or not the board of commissioners has the power to punish the tax collector for contempt because of a failure on his part to comply with a notice to appear before the board with the books and papers appertaining to his office, it is not necessary to determine. It does not appear, either from the notice served upon him or from any allegation in his petition, that the commissioners contemplate punishing him for the alleged contempt otherwise than by a fine of \$25. If they have such power, then of course he is not entitled to an injunction to prevent their exercising it. If they have no such power, then, if they do impose a fine upon him, he can refuse to pay it, and, if an attempt is made to collect it by the issuance and levy of an execution upon his property, he can interpose an affidavit of illegality and prevent the collection of the fine. So in neither event would he be entitled to an injunction. For remedies which the law clearly provides for a case in which a tax collector or county treasurer fails or refuses "to render an account of [his] official actings and doings respecting the county tax and funds," etc., "after being notified so to do by the proper officer or officers," see Pol. Code 1895, § 419. Whether these remedies are exclusive or not need not now be decided.

It is very clear that, under the case presented by this record, the plaintiff was not entitled to the extraordinary relief for which he prayed.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 551)

DOUGLAS COUNTY v. SAYER, Tax Collector.

(Supreme Court of Georgia. Feb. 16, 1904.)

APPEAL—REVIEW.

1. Irrespective of the question whether the petitioner in the court below would have been entitled to an injunction upon proof of the facts alleged in its petition, the judgment must be affirmed, for the simple reason that the evidence upon which the case was tried is not before this court. No evidence is incorporated in the bill of exceptions, nor is there before us any brief of evidence, approved by the trial judge and made a part of the record.

(Syllabus by the Court.)

Error from Superior Court, Douglas County; A. L. Bartlett, Judge.

Action by W. A. Sayer, tax collector, against Douglas county. Judgment for plaintiff, and defendant brings error. Affirmed.

W. A. James and J. D. Kilpatrick, for plaintiff in error. J. S. James and Roberts & Hutcheson, for defendant in error.

FISH, P. J. Irrespective of the question whether the petitioner in the court below would have been entitled to an injunction upon proof of the facts alleged in its petition, the judgment must be affirmed, for the simple reason that the evidence upon which the case was tried is not before this court. No evidence is incorporated in the bill of exceptions, nor is there before us any brief of evidence, approved by the trial judge and made a part of the record. The plaintiff in error has specified, as part of the record material to a clear understanding of the errors complained of, "the brief of evidence specified in the cross-bill of exceptions," with the statement that it need not be sent up except in that part of the record; and the clerk has sent up, with the record accompanying the "cross-bill of exceptions," what purport to be copies of certain affidavits and documents, which form no part of a brief of evidence approved by the trial judge, and none of which is even verified by him as having been introduced in evidence at the hearing. We suppose they were sent up by the clerk because they were specified by one of the parties to the case as parts of the record material to a clear understanding of the errors complained of. They could not become parts of the record by being so specified, and hence the clerk had no authority to treat them as such, and to thus transmit them to this court. Sayer v. Brown (Ga.) 46 S. E. 649, and cit.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 550)

SAYER, Tax Collector, v. DOUGLAS COUNTY et al.

(Supreme Court of Georgia. Feb. 16, 1904.)

APPEAL—REVIEW.

1. This case is controlled by the decision this day rendered in Sayer v. Brown, 46 S. E. 649.

(Syllabus by the Court.)

Error from Superior Court, Douglas County; A. L. Bartlett, Judge.

Action by W. A. Sayer, tax collector, against Douglas county and others. Judgment for defendants, and plaintiff brings error. Affirmed.

B. G. Griggs, Roberts & Hutcheson and J. S. James, for plaintiff in error. W. A. James and J. D. Kilpatrick, for defendants in error.

FISH, P. J. The present bill of exceptions assigns error upon the judgment of the court below, in refusing to grant the extraordinary relief prayed for by Sayer, the plaintiff in error, in what is called by the parties a "cross-bill" in the case of Douglas County v. Sayer (Ga.) ubi supra. Upon an examination of the record we find that every material allegation of fact in this cross-bill, relied upon for the relief therein prayed for, except one, was denied in the answer thereto. As the evidence upon which the case was tried, for the reason stated in the case of Douglas County v. Sayer, is not before us, we cannot consider any question which this bill of exceptions seeks to present, which depends upon facts which were in dispute. The allegation admitted by the answer was one in reference to a certain notice which the county commissioners had served upon Sayer as tax collector, requiring him, on a designated date, to appear before them, with the books, receipts, etc., pertaining to his office, and to make a full and complete settlement with the county. In this case the constitutionality of the act of July 30, 1903 (Acts 1903, p. 332), conferring exclusive jurisdiction upon the commissioners of Douglas county over certain county matters, including the examination, auditing, and settlement of the accounts of the tax collector of the county, is attacked upon the same grounds as those contained in the petition which was under consideration in Sayer v. Brown (this day decided), 46 S. E. 649, and upon two additional grounds. All of these grounds, which appear in both cases, and which were properly presented, have already been passed upon in the former case, and held to be without merit. One of the additional grounds which appears in this cross-petition has not even been alluded to in the brief of counsel for plaintiff in error, and we therefore treat it as having been abandoned. Jones v. Peterson, 117 Ga. 60, 43 S. E. 417. The allegation in reference to the other additional ground, which has been argued in the brief, is so vague, indefinite, and obscure as not to present any constitutional question for determination. A mere general allegation that a given act of the Legislature is void presents no question for consideration by a court; and an allegation that a designated act is unconstitutional, without indicating the particular constitutional provision which it is claimed the act violates, is equally worthless. Sayer v. Brown, supra, and citations.

There is no merit whatever in the contention that the county commissioners have no authority to meet at any other time than the first Tuesday in each month. Section 11 of the act provides: "That said board of commissioners shall meet on the first Tuesday in each month, and at the call of the chairman when the public business so requires." Under this provision the board is required to meet on the first Tuesday in each month, and can lawfully meet, when the public business so requires, at the call of the chairman, on a day other than the first Tuesday of a month. We do not think that the mere service upon the tax collector of the notice referred to in this opinion would have entitled him to an injunction, even if the act in question had been shown to be unconstitutional, but, in any view of the case, it is controlled by the decision in *Sayer v. Brown*, above cited.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 523)

ALABAMA MIDLAND RY. CO. v. GUILFORD.

(Supreme Court of Georgia. Feb. 15, 1904.)

NONSUIT—CARRIERS—INJURY TO PASSENGER—DEGREE OF CARE—INSTRUCTIONS.

1. Where certain allegations in a plaintiff's petition were admitted in the original answer of the defendant, but subsequently the answer was amended by striking therefrom these admissions and denying the truth of the allegations, and on the trial the plaintiff tendered in evidence the admissions contained in the original answer, and the defendant introduced no evidence to explain or controvert them, a motion for a nonsuit, on the ground that these allegations were not supported by the evidence, was properly overruled.

2. In a common-law suit for damages against a railroad company, brought in this state, on account of injuries received in Alabama, the rule of the common law applicable to the case as interpreted by the courts of this state should be given in charge to the jury. It was error, in such a case, to charge that the degree of diligence required of a railroad company as a carrier of passengers is "the highest degree of care and diligence known to skilled persons engaged in that business."

3. It is the duty of a railroad company, in equipping its trains, to use such appliances as are up to the standard of those in general use and reasonably adapted for the purposes for which they were intended; but the law does not require that such appliances shall be of "the most approved pattern in use."

4. It is error requiring the grant of a new trial for the court, in a suit for damages growing out of the alleged negligence of the defendant, to charge the jury that certain acts or omissions of the defendant would be negligent, such acts or omissions not being negligence per se,

(Syllabus by the Court.)

Error from Superior Court, Decatur County; W. N. Spence, Judge.

Action by J. S. Guilford against the Alabama Midland Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

T. S. Hawes and D. H. Pope, for plaintiff in error. Toomer & Reynolds and W. M. Harrell, for defendant in error.

CANDLER, J. The plaintiff below sued the defendant railroad company for damages on account of personal injuries, and was awarded a verdict for \$5,000. The defendant made a motion for a new trial on various grounds, its motion was overruled, and it excepted.

1. The plaintiff in his petition alleged that, prior to the time his injuries were received, a part of the line of railroad now owned and operated by the defendant company had been owned by an Alabama corporation, and the other part by a Georgia corporation, but that these two corporations had been merged and their property consolidated, and the suit was brought against the corporation as thus constituted. In its original answer the defendant admitted these allegations, but by an amendment it sought to "take back" this admission, and averred that it "is composed of two separate, independent, legal entities, each dependent for its existence upon the separate and independent acts of incorporation by the several states of Georgia and Alabama." At the trial the plaintiff introduced in evidence a certified copy of a memorandum and agreement of merger and consolidation of the Alabama Midland Railway Company of Alabama and the Alabama Midland Railway Company of Georgia, "consolidating, uniting, and merging said companies as one, under the name of the 'Alabama Midland Railway Company,' from and after the date of filing the same with the secretaries of state of Alabama and Georgia." This was accompanied by a certificate of the Secretary of State of Georgia, showing that the memorandum of consolidation had been filed in his office. As to whether it was ever filed in the office of the Secretary of State of Alabama the record is silent. The plaintiff also put in evidence the admission, in the defendant's original sworn answer, that his allegations on this subject were true. No evidence was introduced by the defendant to support the averments of its amended plea and contradict the evidence offered by the plaintiff; but at the conclusion of the plaintiff's evidence the defendant made a motion for a nonsuit, and the refusal of this motion is assigned as error.

We do not deem it necessary to consider whether the showing that the memorandum of merger above referred to was filed in the office of the Secretary of State of Georgia, in the absence of evidence that a similar memorandum was filed in the office of the Secretary of State of Alabama, would be sufficient to establish the contention of the plaintiff that the two companies had been consolidated. The defendant, by its sworn plea, admitted the allegation of merger contained in the petition; and while, as was held when the case was here before (114 Ga. 627, 40 S.

El. 794), it was not thereby estopped to amend by striking this admission and denying the truth of the allegation, the contents of the original plea were admissible in evidence as an admission in *judicio*, and, in the absence of some effort to contradict or explain that admission, this evidence is certainly sufficient to withstand a motion for nonsuit. As was said by the Chief Justice when the case was here before, the withdrawal by the defendant of its admissions of the truth of the plaintiff's allegations "would not have prevented the plaintiff from introducing them in evidence as showing *prima facie* what was admitted, but . . . it would have given the defendant an opportunity to explain and disprove them." The defendant in the present case introduced no evidence whatever to show that its original admissions were incorrect, and therefore they must, for the purposes of this investigation, be taken as true. See, on this subject, *Lydia Pinkham Med. Co. v. Gibbs*, 108 Ga. 138, 33 S. E. 945.

2. Complaint is also made, in the motion for new trial, of the following charge of the court: "The law requires of persons engaged in the carriage of passengers by railroad the highest degree of care and diligence known to skilled persons engaged in that business." This charge follows almost literally a decision of the Supreme Court of Alabama, in which state the plaintiff's injuries were received. The plaintiff's action was not brought upon any particular statute, but rests upon his common-law right to recover damages. The common law as to the degree of diligence required of the defendant was therefore applicable to this case; and, as has been frequently ruled by this court, in determining what the common law on a given subject is, the decision of the Georgia courts, rather than those of some other jurisdiction, must be followed. Our own Code section on the subject of extraordinary diligence as applied to railroads is merely declaratory and explanatory of the common law. Civ. Code 1895, § 2899, defines extraordinary diligence to be "that extreme care and caution which very prudent and thoughtful persons use in securing and preserving their own property"; and, while this rule applies particularly to diligence in the preservation of property, it has always been recognized as extending with equal force to diligence to prevent injury to the person. Under the uniform decisions of this court, the degree of care required of a carrier of passengers is somewhere between the comparative and the superlative. A distinction is drawn between "very great" and "greatest." Thus, in *East Tenn. R. Co. v. Miller*, 95 Ga. 738, 22 S. E. 660, it was held error to charge that a railroad company is required to observe the utmost care and diligence for the safe carriage of passengers. See, also, *Florida R. Co. v. Lucas*, 110 Ga. 123, 35 S. E. 283. Taking the Georgia law, then, as applicable to this case, it follows that the rule of diligence laid down

by the trial judge, viz., "the highest degree of care and diligence known to skilled persons engaged in that business," was far too sweeping, and placed upon the defendant company a burden greater than that imposed by the law.

3. Complaint is also made of the following charge: "You will then determine whether the evidence shows that the defendant company did have and was maintaining a good headlight on that night; one that was up to date; the most improved pattern in use up to that time. If you find that they have shown that, then you would not be authorized to find a verdict for the plaintiff on that ground." In its answer the defendant averred, in reply to the allegation of the petition that the headlight on the engine when the plaintiff's injuries were received was dim and otherwise defective, that on the occasion in question it "had a splendid headlight of the latest improved style." In view of this averment of the plea, we are not prepared to hold that the charge complained of is error of such a character as to require the grant of a new trial, especially since the court elsewhere in the charge correctly instructed the jury on this subject, so that it is by no means likely that they were misled. But the charge complained of was inaccurate, and, as the case is to be tried again, we call attention to it in order that it may not be repeated at the next trial. The defendant was required to use a headlight that was up to the standard of those in general use and well suited for the purposes for which it was intended; and it was not necessary, in order to relieve it, that it should show that the headlight used on the occasion of the plaintiff's injuries was of "the most approved pattern in use up to that time."

4. The plaintiff's injuries were occasioned by the train on which he was riding running into a tree which had been blown across the track in a windstorm that took place some time prior to the passage of the train. Whether the tree was on the defendant's right of way, and whether, previously to the time it was blown down, it was so visibly unsound as to make it incumbent on the railroad company, in the exercise of the diligence required of it by law, to remove the tree, were sharply contested questions. The court charged the jury: "If you should find that although the tree in question stood outside of the right of way of the railroad track, just in the edge of it, just outside of it, if you should find that it was an unsound tree, and that there was evidence of its unsoundness that was or could have been visible to the employees of the company, and that it was in reach of the railroad track, and that it was a tree that any ordinarily prudent man, in the exercise of ordinary care and skill, could have discovered was dangerous to passengers—liable to be blown down by an ordinary windstorm—then I charge you that the company would be guilty of negligence in not

removing such a tree as that, if the evidence shows that it was such a tree; and, if you believe that that negligence contributed to the injury of the plaintiff, you should find in favor of the plaintiff." Clearly, this was error requiring the grant of a new trial. It is never permissible for the trial judge to instruct the jury that given acts are negligence, unless the acts are such as to constitute them negligence per se. This is so well settled by the decisions of this court that we deem it necessary to cite only one recent case on the subject, in which this principle of law is fully discussed and the authorities bearing thereon set out. See *Central R. Co. v. McKenney*, 116 Ga. 13, 42 S. E. 229, and citations; a. c. 118 Ga. 535, 45 S. E. 430. The motion for a new trial contained numerous grounds, but only those which have been noticed in the foregoing require discussion here. The charge of the court, with the exceptions heretofore pointed out, was free from any material error, and any minor inaccuracies which it may have contained will, we are sure, in the light of what is here laid down, be remedied when the case is tried again.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 439)

AMERICUS GROCERY CO. v. BRACKETT & CO.

(Supreme Court of Georgia. Feb. 13, 1904.)

SALE—WARRANTY—DESCRIPTION—NONSUIT—DAMAGES—DEMURRER—WAIVER.

1. A sale of a chattel by a particular description imports a warranty that the article sold is of the kind specified.
2. Whether, in a sale of "Texas red rust-proof seed oats," a particular variety of oats, regardless of where they were produced, was intended, or whether, because of special value derived from peculiarities of soil and climate, the term included only those raised in the state of Texas, was a question of fact for the jury.
3. A conflict in the plaintiff's evidence as to the trade meaning of the term did not of itself authorize the grant of a nonsuit.
4. Where there is a breach of warranty in the sale of chattels, the buyer can resell on the same day or retain the goods at the market price, thereby fixing the exact amount of the damages to which he is entitled for the breach.
5. Where goods inferior to those ordered are delivered, the measure of damages is the difference between the contract price of those ordered and the market price of those delivered, at the time and place of delivery.
6. The fact that the inferior goods delivered subsequently increase in value, and are resold by the plaintiff at a price above that paid, does not deprive him of the cause of action which accrued, and became fixed as to the measure of damages, on the day of the breach.
7. Where a defendant files a special demurrer, and without insisting on a ruling thereon goes to trial on the issue raised by the petition and answer, he thereby waives any rights under the demurrer.

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

46 S.E.—42

Action by the Americus Grocery Company against Brackett & Co. Judgment for defendant, and plaintiff brings error. Reversed.

The plaintiff ordered from the defendant 10,000 bushels of "Texas red rust-proof seed oats." It alleges that the defendant delivered Indian Territory and Oklahoma raised oats; that the plaintiff did not know, and by the exercise of ordinary care could not have discovered, the difference when it received and paid for the same; that those delivered were worth from 10 to 15 cents a bushel less than those ordered at the time and place of delivery; and that it was entitled to recover \$1,200 overpaid. One witness for the plaintiff testified that the oats, though raised in Indian Territory and Oklahoma, answered the trade meaning of "Texas red rust-proof seed oats." Other witnesses testified that the term included only those raised in Texas; that Texas grown oats had a special value for seed, derived from the peculiar climate and soil of that state; that Oklahoma and Indian Territory oats were used only as feed oats, and sold at a lower price. The market price of all oats advanced after the sale, and the plaintiff subsequently sold the oats bought at a price above that paid. At the conclusion of the evidence the defendant moved to dismiss the case on the grounds stated in the special demurrer, and because the plaintiff was not entitled to recover under the evidence. The case was dismissed, and the plaintiff excepted.

Shipp & Sheppard, for plaintiff in error.
Allen Fort & Son and E. A. Hawkins, for defendant in error.

LAMAR, J. Bargain and sale of a chattel of a particular description imports a warranty that the article sold is of that description. *Miller v. Moore*, 83 Ga. 684, 10 S. E. 360, 6 L. R. A. 374, 20 Am. St. Rep. 329; Civ. Code 1895, § 3558. It was for the jury to decide whether "Texas red rust-proof seed oats" described a specific variety, regardless of where they were raised, as "Irish" potatoes includes those raised outside of Ireland; or whether the trade meaning included those grown in the state of Texas, deriving their special value from the character of the soil and climate. One witness testified that oats raised in Indian Territory and Oklahoma came within the descriptive words; others that it meant only those raised in Texas. A conflict in the plaintiff's testimony did not of itself authorize the grant of a nonsuit. It proved its case as laid, and by going to trial on the issue raised by petition and answer the defendants waived any advantage which they could have taken by reason of their special demurrer.

Assuming that there was in fact a breach, a recovery would not be defeated because the price advanced, and several weeks later the plaintiff sold these oats raised in Okla-

homa at a profit. The law does not allow the rights of the parties to depend upon the subsequent fluctuations of the market. Where there has been a breach, the measure of damages is fixed at the difference between the value of the goods ordered and those delivered at the time and place of the delivery. The amount which the plaintiff would be entitled to recover is not affected by the subsequent rise or decline in prices of those ordered or of those delivered; nor is it changed by the fact that the plaintiff subsequently resold at an increased or decreased price. Compare *Berry v. Shannon*, 98 Ga. 461, 25 N. E. 514, 58 Am. St. Rep. 313. Often in fact, and always in theory, the party who is damaged by such breach of a warranty of personal property can resell on the same day, or he can retain the goods at that day's market price, and the difference thus calculated represents his actual loss, as well as the measure of legal damage. If the goods thus retained decline in value, the amount he is entitled to recover is not increased; if the goods advance, the defendant's liability is not lessened. The rights and liabilities of each are fixed on that day, and subsequent changes in the value of the goods ordered or delivered are wholly immaterial. Civ. Code 1895, §§ 2319, 3551, 3557.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 446)

MILLER v. STATE

(Supreme Court of Georgia. Feb. 12, 1904.)

CRIMINAL LAW—APPEAL—REVIEW.

1. The exceptions to the charge are without merit. The evidence warranted the verdict, and the court did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Harris County; W. B. Butt, Judge.

Willie Miller was convicted of crime, and brings error. Affirmed.

Henry C. Cameron, for plaintiff in error. S. P. Gilbert, Sol. Gen., for the State.

FISH, P. J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 474)

CARTER & DOROUGH v. MINTON et al.

(Supreme Court of Georgia. Feb. 12, 1904.)

ACTION ON NOTE—DEFENSE—EVIDENCE.

1. When, in defense to a suit on a promissory note, the defendant pleads that the consideration therefor was an organ sold under a covenant of warranty, and an agreement to repair certain known defects, with which obligation the plaintiff failed and refused to comply, it is incumbent on the defendant not only to prove a breach of such agreement, but also to introduce evidence which will enable the jury to estimate the damages thereby sustained.

2. It appearing from the recitals of fact and the brief of evidence set forth in the petition for certiorari in this case that, on the trial thereof in the justice's court in which it was brought, the defendants failed to establish by evidence any of the special defenses relied on by them, save only that they were entitled to a small credit upon the note sued on, but that the jury nevertheless returned a general verdict in their favor, the judge of the court below erred in refusing to sanction the plaintiffs' petition for certiorari.

(Syllabus by the Court.)

Error from Superior Court, Echols County; R. G. Mitchell, Judge.

Action by Carter & Dorough against L. W. Minton and others. Judgment for defendants, and plaintiffs bring error. Reversed.

E. K. Wilcox, for plaintiffs in error. R. G. Tison, for defendants in error.

TURNER, J. Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 426)

WOOD v. STATE.

(Supreme Court of Georgia. Feb. 12, 1904.)

ASSAULT WITH INTENT TO KILL—EVIDENCE.

1. Aside from the evidence for the state, the statement of the accused showed a premeditated design to take the life of the person shot by her, on account of past ill treatment which she had received from him, and that there was no other cause for the shooting. It follows that the verdict for assault with intent to murder was demanded by such statement, without regard to any of the rulings of the court of which complaint was made.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; L. S. Roan, Judge.

W. J. Wood was convicted of assault with intent to kill, and brings error. Affirmed.

R. B. Blackburn, for plaintiff in error. C. D. Hill, Sol. Gen., and L. Z. Rosser, for the State.

FISH, P. J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 529)

BROADHURST v. CARSWELL et al.

(Supreme Court of Georgia. Feb. 15, 1904.)

POSSESSORY WARRANT—EVIDENCE—TITLE TO PROPERTY.

1. The plaintiff in error having sued out a possessory warrant against the defendants in error for certain personal property, and the magistrate, on the hearing before him, having awarded the possession to the plaintiff, whereupon the defendants took the case to the superior court by certiorari, and it appearing from the petition for certiorari and the answer of the magistrate that the plaintiff had in good faith acquired the property from one in possession thereof as the apparent owner of it, and that subsequently possession of the property was taken from the plaintiff's servant against his will, and by intimidation or duress, the court below erred, on the hearing of the certiorari, in award-

ing the custody of the property to the defendants in error. The question of title was not in issue in this case, and may be settled by another and more appropriate proceeding.

(Syllabus by the Court.)

Error from Superior Court, Wilcox County; D. M. Roberts, Judge.

Action by W. J. Broadhurst against W. B. Carswell and others. Judgment for defendants, and plaintiff brings error. Reversed.

E. D. Graham, Martin Cannon, and J. L. Bankston, for plaintiff in error. Hal Lawson, for defendants in error.

TURNER, J. Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 504)

GEORGIA NORTHERN RY. CO. v. HUTCHINS & JENKINS.

(Supreme Court of Georgia. Feb. 13, 1904.)

TRIAL—DISMISSAL—JUDGMENT ON DEMURRER—BILL OF EXCEPTIONS—BREACH OF CONTRACT—INSTRUCTIONS—NEW TRIAL.

1. If the defendant calls in question by demurrer the sufficiency of the petition, and the court renders a decision holding that the petition sets forth a cause of action, so long as this decision stands unreversed the defendant is precluded from calling in question the sufficiency of the petition by oral motion to dismiss.

2. A judgment on demurrer, until reversed, concludes the parties upon all questions necessarily involved in the decision of the points raised in the demurrer.

3. A bill of exceptions specified, as a part of the record to be transmitted, "the motion for new trial." *Held*, that it was the duty of the clerk to transmit the original motion for a new trial and all amendments thereto.

4. The charges complained of were not erroneous for any of the reasons assigned, and especially is this true as to those which related to the cause of action and the measure of damages, when they are construed in the light of the fact that the defendant was concluded, by the judgment on the demurrer, as to the right of the plaintiff to recover and the character of the damages which should be recovered.

5. Neither a ground of a motion for a new trial assigning error upon the admission of evidence nor a similar assignment of error in a bill of exceptions will be considered, unless the evidence is set forth in such a manner that the question of its admissibility can be decided without reference to other parts of the record.

6. The evidence authorized the verdict. No material error has been made to appear by any sufficient assignment of error, and the discretion of the trial judge in refusing to grant a new trial will not be controlled.

(Syllabus by the Court.)

Error from City Court of Moultrie; W. A. Covington, Judge.

Action by Hutchins & Jenkins against the Georgia Northern Railway Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Little & Battle, Wm. Hammond, and W. S. Humphreys, for plaintiff in error. J. W. Mattox and Shipp & Kline, for defendants in error.

COBB, J. Hutchins & Jenkins brought suit in the city court of Moultrie against the Georgia Northern Railway Company, the allegations of their petition being in substance as follows: Defendant has injured and damaged plaintiffs in the sum of \$12,500, by reason of the following facts: On January 3, 1900, defendant entered into a contract with the firm of McGehee & Co., whereby it agreed to extend, by January 3, 1901, its railroad to a point below the still of McNeill & Co., in said county, at which point is a sawmill of McGehee & Co. Said contract was, with the approval and consent of the defendant, transferred to plaintiffs by McGehee & Co. on October 1, 1900, a copy of the contract and transfer being attached to the petition as an exhibit. At the date of the contract the defendant had already constructed a tramroad near the location of plaintiffs' mill and within one mile thereof, and had been using and operating such road for the purpose of hauling freight. This road was in use when the contract was made, and the defendant received and accepted all the benefits and rights under the contract. On October 1, 1900, plaintiffs purchased from McGehee & Co. the location, plant, timber, and contract which they had obtained from the defendant, paying for the same the sum of \$10,000, which was a fair price. Plaintiffs assumed and carried out all the obligations and duties owed by McGehee & Co. to the defendant. They delivered to the defendant all of the lumber cut by them and by their mill, and defendant accepted the lumber and hauled the same, and received from plaintiffs all freight charges specified in the contract, and plaintiffs continued to deliver lumber, and defendant to accept the freight charges, until it moved its track, as herein stated, and made it impossible to further carry out the contract. Before making the purchase from McGehee & Co., plaintiffs saw in person the president of the defendant company, who assured plaintiffs that the contract would be carried out, and urged plaintiffs to buy the contract and have it transferred to them. At the end of three months after the contract was transferred to plaintiffs, defendant tore up the track or line of road it had built to within half a mile of plaintiffs' mill, and since then have not had a track near them over which they could haul lumber for plaintiffs. On account of defendant's having removed its tramroad, leaving plaintiffs seven miles from the nearest railroad station, plaintiffs were compelled to move their mill to a new location two miles nearer a railroad. This was done at a cost of \$1,000, made up as follows: Ten houses for employes at new location, \$500; cost of moving mill and putting it down again, \$300; cost of house for superintendent, \$150; cost of barn and commissary, \$50. Since the removal of the tramroad plaintiffs have had to haul with teams the cut of their mill five miles in order to reach a railroad. Plaintiffs

hauled in this way 474,000 feet of lumber, at a cost of \$1,422. Owing to extra cost of hauling, plaintiffs were forced to abandon 200,000 feet of saw logs, which after being cut down could not profitably be sold. By reason of inaccessibility to railroad these logs were a total loss, and were worth \$600. By reason of the extra cost for the long haul to railroad, plaintiffs could cut only the large trees into lumber, the smaller trees being a total loss. On this account they sustained damage in the sum of \$500. By reason of the removal of the track and failure of defendant to carry out its contract, plaintiffs' sawmill location was damaged and depreciated in the sum of \$7,500, this depreciation resulting from the fact that, on account of the extra cost of hauling to the railroad, the business could not be profitably operated. Plaintiffs still have of the timber leased as above stated 1,400 acres that have not been cut, which will cut 5,600,000 feet, and to haul this timber to the railroad will cost \$16,800, this extra cost being occasioned by the failure of the defendant to carry out its contract.

The contract referred to in the petition was attached thereto as an exhibit, and is in substance as follows: "John F. Pidcock, President of the Georgia Northern Railway Co." was "party of the first part," and McGehee & Co. party of the second part. McGehee & Co. obligated themselves to locate their sawmill on the line of the Georgia Northern Railroad at McNeill's still, or somewhere near that point, and to give the "Georgia Northern Railway Company" the hauling of all the lumber made from the McNeill purchase and the timber they may buy adjoining or near by such timber, except certain specified timber. "And the said John F. Pidcock, president of the aforesaid, hereby agrees to build, construct and equip a railroad to McNeill's still as early as practicable for the purpose of hauling said lumber;" also, to extend the railroad one mile beyond the still in a southerly direction, as McGehee & Co. may desire, within 12 months from date, and to give that company freight rates on all lumber shipped from their mill. McGehee & Co. were to pay certain freight rates and \$2 per car for each car placed at their sawmill for the purpose of moving the lumber. If McGehee & Co. should fail to pay to McNeill & Co. a certain note for \$2,500 due them, the timber was to revert to the "Georgia Northern Railway Company, or its president, John F. Pidcock, who is responsible for the payment of said note." The contract was signed, "John F. Pidcock, Pres. Ga. Northern Railroad Co., E. J. McGehee & Co." Indorsed on the contract was an assignment by McGehee & Co. to Hutchins & Jenkins of all right, title, and interest in the contract.

To this petition the defendant interposed a general demurrer on the grounds that no sufficient facts were alleged to authorize a

recovery against defendant; that the petition shows on its face that the defendant neither has nor ever had any contract relations with plaintiffs, nor was ever under any legal duty to plaintiffs to do any of the acts or things, the performance of which makes the pretended cause of action against it; that the damages claimed in the petition are remote and speculative, and incapable of being recovered at law. The defendant also filed a special demurrer to several named paragraphs of the petition, amplifying and emphasizing the points raised in the general demurrer. These demurrers were overruled on July 17, 1902, after the petition had been amended, and exceptions pendente lite to this ruling were filed. The allegations of the defendant's answer were, in substance, as follows: Defendant denies that it has damaged plaintiffs in any sum whatever. Can neither admit nor deny that John F. Pidcock made or entered into the contract attached to the petition, but denies that the defendant ever made any such contract, and denies that the contract was transferred with its knowledge or consent. Avers that it did not remove the line of railway from the sawmill until the mill had ceased to supply sufficient lumber to enable it to retain such railroad. Avers that the damages claimed in the petition are too remote and speculative to be the basis of a recovery, and that defendant is in no way responsible for such damage.

The case came on for trial on June 11, 1903, and resulted in a verdict for the plaintiffs for \$7,500. The defendant made a motion for a new trial, which was overruled. It filed a bill of exceptions, assigning error upon the overruling of the motion for a new trial, and also upon certain rulings made at the trial, the bill of exceptions having been tendered and certified within the time allowed by law for this purpose. On the same day that this bill of exceptions was certified, the judge also certified another paper purporting to be a bill of exceptions, assigning error upon the exceptions pendente lite filed at the time of the judgment overruling the demurrer, but in this paper there was no assignment of error upon any ruling at the trial. Both bills of exceptions were served and filed and transmitted to this court. Before the case made by the bill of exceptions first above referred to was called, the plaintiff in error, by leave of the court, withdrew the bill of exceptions and record in the other case. If this bill of exceptions had not been withdrawn, it would have been dismissed, for the reason that it did not contain an assignment of error on any ruling made at the trial. See *Barge v. Robinson*, 115 Ga. 41, 41 S. E. 258.

1. In the case now under consideration the bill of exceptions specified, as a part of the record to be transmitted to this court, the general and special demurrers of the defendant, and they were transmitted as a part of the record. It did not appear what dispo-

sition had been made of these demurrers, and under the authority conferred upon this court by Civ. Code 1895, § 5536 (4), the clerk of the trial court was required to certify and transmit a copy of any judgment that might appear to have been made on those demurrers; and in response to this order there was transmitted to this court a certified copy of a judgment reciting that, an amendment having been allowed to the plaintiffs' petition, both the general and special demurrers were overruled, this judgment being dated July 17, 1902. This part of the record was necessary to a proper determination of the assignment of error in the bill of exceptions which complained that the court erred in overruling, at the trial, an oral motion to dismiss the case because the petition failed to set forth any cause of action. If the defendant had filed no demurrer to the petition, or had withdrawn the demurrers or failed to press the same, it had the undoubted right at the trial to make an oral motion to dismiss the case upon any ground which would be good in arrest of judgment. Civ. Code 1895, § 5046; *McCook v. Crawford*, 114 Ga. 339, 40 S. E. 225 and citations. But when the defendant, at the first term, filed demurrers, both general and special, and pressed the same to a decision, and a judgment was rendered overruling the demurrers, the question arises as to how far this judgment is conclusive between the parties as to the right of the plaintiffs to recover upon the facts alleged. It has been held that a judgment sustaining a general demurrer to a petition will bar a second suit for the same cause of action. *Greene v. Central of Georgia Railway Company*, 112 Ga. 859, 38 S. E. 360, and citations; *Satterfield v. Spier*, 114 Ga. 127 (3), 39 S. E. 980. If a judgment on a demurrer that a petition sets forth no cause of action will conclude the plaintiff in another suit against the defendant, it would seem that upon similar principles a judgment upon a demurrer that a petition does not set forth a cause of action will conclude the defendant in the same case, so long as such judgment stands unreversed. See, in this connection, *Kelly v. Strouse*, 116 Ga. 874 (7), 891 (7), 43 S. E. 288. In the case just cited the following language appears: "If the defendant calls in question the sufficiency of the petition by demurrer, as he has a right to do, and the court renders an erroneous decision holding that the petition sets forth a cause of action, when in truth it does not, and the defendant acquiesces in this decision, of course no one will contend that, after the time allowed by law has expired for bringing under review this erroneous decision, the defendant can be heard to say that the petition sets forth no cause of action." There was no error in overruling the motion to dismiss. The judgment on demurrer is conclusive upon the question as to whether the petition sets forth a cause of action.

2. A judgment on demurrer, so long as it

stands unreversed, is conclusive on the parties as to all questions which were necessarily involved in the decision of the points raised by the demurrer. The demurrer in the present case not only raised in a general way the question as to the sufficiency of the plaintiffs' allegations to authorize a recovery, but it specifically raised the question that on the face of the petition there did not appear to be any contractual relation between the defendant and the plaintiffs which would authorize the plaintiffs to recover damages for the alleged wrongful acts committed by the defendant. The question was distinctly made by demurrer to the whole petition, as well as by demurrers to different paragraphs, that the damages claimed were too remote and speculative and incapable of computation, and generally of such a character as not to be the basis of a legal recovery. In other words, in passing upon the demurrers the court was compelled to decide two questions: (1) Have the plaintiffs alleged such a state of facts as to show that in law the defendant is liable in damages to it? and (2) are the damages claimed of such a character as to be properly the subject of a legal recovery? The judgment overruling the demurrers decided these questions in favor of the plaintiffs, and this decision is the law of this case, whether right or wrong. A great part of the brief of counsel for the plaintiff in error is devoted to a discussion of the question as to whether the facts alleged are sufficient to constitute a cause of action, and whether the damages sought to be recovered are of such a character as to be the basis of a legal recovery. It is not proper for us to determine either of these questions, nor do we express or intimate any opinion in reference to the same, as they are concluded by the judgment on the demurrers.

3. The bill of exceptions specified as a part of the record "the motion for new trial." The clerk transmitted a motion for a new trial based upon the general grounds only. Before the call of the case, counsel for the plaintiff in error filed a suggestion of a diminution of the record, in which it was set forth that there was in the court below an amendment to the motion for a new trial which had not been transmitted. It may be that under authority of Civ. Code 1895, § 5536 (4), this court would require such an amendment to be transmitted whenever it became apparent that it was necessary to a proper determination of the case, even though the amendment was not in any way specified in the bill of exceptions. But in any event a specification of "the motion for a new trial" includes the original motion and all amendments thereto.

4. There are various assignments upon different parts of the charge. In one, complaint is made that the court charged the law of recoupment; but, as it appears from the motion that this charge was made at the request of the defendant, of course it

has no right to complain. Complaint is also made that the court charged the jury that "the jury may also consider the number of witnesses, although not necessarily with the greater number." This charge is unintelligible, but reference to the charge which is contained in the record shows that the judge, in concluding his remarks upon what is meant by a preponderance of the evidence, used this language: "The jury may also consider the number of witnesses, although the preponderance is not necessarily with the greater number." There was evidently a mistake in copying the charge excepted to in the motion for a new trial and bill of exceptions, the words "preponderance is" having been omitted after the word "although." But treating the extract from the charge in the record as the one actually given, when the part of the charge referring to the subject of the preponderance of the evidence is considered as a whole, there was nothing in the charge complained of to require the granting of a new trial. The jury could not have been misled by it if they had been attentive to other parts of the charge. The other portions of the charge which are alleged to be erroneous were not so for any of the reasons assigned, in the light of the fact that the judgment on the demurrers concludes the defendant, not only as to the right of the plaintiffs to recover, but also as to the elements of damage to be considered in determining the amount of the recovery, provided, of course, the allegations in reference to the cause of action and the damages sought to be recovered were established to the satisfaction of the jury by competent evidence.

5. The third ground of the motion for a new trial was as follows: "Because the court erred in submitting in evidence, over defendant's objection, that portion of E. J. McGehee's answer to direct interrogatory No. 5, in which the witness states that 'the president, Mr. John F. Pidcock, was speaking for the company'; defendant's objection being that said answer was irrelevant and the expression of a mere opinion or deduction of the witness." There is an assignment of error in substantially the same language in the bill of exceptions. Neither the assignment in the motion nor that in the bill of exceptions can be considered, for the reason that it does not appear what was the matter about which Pidcock was speaking. Reference is made to direct interrogatory No. 5 for this purpose, but it is well settled that this court will not look beyond the motion for a new trial or the assignment of error in the bill of exceptions, as the case may be, to ascertain the facts necessary to pass intelligently upon the assignment. See *Seaboard Air-Line Railway v. Phillips*, 117 Ga. 98, 106, 43 S. E. 494, and cases cited. There are numerous other assignments of error upon rulings on evidence, which cannot be considered, for the reason that the evidence

objected to is not set forth; others, for the reason that it is not set forth with sufficient certainty; others, for the reason that the objection made to the admission of the evidence is not stated; and still others, for the reason that it does not appear that the objection set forth in the assignment of error was made at the time the evidence was offered.

6. Error is assigned in the motion for a new trial and in the bill of exceptions upon the admission in evidence of a written assignment or transfer signed by "John F. Pidcock, President Georgia Northern Railway Company," of what was described as "the within and foregoing lease," etc. The objection made to this evidence was that it was irrelevant, did not have the corporate seal of the railway company, and there was no evidence that John F. Pidcock had authority from the railway company to execute the assignment. Neither in the bill of exceptions nor in the motion for a new trial is the paper assigned nor the substance of it set forth. It is simply referred to in each instance as "the instrument of bargain and sale, etc., from N. McK. McNeill and T. I. McNeill to John F. Pidcock, President, etc." It is impossible to pass upon the assignment of error without having before us the paper to which the transfer relates; and as this is not embodied, either literally or in substance, either in the motion for a new trial or the bill of exceptions, the assignment of error will not be considered.

After a careful consideration of all the assignments of error relating to the admission of evidence, we find no error which would, in our opinion, require the granting of a new trial. Objection to the evidence introduced to prove the amount of damages was not well taken, for the reason that the plaintiff simply proved the character of damages alleged in the petition, and the judgment on the demurrers concluded the defendant on the question as to whether these were the subject of a lawful recovery. After a careful examination of the entire record, we find no sufficient reason for reversing the judgment. The evidence authorized the verdict, and, no material error having been committed, we will not interfere with the discretion of the trial judge in refusing to grant a new trial.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 424)

WILLIAMS v. TOWN OF SYLVESTER.

(Supreme Court of Georgia. Feb. 12, 1904.)

CRIMINAL LAW—CERTIORARI—ORDINANCES—VIOLATION.

1. Section 765 of the Penal Code, providing that the writ of certiorari shall not be granted from the judgment of a county court in criminal cases, "unless the accused shall file his affidavit stating that he has not had a fair trial

and has been wrongfully and illegally convicted," has no application to a writ of certiorari sued out from the judgment of a municipal court.

2. Section 11 of the act approved December 21, 1898 (Acts 1898, p. 273), incorporating the town of Sylvester, empowers the mayor "to see that the laws of said town, the ordinances, the by-laws, the rules and regulations, and orders of the council are duly executed," and to "impose fines, not to exceed the sum of fifty dollars," upon offenders, or sentence them to imprisonment or labor on the public works for a term not to exceed thirty days, "whenever they have violated any of the laws, by-laws, rules, or orders of the council, or the ordinances of said town," but the act nowhere contemplates that he shall have power to impose punishment for a specific offense not made penal by the ordinances or other laws of the town.

3. The allegations of the petition for certiorari were such as to require a consideration of the case on its merits, and the judgment of dismissal on the technical ground that the petition was insufficient in law was erroneous.

(Syllabus by the Court.)

Error from Superior Court, Worth County; W. N. Spence, Judge.

Homer Williams was convicted of violating an ordinance of the town of Sylvester, and brings error. Reversed.

Claude Payton, for plaintiff in error. Perry & Tipton, for defendant in error.

CANDLER, J. Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 485)

SCOTT et al. v. WHIPPLE.

(Supreme Court of Georgia. Feb. 13, 1904.)

RECEIVERS—DEPOSIT IN BANK—LIABILITY OF SECURITIES.

1. In a suit pending in Dooly superior court, in which a receiver had been appointed, the receiver was, by a special order of court, directed to deposit certain funds in a named bank, "upon said bank giving good and solvent bond and security to the receiver for the forthcoming of said money; said security to be approved by the receiver." The deposit was made, the receiver having first taken a bond with the plaintiffs in error as securities; the condition of the bond being that the depository bank "shall well and truly account for all moneys, funds, and notes which may be deposited with it by said receiver, and shall pay and apply such money and funds as directed by said receiver promptly upon his demands, and do and perform its functions as depository . . . according to the true intent and meaning of" the order directing the receiver to make the deposit. The receiver at first made a demand deposit, but subsequently, at the solicitation of an officer of the bank, and with no consideration moving to him, changed it to a time deposit bearing no interest. Before the time certificate matured, the bank failed, and the receiver made demand upon it and upon the securities on the bond for the amount then on deposit to his credit as receiver, which was refused, and he brought suit for the breach of the bond. The defendants introduced no evidence. *Held*, it was not error to direct a verdict for the plaintiff for the amount of money shown by the undisputed evidence to have been on deposit to the receiver's credit when the bank failed. In the light of the court's order, which was recited in the bond, and of the express condition of that

instrument, the independent transaction between the receiver and the bank, by which a demand deposit was changed to a time deposit, in no way affected the obligation of the securities on the bond, which was that the money on deposit should be forthcoming whenever the receiver should demand it.

(Syllabus by the Court.)

Error from Superior Court, Dooly County; E. A. Hawkins, Judge pro hac vice.

Action by U. V. Whipple, receiver, against J. B. Scott and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Guerry & Hall, J. G. Jones, and De Lacy & Bishop, for plaintiffs in error. U. V. Whipple and Bacon, Miller & Brunson, for defendant in error.

CANDLER, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 534)

HORNE et al. v. MULLIS.

(Supreme Court of Georgia. Feb. 15, 1904.)

CONSTRUCTIVE TRUST—ENFORCEMENT—PLEADING—DEMURRER.

1. As against a general demurrer, the petition set forth a cause of action.

2. Such parts of the petition as were subject to the special demurrers filed are indicated in the opinion.

(Syllabus by the Court.)

Error from Superior Court, Pulaski County; D. M. Roberts, Judge.

Action by Julia Horne and others against W. J. Mullis. Judgment for defendant, and plaintiffs bring error. Reversed.

W. L. Grice & Sons, for plaintiffs in error. J. H. Martin, for defendant in error.

COBB, J. Julia Horne and others brought an action against Mullis, alleging in their petition: Plaintiffs are the widow and children of Isaac Horne. On January 1, 1890, Isaac Horne executed and delivered to the Guaranty Company of Georgia a mortgage deed to certain described tracts of land to secure the payment of a loan of \$600. The land mortgaged was worth \$2,500, and is still worth that sum. After executing the mortgage, to wit, on July 24, 1890, Isaac Horne executed to petitioners a warranty deed to the same land described in the mortgage, reserving to himself the use and control of the land during his life. This deed was duly recorded. The mortgage debt not being paid at maturity, the mortgage was duly foreclosed and the property advertised for sale about the year 1896. A few days before the sale was to take place, Isaac Horne entered into an arrangement with the defendant, who was his son-in-law, under which the defendant was to buy the land, and permit Horne to redeem it within two years, by paying the amount of the bid, together with interest and the necessary expenses which had been incurred. At the time this agreement was en-

tered into, the defendant, Mullis, had actual notice of the deed from Horne to petitioners. The purpose of Horne in making the agreement with defendant for a reconveyance of the property was to preserve for himself a home for life, and to secure the land for his wife and children, with the incumbrance of the mortgage removed. The land was sold under the mortgage execution, and bought by the defendant, who had no competitor at the sale, for a sum equal to the amount of the debt and costs and expenses. The land was worth \$2,500 at the time of the sale. The defendant received a deed from the sheriff to the land, but Isaac Horne remained in possession thereof until his death, and plaintiffs have been in possession since that time. Isaac Horne paid defendant \$90 in 1897, and the same amount in 1898, and petitioner Julia Horne paid him \$90 in 1899. While these payments were called "rent," they were really intended as payments on the redemption money agreed to be paid to the defendant, as heretofore stated. A short time before the death of Isaac Horne, which occurred on October 21, 1898, and a few days before the time for redemption under the agreement expired, he made arrangements to get the money and redeem the land before the time for redemption should expire. The defendant, upon hearing of this arrangement, went to Horne, who was then in his last sickness, and told him not to give himself any concern about the redemption of the land; that he (defendant) wanted nothing but the money which he had expended, with interest, and, if the lands were not redeemed, he would sell enough of them to get back his money, and would then turn over to Isaac Horne, if living, the surplus, and, if he was not in life, then to his wife and children; and to this Horne agreed. Relying upon these promises of the defendant, Isaac Horne abandoned his purpose of getting the money and redeeming the land while yet he had time to do so. Within a few days after these promises were made, and after the time for redemption had expired, Isaac Horne died, without having taken any further steps in the matter. Some time in the fall of 1899 the defendant sold a portion of the land for \$1,600. He still holds the title to the remainder of the land, 102½ acres, which is worth about \$5 or \$6 per acre, and refuses to account to petitioners for the surplus of the money received from the sale of a portion of the land, or to make a reconveyance of the balance. Isaac Horne died intestate, and there has been no administration on his estate, nor is there any necessity for any, there being no debts. The petition prays for an accounting, that defendant be required to make a conveyance to petitioners of the portion of the land to which he holds title, and that he be also required to pay to petitioners the balance remaining from the sum received from the sale of a portion of the land, after deducting the amount of his bid at the sale

under the mortgage foreclosure, with interest and costs and expenses. To the petition the defendant filed a general demurrer, and also special demurrers to different paragraphs of the same. The court sustained the demurrers and dismissed the petition. The plaintiffs excepted.

As against a general demurrer, the petition set forth a cause of action. See *Burnett v. Vandiver*, 56 Ga. 302. The distinction between this case and *Roughton v. Rawlings*, 88 Ga. 819, 16 S. E. 89, is that in the latter case the two persons who made the agreement to divide the land after the sale had no interest whatever in the property which was to be sold. The distinction is manifest when we consider the opening sentences of the opinion by Mr. Chief Justice Bleckley, on pages 821 and 822, 88 Ga., page 89, 16 S. E., where he says: "The plaintiff has parted with nothing which he possessed or owned before. He has the same amount of money and property, and has rendered no service, nor caused any to be rendered. What he has missed by reason of the defendant's refusal to perform the verbal agreement is only the gain which he would have derived from the performance if the defendant had not violated his promise. The mere right to bid for the property at the executor's sale was not itself property, nor the subject-matter of bargain and sale. The nonexercise of that right by forbearing to bid was therefore not a consideration for the agreement which will take the case out of the statute of frauds by reason of part performance." The case should not have been dismissed, and the judgment must therefore be reversed.

A reversal of the judgment on the general demurrer renders it necessary to pass upon the questions made by the special demurrers, as the judge sustained all of the demurrers.

There was no merit in the demurrer which raised the question that copies of certain deeds and other papers were not exhibited to the petition. The allegations in reference to these papers were mere matters of inducement, and did not constitute the cause of action, nor was the relief prayed for based entirely thereon. Under such circumstances, it was not necessary to exhibit copies of such papers to the petition. *Harp v. Investment Company*, 108 Ga. 179, 33 S. E. 998; Civ. Code, § 4963. Especially would this be the case when the papers referred to were described in the petition in such a way as to render intelligible the allegations referring to them.

There was no merit in that ground of the demurrer which raised the point that Horne and his wife were tenants of defendant, and therefore could not deny his title. The petition alleged that certain amounts had been paid to defendant by Horne and his wife in the name of rent, but it was distinctly averred that these payments were not in fact rent, and were not intended as such. There is nothing in the petition which would pre-

clude the plaintiffs from showing that no relation of landlord and tenant ever existed between Horne and the defendant; or between the widow of Horne and defendant. All of paragraph 6 should have been stricken, except that which alleged that the conveyance referred to conveyed the same land. Paragraphs 12 and 13 should have been stricken. All of paragraph 15 should have been stricken, except that which alleged the value of the land. Paragraph 20 should be stricken, unless the plaintiffs, by amendment, set forth the names of the persons therein referred to. The petition, with these paragraphs stricken, is set forth in substance above. It stated facts sufficient to require the defendant to file an answer.

Judgment reversed. All the Justices concurring, except SIMMONS, O. J., absent on account of sickness.

(119 Ga. 479)

ATLANTIC & B. R. CO. v. PENNY.

(Supreme Court of Georgia. Feb. 13, 1904.)

ASSIGNMENTS OF ERROR—EXCEPTIONS PENDENTE LITE—CONDEMNATION PROCEEDINGS—RIGHT OF WAY—DISCRETION OF RAILROAD COMPANY.

1. Before this court can consider exceptions pendente lite, an assignment of error thereon must be made in the bill of exceptions, or filed in this court on or before the call of the case. The failure to assign error in one of these methods will result in a dismissal of the writ of error, whether it be sued out upon a main or a cross bill of exceptions.

2. In a proceeding under Civ. Code 1895, § 4657 et seq., for the purpose of acquiring private property for public purposes, the sole question to be passed upon by the assessors or a jury in the superior court on appeal is the amount of compensation to be paid. Whether the quantity of land sought to be taken is necessary and proper for the purpose for which it is sought is a question not involved in this proceeding.

3. Under the general railroad law in the present Code the railroad company is allowed to appropriate for a right of way a strip of land not exceeding in width 200 feet. Whether a less quantity shall be taken for this purpose is left to the discretion of the company.

4. Under the general railroad law referred to in the preceding note, a railroad company is authorized to take, for the purpose of cuttings and embankments and for obtaining gravel and other material, as much land as may be necessary for these purposes, and it is authorized to acquire, for stations, terminal facilities, and the like, such quantity of land as may be necessary and proper for these purposes; the company being vested with a discretion to determine, in the first instance, how much land is necessary. If the company abuses the discretion thus vested in it, a court of equity may by injunction so restrain it as to keep it within the limits of its charter.

(Syllabus by the Court.)

Error from Superior Court, Dooly County; Z. A. Littlejohn, Judge.

Proceedings by the Atlantic & Birmingham Railroad Company against Z. T. Penny. From the judgment, both parties bring error. Judgment on bill of exceptions of railroad

company reversed. Writ of error sued out by defendant dismissed.

D. A. R. Crum, for plaintiff. J. L. Sweat, J. G. Jones, and W. F. George, for defendant.

COBB, J. The Atlantic & Birmingham Railroad Company instituted proceedings to condemn "two hundred and fifty (250) feet right of way, sixty feet on the east, and one hundred and ninety feet on west, side of the center line," through a described tract of land, the property of Z. T. Penny. A majority of the assessors chosen in the manner prescribed by law filed an award fixing the damages to be paid at \$400. The third assessor refused to agree to this, and filed with the award a writing stating that in his opinion the amount should have been \$500. Penny entered an appeal from the award of the assessors to the superior court. When the case came on for a hearing in the superior court Penny filed a written motion to dismiss the entire proceeding, upon the ground that the amount of land sought to be taken was not necessary for the right of way, stations, terminal facilities, cuttings, embankments, and other purposes for which the railroad company could lawfully take private property; that under its charter 100 feet was all that could be condemned for a right of way, and that 50 feet on each side of the track would be ample for all of the legitimate purposes of the company; and that the real purpose of the condemnation was to secure property to be leased for factories, plants, business houses, etc. The plaintiff then amended its proceedings by alleging that the land sought to be condemned was necessary and required, not only as a right of way, but for a freight and passenger depot and purposes therewith connected, including station grounds, yards, tracks, warehouses, etc. The court allowed the amendment, and then overruled the motion to dismiss. Penny filed exceptions pendente lite to these rulings. The case proceeded to trial, and resulted in a finding by the jury that the company was entitled to condemn only 200 feet, and fixing the value of the land embraced within these limits at \$275 per acre. Judgment was entered on this verdict. The company made a motion for a new trial, on the ground that the verdict was contrary to law and the evidence. The court overruled the motion, and the company excepted. Penny filed a paper which recited the demurrer to the proceedings, the trial of the case, the motion to dismiss, the amendment by the railroad company, and the rulings of the court on the questions thus raised. The paper also recited that exceptions pendente lite had been filed to these rulings, and specified, as parts of the record to be transmitted, the motion to dismiss, the amendment, order of the judge thereon, and exceptions pendente lite. This paper was certified by the judge as a bill of exceptions, but it did not contain any assignment of error on any ruling or decision of the

court or on the exceptions pendente lite, nor was error assigned on these exceptions in this court after the case reached here.

1. Whether the paper filed by Penny be considered as a cross-bill of exceptions, or as an independent bill, it will have to be dismissed for want of any assignment of error. *Jackson v. Fitzpatrick*, 114 Ga. 364, 40 S. E. 234. Even if it had contained an assignment of error upon the exceptions pendente lite, it would have been defective as an independent bill, because in such bill of exceptions "there must be some legal assignment of error on what transpired at the trial term, in order to bring up an assignment of error upon exceptions pendente lite filed at the appearance term." *Barge v. Robinson*, 115 Ga. 41, 41 S. E. 258, and *cit.* The exceptions pendente lite not being before us, it cannot be determined in the present case whether proceedings instituted under Civ. Code 1895, § 4657 et seq., for the purpose of condemning private property for a public use, are amendable at all, or whether in the present case they were amendable in the particular indicated in the foregoing statement of facts.

2-4. Private property cannot be taken for public use unless there is a necessity for such taking; for the taking of property when not at all necessary for a public purpose, or the taking of more property than is necessary for a given public purpose, is in effect a taking for private use. *Randolph on Em. Dom.* §§ 185, 186; 10 Am. & Eng. Enc. L. (2d Ed.) 1057; 3 Ell. R. R. § 952; *New Central Coal Co. v. Coal & Iron Co.*, 37 Md. 537, 539; *Matter of N. Y. Cen. R. Co.*, 66 N. Y. 407; *Highland Boy Gold Min. Co. v. Strickley*, 116 Fed. 852 (5), 54 C. C. A. 186. Under the present Constitution of this state the general rule is, so far as private corporations are concerned, that the General Assembly shall pass upon this question of necessity by general laws providing what classes of corporations shall be authorized to exercise the power of eminent domain. Civ. Code 1895, § 5780. In many instances where it is proper for the power of eminent domain to be conferred upon corporations so as to authorize the taking of land it is impracticable in a general law to prescribe the exact quantity that shall be taken, and this must be determined by some authority to whom the law delegates the power to decide this question. Wherever it is practicable for the quantity of land to be determined, it is best that it should be fixed in the law, and in many instances this can be done. The general railroad law of this state prescribes that the right of way proper of a railroad constructed under the provisions of that law shall not exceed 200 feet in width. The corporation is given a discretion as to the amount to be taken, limited in the manner indicated. The law recognizes, however, that there may be places where the company could not, within those limits, obtain earth and other material for necessary cuttings and embankments; and it

is therefore prescribed that for this purpose the company may "take as much land as may be necessary for the proper construction, operation, and security" of the road. Civ. Code 1895, § 2167 (4). See, in this connection, *Hopkins v. Railroad*, 97 Ga. 107, 25 S. E. 452.

The exact quantity of land that may be necessary for the construction and maintenance of stations, terminal facilities, and the like cannot be definitely fixed, even by prescribing a maximum amount, as in case of the right of way, and therefore the General Assembly has prescribed that the company may acquire as much "as may be necessary" for this purpose. Section 2167 (3). It is provided that, in the event the company cannot procure from the owners title to the right of way or other lands necessary and proper for the construction of stations, terminal facilities, and the like, such property may be acquired in the manner prescribed in the Code. Civ. Code 1895, § 2170. The manner prescribed in the Code is that set forth in section 4657 et seq. The general railroad law does not in terms declare who shall determine the question as to how much land shall be taken for the right of way within the limits prescribed, nor how much land shall be taken for cuttings, embankments, stations, terminal facilities, etc. Nor is there anything in those provisions of the Code relating to the manner in which private property may be taken for a public use which determines who shall pass upon the question of necessity for the taking and of the quantity of land necessary for the public purpose for which condemnation is sought. Such being the case, the only question which can be determined by the assessors or by the jury on appeal is the amount of compensation to be paid. See, in this connection, *O'Hare v. Railroad Company* (Ill.) 28 N. E. 923 (5). The Code provides that "if the parties cannot agree upon the compensation to be paid, the same shall be assessed and determined" in the manner indicated in the Code. Section 4659. The Code prescribes the form of award to be made, and in this form there is no reference to any matter except the amount of money to be paid as compensation. Section 4676. Under the general railroad law express authority is given to take private property for the purposes indicated in that act. It is therefore necessary that the quantity to be taken shall be fixed by some person, and from the silence of the act with reference to the person who shall determine this question it is to be inferred that the corporation is to have authority, in the first instance, to judge of this matter. Such seems to be the rule laid down in other jurisdictions. See 10 Am. & Eng. Enc. L. (2d Ed.) 1057 (3); 1 Lewis on Em. Dom. (2d Ed.) § 279, p. 675; *Eldridge v. Smith*, 34 Vt. 485; *Smith v. Railroad Co.* (Ill.) 14 Am. & Eng. R. Cas. 385; *Dietrichs v. R. Co.* (Neb.) 13 N. W. 624 (3). If the land sought to be taken is

to be used for the purpose of a right of way only, the corporation must determine how much it shall take, and in no event can it take more than a strip 200 feet in width. If the land is sought to be taken for the purpose of making necessary cuttings and embankments, or for stations, terminal facilities, and the like, the corporation, after an investigation as to its needs, is authorized, under the act, to determine in the first instance how much is necessary for these purposes. After the corporation has determined this question, if it cannot acquire the title by contract from the owners, it may proceed to condemn the land under the law above referred to. If it does so proceed, and the assessors, or the jury on appeal, fix the amount of compensation to be paid, and the corporation pays this amount after final judgment by the assessors, or by the court if an appeal is taken, it acquires the right to use the property for the purposes and for the time authorized by law. Of course, we are not to be understood as ruling that this discretion of the corporation to determine the quantity of land necessary is not subject to control if abused. An unlimited and unrestrained power of this kind might be subject to great abuse, and the General Assembly did not, of course, intend to make the person seeking to condemn the final judge of necessity and quantity. If the proceeding authorized by law is instituted and the amount is fixed in the proper manner and by the proper authorities, and the company pays this sum, which is accepted by the landowner, the owner is thereafter concluded on the question of the necessity for the taking and the quantity which is necessary for the purposes for which condemnation is sought. While there is no provision in the general railroad law or in the law providing the method of condemnation for raising the question as to the necessity for taking the land sought to be condemned, if an effort should be made to appropriate more land than is necessary for the purpose for which condemnation is sought the landowner may appeal to a court of equity to interfere by injunction, and thus have the question of necessity and quantity determined before an award is made by the assessors. How far the act of the property owner in appointing an assessor and proceeding to a hearing before the assessors may amount to a waiver of his right to question the necessity of taking the quantity of land sought to be condemned will not now be determined. Nor is the question of how far a court of equity would in a given case supervise the action of the Legislature in declaring what amount of land is necessary involved in the present case. It would seem that the question of necessity would be open to investigation by the courts even after the Legislature has passed on it, and it has been so held. See 3 Ell. R. R. § 952, p. 1338. But, as stated above, we make no ruling on

this question. We are clear that the jury to whom the case was submitted on appeal had no right to pass on any question save that relating to the amount of compensation to be paid, and that the verdict reducing the quantity of land which the railroad company sought to condemn was unauthorized.

Judgment on the bill of exceptions of the railroad company reversed; writ of error sued out by Penny dismissed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 537)

HOWELL et al. v. PATE et al.

(Supreme Court of Georgia. Feb. 16, 1904.)

MUNICIPAL ELECTIONS—CONSTITUTIONAL LAW—QUALIFICATION OF VOTERS.

1. The act of December 12, 1859, to incorporate the town of Warrenton (Acts 1859, p. 210), was, in so far as it limited to white persons the right to vote in municipal elections held in that town, modified by the fifteenth amendment to the Constitution of the United States (McCrary, Elec. [4th Ed.] 31; 6 Am. & Eng. Enc. Law [1st Ed.] 260, note 4; 10 Am. & Eng. Enc. Law [2d Ed.] 573), as well as by the provisions of article 2 of the Constitution of this state adopted and ratified in 1868 (Code 1873, § 5027; Civ. Code 1895, § 5737).

2. The exclusion, solely on account of color, of persons qualified and offering to vote at the late municipal election in that town, there being a sufficient number excluded to have altered the result of the election, rendered it void. *Spence v. Judge*, 13 Ala. 805; *Pennington v. Hare*, 62 N. W. 116, 60 Minn. 146; *Hartt v. Harvey*, 19 How. Prac. 245; *Id.*, 32 Barb. 55; *Webster v. Byrnes*, 34 Cal. 273.

3. This being so, the defeated candidates could not, as such, have gained anything by contesting the election; and it was their right, in their capacity as citizens and taxpayers of the town, to institute quo warranto proceedings against such of their opponents as were illegally installed in office under that election. *Davis v. City Council of Dawson*, 17 S. E. 110, 90 Ga. 817.

4. The mayor and commissioners of Warrenton, being elected by the same constituency and at the same time, and having joint functions to perform in connection with municipal affairs (Acts 1859, p. 210; Acts 1899, p. 299), could properly be joined as defendants to the petition filed in this case, the right of each to hold office being altogether dependent upon the validity of the election above referred to. *State v. Kearns*, 22 Atl. 322, 1018, 17 R. I. 391; *Reg. v. Whitehorn*, 10 Mod. 65; *Com. v. Stevens*, 32 Atl. 111, 168 Pa. 582.

(Syllabus by the Court.)

Error from Superior Court, Warren County; H. M. Holden, Judge.

Action between F. L. Howell and others and J. R. Pate and others. From the judgment, Howell and others bring error. Reversed.

E. P. Davis, for plaintiffs in error. L. D. McGregor and S. H. Sibley, for defendants in error.

TURNER, J. Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 519)

SOUTHERN BANKING & TRUST CO. v. WILCOX LUMBER CO.(Supreme Court of Georgia. Feb. 13, 1904.)
TAXATION—SALE—IMPROVED LANDS—WILD LANDS.

1. Under the act approved February 28, 1874 (Acts 1874, p. 105), the Comptroller General was authorized only to issue a tax *fi. fa.* against unimproved or wild land. A sale of improved land as wild land under such execution would convey no title.

2. Whether the land was to be taxed as wild or improved depended altogether on the appearance it presented to the eye, it being immaterial by whom the improvement had been made.

3. Wherever there appeared to be such improvements as indicated that there was some one personally responsible for taxes, it was necessary to return and tax the same as improved property, and the Comptroller was not bound to inquire how the improver held the property—whether by title perfect or imperfect, or by no title at all.

(Syllabus by the Court.)

Error from Superior Court, Wilcox County; D. M. Roberts, Judge.

Action by the Southern Banking & Trust Company against the Wilcox Lumber Company. Judgment for defendant, and plaintiff brings error. Affirmed.

The plaintiff relied on a deed under a tax sale by virtue of a tax *fi. fa.* issued by the Comptroller General for taxes in 1875 against the land in controversy as wild land. The defendant attacked the validity of the sale on the ground that the land had been improved prior to 1875. Dowdy, one of the defendant's grantors and warrantors, testified that he made improvements on this lot about 1871, 1872, 1873, 1874, and 1875. "I put a patch on it of about an acre and a half, and put a house on it. I do not recollect the year, but it was about thirty-three years ago, making it about 1870 that I first made improvements. I moved a woman into the house, and she and her children worked. That was just after I built the house. The patch was fenced and a well dug. In the fall of the year I took in about an acre, and fenced it and sowed it. About two years after I put in an acre peach orchard on it, and fenced it. All these improvements on it were prior to 1873. I built another house about sixteen years ago; and I have kept clearing and improving since. Possession has been continuous since." Other witnesses testified to the same facts substantially as to the time when and the character of the improvements made. One of the witnesses for the plaintiff testified that the improvements mentioned by Dowdy had been made before the year 1875.

A. C. Pate, Eldridge Cutts, and Hal Lawson, for plaintiff in error. Whipple & McKenzie, for defendant in error.

LAMAR, J. In trespass to try title the validity of an essential link in plaintiff's chain depended upon the question as to

whether the Comptroller General, under the act of 1874 (Acts 1874, p. 105), had the right to sell the property as wild land. There was evidence that there had been some improvements placed on the property prior to 1875. The plaintiff insisted that this work had been done by a mere trespasser, and that in legal effect the land remained wild, and could be sold as such by the comptroller. He excepts to the contrary ruling.

Under the act the Comptroller was authorized only to issue tax *fi. fas.* against unimproved or wild lands. If the property was in fact improved he had no right to issue execution against it, and a sale thereunder would convey no title. *Hutchins v. Tenant*, 73 Ga. 96. In that case about six acres had been cleared and fenced in 1874. The *fi. fa.* was for taxes alleged to be due on a land lot for 1874 and 1875, and there, as here, an effort was made to show that, as the person in possession was a trespasser, his wrongful act could not make domestic the wild land. The court, however, refused to permit such testimony, holding that the sale was void, and conveyed no title to the purchaser. The decision is in accord with the ruling in other states under statutes in reference to the sale of unoccupied or unseated lands. In *Biddle v. Noble*, 68 Pa. 289, it was held that an entry upon an unseated tract of land by any one, whether as an intruder or under the title of the owner, either for purchase or residence or for cultivation, makes the tract seated. The cultivation of several acres fixes the denomination of the whole, and charges the person of the cultivator so as to render a sale for taxes illegal. And again, in *Stoetzel v. Jackson*, 105 Pa. 562, 567, it was held that "land may be seated as well by an intruder as by an owner, and whether it is to be taxed as seated or unseated depends altogether on the appearance it presents to the eye of the assessor. Where there appears to be such a permanent improvement as indicates a personal responsibility for taxes, the land should be returned and taxed as seated. It is not the business of the assessor to inquire how the improver holds the property, whether by title perfect or imperfect, or by no title at all; for the question is but how the taxes shall be collected; if seated, then from some person; but if unseated, from the land itself."

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 516)

McRAE OIL & FERTILIZER CO. v. STONE.

(Supreme Court of Georgia. Feb. 13, 1904.)

SALE—OVERPAYMENT—ACTION TO RECOVER—VOLUNTARY PAYMENT—EVIDENCE.

1. On the trial of an action brought by a vendee against his vendor for the recovery of an alleged overpayment for cotton seed purchased at a given price per ton, alleged to have been made by reason of a mistake in the weight of

such seed, neither the law of voluntary payment as embodied in Civ. Code 1895, § 3782, nor the law of caveat emptor, was applicable, and the court erred in giving the same in charge to the jury.

2. Evidence that the vendor did not consent that the cotton seed should be reweighed was irrelevant, and should have been rejected.

3. There was no error in rejecting as hearsay the testimony referred to in the fourth ground of the motion for a new trial.

(Syllabus by the Court.)

Error from City Court of Mt. Vernon; W. M. Lewis, Judge.

Action between the McRae Oil & Fertilizer Company and A. P. Stone. From the judgment, the fertilizer company brings error. Reversed.

Graham & Graham, for plaintiff in error.
J. B. Geiger, for defendant in error.

FISH, P. J. Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 486)

WINGO, ELLETT & CRUMP SHOE CO. v. JOHNSON et al.

(Supreme Court of Georgia. Feb. 13, 1904.)

GARNISHMENT—PROCEDURE—CLAIMANT—JUDGMENT.

1. Where garnishment proceedings were instituted in Sumter superior court, based upon a suit pending in the city court of Macon, and a claim, pursuant to Civ. Code 1895, § 4720, was filed in the city court of Macon, the claimant did not thereby become a party to the proceedings in Sumter county; it not appearing that there was a compliance by the plaintiff with the provisions of Civ. Code 1895, §§ 4715-4717. It follows that a judgment rendered against the claimant in Sumter superior court, based on a verdict rendered in that court, finding in favor of a traverse to the garnishee's answer, was void, and was properly set aside on motion.

(Syllabus by the Court.)

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Action by the Wingo, Ellett & Crump Shoe Company against C. H. Weeks. Summons of garnishment served on Elmore & Daniel. Judgment for plaintiffs, and W. M. Johnson and R. W. Johnson move to set it aside, and plaintiffs bring error. Affirmed.

H. B. Simmons and F. Chambers & Son, for plaintiffs in error. Hardeman, Davis, Turner & Jones, for defendants in error.

CANDLER, J. The plaintiffs in error, by their attorney, made an affidavit before a notary public and ex officio justice of the peace in Bibb county for the purpose of suing out summons of garnishment in an action which they had instituted in the city court of Macon against C. H. Weeks. The usual garnishment bond was given. The summons of garnishment does not appear in the record, but immediately following the affidavit and bond is this entry: "Georgia, Sumter county. I have this day served summons of garnishment issued on within affi-

davit and bond personally on Olin Daniel, of the firm of Elmore & Daniel, at 9:20 a. m. This 12th day of December, 1901. W. P. McArthur, L. C." Following this entry is another, which is unsigned, as follows: "Filed in office December 12th, 1901." In what office or in what county the filing was had does not appear. Elmore & Daniel answered the garnishment, denying that they were indebted to Weeks, or that they had in their possession any property, money, or effects belonging to him. The answer was sworn to in Sumter county, and appears to have been "filed in office May the 26th, 1902"; but this entry of filing is also silent as to the office and county in which, and the officer with whom, the answer was filed. The plaintiffs traversed the garnishees' answer, and service of the traverse was acknowledged by the attorney for the garnishees in Sumter county. The entry of filing on this paper was in like vague and general terms as on the papers previously mentioned. The traverse is headed: "Georgia, Sumter county. To the Superior Court of Said County." The record next shows a verdict "in favor of the traverse, except as to the note claimed by C. G. Johnson. We find title to this note of C. G. Johnson to be in claimant, C. G. Johnson." On this verdict, which appears to have been rendered by a jury in Sumter superior court, a judgment was entered in favor of the plaintiffs, Wingo, Ellett & Crump Shoe Company, against the garnishees, Elmore & Daniel, and against W. M. Johnson as principal and R. W. Johnson as security, the said judgment reciting, "upon a claim bond given in the city court of Macon to dissolve the garnishment before mentioned." The record fails to show how this case ever got into Sumter superior court, or how W. M. Johnson and R. W. Johnson ever got into the case. There is nothing to indicate how it ever happened that a bailiff in Sumter county served a summons of garnishment in that county issued upon an affidavit and bond made in Bibb county and returnable to the city court of Macon. There is nothing in the record other than the recital in the judgment before mentioned to show the making of any bond by the Johnsons in any court for any purpose.

At the same term of court at which the verdict and judgment before referred to were rendered, W. M. Johnson and R. W. Johnson moved to set aside the judgment, on the grounds that they were not proper parties to the case; that there were no pleadings in the case which made them parties thereto in any sense upon which a judgment might be rendered against them; and that the superior court of Sumter county had no jurisdiction over them, and for that reason no legal judgment could be rendered against them in that court. By amendment they alleged "that they, nor either of them, had filed in Sumter superior court any claim bond to

dissolve said garnishment, nor had any copy of any such bond alleged in said judgment to have been filed in the city court of Macon been filed in the superior court of Sumter county, nor had movants, or either of them, been made parties to the garnishment proceedings pending in Sumter superior court by any order of court, all of which will appear by an inspection of the records of said court, nor did said movants, or either of them, appear in person or by attorney in Sumter superior court at any stage of said garnishment proceedings, or take any part in the trial thereof, or in any manner submit themselves to the jurisdiction of said court"; that the verdict rendered did not authorize the judgment entered in said cause; and that neither before nor after the rendition of the judgment did the plaintiffs produce in evidence any judgment or exemplification from the city court of Macon of any judgment in the suit brought against Weeks, nor was the production of such evidence waived. On the hearing of the motion as amended the judge set aside the judgment as against the Johnsons. The plaintiffs excepted.

Taking the record as a whole, we are clear that the court was correct in setting aside the judgment against the defendants in error. As has been seen, the record does not show upon what the judgment against the Johnsons was based. It may be inferable that they filed in the city court of Macon a bond to dissolve the garnishment pending in that court, in accordance with Civ. Code 1895, § 4720, but it nowhere appears, nor is it suggested, that they filed a bond to dissolve a garnishment proceeding pending in Sumter superior court. Indeed, it cannot be said that it appears from the record that there were any garnishment proceedings pending in Sumter superior court. In the motion to set aside it was expressly alleged that the movants were in no way connected with the proceedings in Sumter superior court, that they were never made parties thereto, and that they were never served with any paper to connect them with any proceedings in Sumter county. Assuming that there was a garnishment proceeding pending in Sumter superior court, and that the claim bond was given under the provisions of Civ. Code 1895, § 4720, to dissolve the garnishment, when the garnishees answered they would have been discharged, and any judgment rendered in the case should have been against the claimants and not the garnishees. If the bond was filed in the city court of Macon to dissolve a garnishment pending there, the claimants were in no way connected with any garnishment proceedings in Sumter superior court, and a judgment against them in that court would be illegal and void. If, under the Code section before cited, they had filed their bond in Sumter superior court to dissolve a garnishment pending in that court, the verdict of a jury

finding in favor of a traverse to the answer of the garnishees would have required a judgment against the claimants; the garnishees, as we have seen, being discharged, under such circumstances, upon filing their answer.

In view of the past rulings of this court, we think the allegation in the motion to set aside the judgment, to the effect that previously to the entering of the judgment against the movants no judgment had been rendered against Weeks in the city court of Macon, was immaterial. If the Johnsons had been parties to the case in Sumter superior court, we would be bound to presume that the court rendering the judgment had before it all the facts necessary to render that judgment valid. *Holbrook v. Evansville R. Co.*, 114 Ga. 1, 39 S. E. 937, where it was held that "a judgment against a garnishee, duly entered, is as to him conclusive of the proposition that the plaintiff had already obtained a valid judgment against the main debtor, whose effects were sought to be reached by the garnishment proceedings." Upon the facts stated, and which are certified as true by the trial judge, we find no error in the ruling complained of in the bill of exceptions.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 515)

FARKAS v. MONK.

(Supreme Court of Georgia. Feb. 13, 1904.)

PLEADING—DEMURRER—AMENDMENT—ACTION ON NOTE—ANSWER—FRAUDULENT REPRESENTATIONS—OFFER TO RESCIND.

1. It is too late, at the trial term of a case, for the plaintiff to file an amendment to a demurrer to the defendant's plea, setting up new and distinct grounds of objection thereto. Civ. Code 1895, §§ 5045, 5047; *City Council v. Lombard*, 28 S. E. 994, 101 Ga. 724.

2. The answer of the defendant set forth a good defense, it being alleged that the note sued on was obtained from him by reason of the false and fraudulent representations of the plaintiff that he held a *fi. fa.* against another, under whom the defendant claimed title to certain land, the lien of which *fi. fa.* was superior to and antedated a deed upon which the defendant relied as a muniment of title; that, upon defendant's request to see the *fi. fa.*, the plaintiff replied that it would take him some time to find it, but that it was just as he had stated, and he would send it to defendant in a few days if he would purchase it, and give his note for the price agreed on; that, acting on this assurance, defendant did give his note, not knowing or having an opportunity to know the date of the said *fi. fa.* until the plaintiff subsequently sent it to him; that he then discovered that the *fi. fa.* was not prior in date to the deed under which he claimed; and that, as soon as he discovered the fraud which had been practiced upon him, he returned the *fi. fa.* to the plaintiff, but that the plaintiff refused to surrender defendant's note.

3. This plea of fraud and a timely offer to rescind was not open to special demurrer on the ground (1) that the conduct of the plaintiff was such that the defendant could, by the exercise of ordinary prudence, have ascertained

the date and legal effect of the *fi. fa.* and thus have protected himself against the imposition practiced upon him; or (2) because it did not appear that the person against whom the *fi. fa.* issued was insolvent, or that for any other reason it was "not good"; or (3) because the defendant's answer did not disclose whether it was a common-law *fi. fa.*, or one based upon a mortgage foreclosure on the land claimed by him.

4. While a mere written transfer, indorsed upon a deed, does not have the effect of passing title to the property therein described into the transferee (*Henry v. McAllister*, 20 S. E. 66, 93 Ga. 688), yet it was proper in the present case to allow the defendant to introduce in evidence a deed having indorsed upon it a transfer to him, signed by the grantee, from whom and the grantor the defendant testified he had purchased the land on which the plaintiff stated the *fi. fa.* sold to the defendant was a superior lien. Not only did this written transfer afford evidence of the date on which the defendant became the equitable owner of the land, but, in connection with the deed on which it was indorsed, showed color of title, and disclosed the fact that the defendant held under the grantor named in that deed, against whom the *fi. fa.* was issued after its execution and delivery.

5. The trial judge properly declined to instruct the jury that it was incumbent on the defendant to show that he had "retransferred" to the plaintiff, in writing, the *fi. fa.* in question; for, though the evidence showed that the plaintiff had, before sending the *fi. fa.* to the defendant, indorsed upon it a transfer to him, there was also testimony to the effect that the defendant's offer to rescind was declined by the plaintiff on the ground that "he made no children's trade," and not for the reason that the defendant had not, before returning the *fi. fa.* to the plaintiff, "retransferred" it to him.

6. The charge of the court was as favorable to the losing party as he had any right to demand or expect, and the verdict returned against him was warranted by the evidence.

(Syllabus by the Court.)

Error from City Court of Moultrie; *W. A. Covington*, Judge.

Action by Sam Farkas against Miles Monk. Judgment for defendant, and plaintiff brings error. Affirmed.

Robt. L. Shipp and Alfred R. Kline, for plaintiff in error. Humphreys & Humphreys, for defendant in error.

TURNER, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 466)

HOLCOMBE et al. v. CABLE CO.

(Supreme Court of Georgia. Feb. 12, 1904.)

CORPORATIONS—PRESUMPTIONS—SALE—WARRANTY—CONSTRUCTION OF CONTRACT—FAILURE OF CONSIDERATION—ACTION ON NOTE—ATTORNEY'S FEES.

1. When the name of a party to a suit is such as to import that the party is a corporation, there is a presumption to this effect, which prevails until the contrary is shown. *Mattox v. State*, 41 S. E. 709, 115 Ga. 219, and cases cited. The name, "The Cable Company," imports a corporation.

2. When the parties have reduced to writing what appears to be a complete and certain agreement, importing a legal obligation, it will, in the absence of fraud, accident, or mistake,

be conclusively presumed that the writing contains the whole of the agreement between them, and, if it contains an express warranty of certain qualities in the article sold, an implied warranty of other qualities is excluded. *Malsby v. Young*, 80 S. E. 854, 104 Ga. 205 (4); *Bulard v. Brewer*, 45 S. E. 711, 118 Ga. 918.

3. Where, by the authority of the principal and in his name, an agent to sell gives an express warranty of certain qualities, the principal is not bound by a warranty as to other qualities, specifically reciting that it is given in the agent's individual capacity, unless he subsequently ratifies such act of the agent.

4. When, in the contract of sale, the vendor of a piano expressly stipulates that he will not be responsible for "tuning," he cannot be held liable for a defect of that character in the instrument.

5. There was no evidence to authorize a verdict of a partial failure of consideration.

6. Attorney's fees cannot be recovered in a suit on a note providing for the payment of the same, unless the plaintiff, his agent or attorney, notifies the defendant, in writing, 10 days before suit is brought, of his intention to bring suit, and the term of the court to which the suit will be brought. Acts 1900, p. 53; Van Epps' Code, § 6185.

7. Applying the principles above announced to the evidence in this case, the verdict rendered was demanded, except as to the attorney's fees. It is therefore directed that the judgment be affirmed, provided the defendant in error will, before the judgment of this court is made the judgment of the court below, write off from the judgment the amount recovered for attorney's fees, and, in the event that should not be done, then the judgment of the court shall be reversed.

(Syllabus by the Court.)

Error from City Court of Vienna; *D. L. Henderson*, Judge.

Action by the Cable Company against R. W. Holcombe and others. Judgment for plaintiff. Defendants bring error. Modified.

J. T. Hill, for plaintiffs in error. Crum & Jones, for defendant in error.

FISH, P. J. Judgment affirmed, with direction. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 418)

GORE v. STATE.

(Supreme Court of Georgia. Feb. 12, 1904.)

RAPE—IMBECILE FEMALE—EVIDENCE.

1. A man who has sexual intercourse with an imbecile female, who is mentally incapable of expressing any intelligent assent or dissent, or of exercising any judgment in the matter, is guilty of rape, though no more force be used than is necessary to accomplish the carnal act, and though the woman offer no resistance.

2. The evidence warranted a finding that the woman with whom the intercourse was had was, by reason of mental infirmity, incapable of consenting, and, the conviction having been approved by the trial judge, a new trial will not be ordered.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; *W. M. Henry*, Judge.

Albert Gore, alias Albert Goings, was convicted of crime, and brings error. Affirmed.

M. B. Eubanks and C. E. Carpenter, for plaintiff in error. Moses Wright, Sol. Gen., for the State.

COBB, J. "Rape is the carnal knowledge of a female forcibly and against her will." Pen. Code 1895, § 93. This is the common-law definition as given by Blackstone. 4 Bl. 210; 2 Bish. New Crim. L. § 113 (2). Rape, as thus defined, was an offense at common law. English statutes were enacted making the offense penal, but these have been treated as simply declaratory of the common law. Various definitions of the offense have been given. A number of these are collected in an article in 13 Criminal Law Magazine, p. 503, the author of which puts into the following definition the various elements of the several definitions: "Rape is the act of having carnal knowledge, by a man, of a woman, forcibly and against her will, or without her conscious permission, or where permission has been extorted by force or fear of immediate bodily harm." This is probably as comprehensive as any definition that could be given. Ordinarily, penal laws are construed strictly, and, strictly speaking, it might be with some force contended that an act cannot be "against the will" of a person when he or she is not in a physical or mental condition to exercise any will on the subject. See, in this connection, *Croswell v. People*, 13 Mich. 427, 437, 87 Am. Dec. 774; *Bloodworth v. State* (Tenn.) 32 Am. Rep. 546. The authorities generally, however, construe the words "against her will" to be synonymous with "without her consent," and hold that the act of sexual intercourse is against the woman's will, when, from any cause, she is not in a position to exercise any judgment about the matter. Thus intercourse with a woman whose will is temporarily lost from intoxication, or unconsciousness arising from the use of drugs or other cause, or sleep, etc., is rape. As stated above, there are a few cases opposed to this view, but the great weight of authority is undoubtedly in favor of giving to the statute such a construction as that just indicated. We have to consider in this case, however, only that form of inability to consent which is presumed to arise from idiocy or imbecility. The rule of law applied by the English courts in cases where the female is alleged to have been idiotic or imbecile is the one generally followed in this country. The rule laid down by those courts is that if the female is so idiotic as to be incapable of expressing any intelligent consent or dissent, or of exercising any judgment in the matter, the offense is rape. See *Queen v. Ryan*, 2 Cox, C. C. 115; *Reg. v. Richard Fletcher*, 8 Cox, C. C. 131. The case of *Reg. v. Charles Fletcher*, 10 Cox, C. C. 248, L. R. 1 C. C. 39, has been regarded (and, it would seem, with much reason) as being in conflict with the two decisions above cited, and as laying down the broad rule that in no case could a conviction be had where nothing appears but the con-

nection and the imbecility of the female. But the English Criminal Court of Appeals has not so treated that decision. See *Reg. v. Barratt*, 12 Cox, C. C. 498. In that case it was held: "Upon the trial of an indictment for rape upon an idiot girl the proper direction to the jury is that, if they are satisfied that the girl was in such a state of idiocy as to be incapable of expressing either consent or dissent, and that the prisoner had connection with her without her consent, it is their duty to find him guilty." And it was said that: "The two cases of *Reg. v. Fletcher* are not adverse to one another. The principle is properly laid down in the first case, and the second case was only a decision on the facts that there was not that requisite testimony of want of assent to justify leaving the case to the jury." See, also, *Regina v. Connolly*, 26 U. C. Q. B. 317, where the earlier English decisions are reviewed, and the rule is thus stated: "In the case of rape of an idiot or lunatic, the mere proof of connection will not warrant the case being left to the jury. There must be some evidence that it was without her consent—a. g., that she was incapable from imbecility of expressing assent or dissent; and if she consent from mere animal passion it is not rape." A comprehensive statement of the law of the subject as applied by the American courts is found in *Clevenger on Medical Jurisprudence of Insanity*, vol. 1, pp. 202, 203. This summary of the law is merely an epitome of the decisions which are cited, and seems to us to be a very fair analysis of those decisions. We quote the following from this author: "Sexual intercourse with a woman who is so destitute of mind as to be incapable of giving consent is rape, though she does not resist. The test of mental capacity under this rule is whether she was capable or incapable of giving consent or of exercising any judgment in the matter. And very slight proof of force is necessary where the woman lacks the intelligence to comprehend the nature and consequences of the act, and to distinguish morally and legally between right and wrong; and when the man does not suppose that he has her consent the force required and which is involved in the carnal act is sufficient. But where the will is active, though perverted, the act is not rape, when all idea of force or unwillingness is distinctly disproved. And the mere fact that a woman is weak-minded does not disable or debar her from giving consent to the act, and intercourse with her when she is capable of exercising her will sufficiently to control her personal actions is not rape; and, if there is reasonable doubt whether force was used, the jury should acquit, though the woman was of weak mind. A woman with less intelligence than is requisite to make a contract may consent to sexual intercourse so that the act will not be rape upon the part of the man. And connection with a woman who is in a state of dementia, and not idiotic, but approaching to-

ward it, having a predisposition to be with men, and a morbid desire for sexual intercourse, is not rape when no circumstances of either force or fraud accompany the act; nor is intercourse without resistance with a woman subject to epileptic fits, where the evidence does not show that she was under the influence of a fit at the time. The burden of proof of insanity at the time of the act, and that the carnal knowledge was obtained by force, and without consent, rests with the prosecution. There must be some evidence that she was incapable, from imbecility, of expressing assent or dissent; and when consent is given from mere animal passion or instinct it is not rape, and a conviction cannot be sustained, in the absence of evidence as to her general character for chastity and decency, or anything else to raise a presumption, that she did not consent. Evidence of the connection and the imbecility alone is insufficient. But evidence of habits of decency raises a presumption that she would not have consented." See, also, the following authorities: 2 Bish. New Crim. L. §§ 1121, 1123; Clark & Mar. Crimes, § 295; 1 Whart. Crim. L. (10th Ed.) § 590; 13 Crim. Law Mag. 510; 2 Russ. Crimes (6th Ed.) 226; 2 Ros. Crim. Ev. (8th Ed.) 1119; May's Crim. Law, § 196. The following is the rule stated in 23 American and English Encyclopædia of Law (2d Ed.) 856: "Sexual intercourse with an insane or idiotic woman, whose mind, to the knowledge of the man, is totally incapable of consenting to the act, is rape, though she submits to the act without resistance, as in such a case the intercourse is without her consent and against her will. If, however, the female, though weak-minded or idiotic, consents to the intercourse from animal instincts, passion, or morbid desires, the act is not rape." See, also, *State v. Williams*, 149 Mo. 498, 51 S. W. 88; *Payne v. State* (Tex. Cr. App.) 49 S. W. 604, 76 Am. St. Rep. 712; *State v. Cunningham*, 100 Mo. 383, 12 S. W. 376; *State v. Atherton* (Iowa) 32 Am. Rep. 134; *McQuirk v. State*, 84 Ala. 435, 4 South. 775, 5 Am. St. Rep. 381; *State v. Tarr*, 28 Iowa, 397.

There was evidence to show that the accused was acquainted with the mental condition of the female, and hence the sole question is whether the present case falls within the rule declaring the act to be rape where the woman is so idiotic as to be incapable of exercising any intelligent judgment in the matter; or whether the girl belongs to that class of unfortunate females, who, while weak-minded, yet possess sufficient mental capacity to comprehend the nature and consequences of the act, and are able to bring to bear that judgment which a woman with that knowledge would exercise. We have reached the conclusion that the conviction should be upheld, and in stating the result of our deliberations we do not deem it necessary to discuss at length the evidence in the case. The most important consideration which has

led us to this conclusion is the fact that the girl herself was sworn as a witness, and the judge and jury had an opportunity to pass upon her mental condition by inspection, as it were. There was testimony other than that of the girl upon which the jury could base a finding that the act of sexual intercourse had taken place, and hence the state is not in the embarrassing situation in which the prosecution found itself in a Texas case, where it had to rely upon the woman's testimony to show that the carnal act was accomplished, and at the same time contend for a conviction on the ground that the female was an imbecile, and incapable of consenting. See *Thompson v. State*, 33 Tex. Cr. R. 472, 26 S. W. 987. Apparently the girl could answer only leading questions, generally responding to these by a simple "Yes" or "No." And even these brief answers are contradictory in important respects. She said she consented to the act, and yet, when counsel for the state explained to her what opposing counsel meant by consent, she said she did not agree for the accused to do what he did. Questions asked for the purpose of eliciting any extended information as to what took place she wholly failed to answer. She testified that she was 15 years of age, whereas her mother said she was 19. She said she had been to school, and could read and write, could read in the third and fourth readers. She was not, however, so far as appears, put to the test before the jury, and her father distinctly swore that she could not learn anything at all at school, and that, notwithstanding she had been to several teachers, she did not even know her alphabet. The jury saw the girl, heard her conflicting statements, and witnessed her demeanor and manner of testifying. A great deal would depend on her appearance. The jury are constituted by law the judges of all of these matters. They have, by their verdict, solemnly affirmed that the girl's intellect was so weak that she was incapable of consenting to the act of sexual intercourse, and we do not feel disposed to usurp their functions, and at this distance, upon a printed record, without ever having seen the girl, declare that we are better judges of the girl's mental condition than the members of the jury were. The trial judge also saw the girl, and heard her testimony, and he is satisfied with the verdict. The Supreme Court of Iowa, in a recent case, where the accused was charged with having committed rape on an imbecile woman, said: "Taking the testimony of the witnesses on both sides of the question, without more, we would be strongly inclined to reverse the case. But the record shows that the complainant was examined as a witness, and that her examination was quite lengthy. Her answers to questions show that she is almost an imbecile, unless she was feigning imbecility. The learned judge and the jury who tried the case saw and heard her while she was on the witness stand, and we cannot put

ourselves in the place of the judge and jury. Her appearance and demeanor while testifying were most important considerations in determining her mental capacity, and under the circumstances we think it is not proper for this court to interfere with the verdict." Inasmuch as no complaint has been made of any charge or ruling of the trial judge, it is necessarily to be presumed that the law was fully and fairly given in charge, and that the accused was deprived of no right to which he was entitled. Women like the unfortunate girl involved in this case must be protected, not only against the animal lusts of the members of the opposite sex, but against themselves as well; and men who, knowing of their imbecility, take advantage of their helpless condition to gratify their own lustful desires, are guilty of rape, though they use no more force than that involved in the carnal act, and though the woman offers no resistance to the consummation of their purpose. In the language of Lord Chief Justice Campbell in *Regina v. Richard Fletcher*, supra: "It would be monstrous to say that these poor females are to be subjected to such violence, without the parties inflicting it being liable to be indicted. If so, every drunken woman returning from market, and happening to fall down on the roadside, may be ravished at the will of the passers-by."

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 448)

EVANS v. JOSEPHINE MILLS.

(Supreme Court of Georgia. Feb. 12, 1904.)

INJURY TO EMPLOYE—PETITION—DISMISSAL—NONSUIT—CONTRIBUTORY NEGLIGENCE—NEGLECT OF FELLOW SERVANT—INFANCY.

1. If the petition sets out no cause of action, proof of every fact therein charged is nugatory; but advantage thereof should be taken by motion to dismiss on the ground that the pleadings are fatally defective, and not by motion to nonsuit, which is intended to test the sufficiency of the evidence to support the petition.

2. If the petition sets out a cause of action, and the plaintiff proves every fact charged, but, on cross-examination or otherwise, disproves his right to recover by establishing the existence of other undisputed defensive facts which show that he is not entitled to a verdict, then a nonsuit should be granted.

3. In the present case, even if the plaintiff established the facts contained in her petition as originally filed, she also proved additional facts as to her mental capacity and experience which would have authorized a nonsuit, since the danger of placing her hand between moving rollers was so patent and obvious as of itself to be a warning to one of her age and experience.

4. By amendment, and the evidence in support thereof, it appeared that she was injured by the act of a fellow servant; and, inasmuch as the doctrine of fellow servants does not apply to infants of tender years, it was error to grant a nonsuit, but the case should have been submitted to the jury to determine whether there was any negligence of the co-employee in the act causing the injury.

5. The master is not liable to one servant for injuries inflicted by a fellow servant, because the risk thereof is one of those assumed in the contract of employment.

6. Infants under 14 years of age are chargeable with contributory negligence resulting from a want of such care as their mental and physical capacity fits them for exercising, and assume the risk of those patent, obvious, and known dangers which they are able to appreciate and avoid.

7. But the risk arising from the negligence of fellow servants is not patent, and there is no presumption that the same was assumed by an infant of tender years.

(Syllabus by the Court.)

Error from City Court, Polk County; F. A. Irwin, Judge.

Action by Betty Evans, by her next friend, against the Josephine Mills. Judgment for defendant. Plaintiff brings error. Reversed.

The petition alleged that the plaintiff was between 11 and 12 years of age, and ignorant of the danger of exposed machinery in defendant's mill, and that defendant negligently left the same uncovered, and failed to warn plaintiff of the danger, and was negligent in permitting and not restraining the plaintiff from going about the dangerous machinery, who was injured by placing her hand between the presses. By amendment it was alleged that, if she was out of the line of her work, the defendant was guilty of negligence in not restraining her from going to and remaining about the dangerous machinery; that defendant did not warn plaintiff that she was out of the line of her work, or request or command her to keep away from the same; that the machinery was not in motion when she put her hand therein, but it was set in motion by another youthful, incompetent, and inexperienced employé, though there was no proof of her incompetence and inexperience, further than appeared from the testimony that she was a "little girl." The plaintiff "had worked two months at the Wahneta Mill, and in the Josephine Mill about three weeks." She testified that she was 11 years and 2 months old; had no regular work in the mill, but was employed "to do first one thing, and then another." Sometimes she would take shirts to the folding table of the presser, which is attached to a mangle having rollers heated by steam, and through which the shirts were run and pressed. On the morning of the accident the machine had not been started, and, when she carried the shirts and placed them on the folding table, she put her finger on the presser to see if the machine was in working order, so that she could tell the operator, and let her keep up with the "overseamer." When she put her finger on the presser, a "little girl" (Minnie Sanders, another employé) started the machine. It caught plaintiff's arm, seriously mashing it, and necessitating its amputation. Plaintiff's evidence tended, to show that she had never been warned as to the danger of the machine, and she claimed that she did not know that it was dangerous, or that it was dangerous to touch her finger to the presser. She had frequently carried clothes

¶ 7. See Master and Servant, vol. 24, Cent. Dig. § 601.

to the presser previously to this occurrence. One witness testified that the mangle was very dangerous, and not at all safe for children of tender years to be around. The mangle is provided with a cover, and, with the cover on, it is not dangerous, but, with it off, it is very dangerous. At the time the plaintiff was injured the cover was off. The testimony of a number of employes who were in the room at the time of the accident was introduced, with a view of establishing the dangerous character of the machinery, and proving that no warning had been given to plaintiff in reference thereto. Several witnesses testified that plaintiff was a "sweet, bright," and intelligent child. At the conclusion of the evidence, the court directed a nonsuit.

Janes & Hunt, for plaintiff in error. Bunn & Trawick, for defendant in error.

LAMAR, J. A nonsuit will not be granted where the plaintiff proves his case as laid. *Kelly v. Strouse*, 118 Ga. 872, 43 S. E. 280 (4b). This ruling does not lead to the result that it is necessary to submit the case to the jury, even though it appears on the plaintiff's evidence that he is not entitled to recover. Nor is it in conflict with Civ. Code 1895, § 5347, since that section evidently contemplates a trial upon a petition which sets out a cause of action. Usually there is such a petition, and the plaintiff, by proving his case as laid, makes out a prima facie right to recover; and it would, of course, be improper to grant a nonsuit. If he fails to prove what he has thus alleged, or if he actually proves every fact charged, but, on cross-examination or otherwise, disproves his case by establishing beyond doubt the existence of other defensive facts which make it manifest that he ought not, on the whole evidence, to recover, then Civ. Code 1895, § 5347, declares that "a nonsuit will be granted." If, for example, he sues on an account, and proves his case as laid, but also proves that the debt has been fully paid, a nonsuit should be awarded. He proves his case, and then he disproves it. There may be a fatal defect, caused by too much evidence, as well as by too little, and a motion for nonsuit is the proper means by which to test the question as to whether the plaintiff's evidence entitles him to go to the jury. But where the defendant has failed to test the sufficiency of the petition by demurrer at the first term, and the petition sets out no cause of action, it does not follow that proof of the idle allegations therein will compel the court to do a useless thing, and refer to the jury that which is so vain and nugatory that a judgment on a verdict in favor of the plaintiff would have to be arrested. Civ. Code 1895, §§ 5362, 5046. In such instances, however, the vice is in the petition, rather than in the proof. The remedy is not by motion to nonsuit, which is intended to test the sufficiency

of the evidence, but by motion to dismiss, which is aimed at the fatal defect in the pleading. Compare *O'Connor v. Brucker*, 117 Ga. 451, 43 S. E. 731. The original petition set out a cause of action, and it may be conceded that the plaintiff proved her case substantially as alleged. But the testimony further established certain additional facts as to her previous employment in another mill, her experience, capacity, "smartness," and "brightness," which were sufficient to take the matter out of the rule that proving the case as laid will prevent a nonsuit, and to call for the determination of the question as to whether she had not disproved her cause of action. The original petition charged that the plaintiff touched with her fingers the moving machine, and that the master was negligent in failing to warn her of the danger. If she had been an adult, or over 14 years of age, clearly she would not have been entitled to a verdict. She was out of the line of her employment. Although she was only 11 or 12 years of age, it appears by the undisputed testimony that she was a "smart, bright child," and had worked in this and another mill long enough to know that it was dangerous to put hand or finger between moving rolls. And even if the master did not give her warning, the danger was so obvious, and the risk so patent, as of itself to amount to a warning to any one with the mental capacity and experience which the plaintiff was shown to have possessed. While the law exacts of the master the duty to warn those, old or young, who are inexperienced and ignorant of latent dangers, still he is not an insurer, even of infants of tender years; nor is he bound to warn them of dangers of which they know, and are able to appreciate. If, without warning, they deliberately walk into a fire, or purposely step from high places, or voluntarily and unnecessarily put their hands between moving rolls, the master is not responsible. Civ. Code 1895, §§ 2610, 2611, 2612.

In employing minors to work, the master is not bound to employ others to restrain them from leaving their places of duty and going into places of danger. If he actually sees infants of tender years doing any act which is manifestly hazardous, he should restrain them from so doing. *Angusta Factory v. Barnes*, 72 Ga. 217, 58 Am. Rep. 838. But the evidence in this case does not call for the application of any such rule. The plaintiff had been at work in another mill, and for some time had been properly and safely performing the duties for which she was engaged by the defendant. She had frequently been about the presser; was not expected to get on the platform, or to put her hand anywhere near the rollers; nor is there any evidence that the master or superior officers knew she intended so to do, or had any opportunity to restrain her. If, as alleged in the original petition, she placed her hand on the moving rollers, she saw and knew

the danger, and the injury was not the result of any negligence on the part of the master. If, as alleged in the amendment, it was not in motion when she mounted the platform and touched the roller, then the machine was not dangerous to the infant or any one else. No warning was needed, and on this theory alone she was not entitled to recover. The amendment, however, further alleged that, though the machine was not in motion when the plaintiff put her hand between the rollers, another "little girl" started it up, with the result that serious personal injuries were inflicted upon the plaintiff. On this theory: (1) If the master, or some one for whose act he was responsible, was not negligent, she cannot recover. (2) This not being a suit against a railroad company, if the master was negligent, the plaintiff's contributory negligence might lessen, though under our statute it does not necessarily defeat, a recovery. Civ. Code 1895, § 3830. (3) If the plaintiff was free from fault, and was injured by a fellow servant, she cannot recover, unless the fact that she was a minor under the age of 14 takes her without the operation of the fellow-servants rule. There are cases which hold that this doctrine is applicable to infants. *Shields v. Yonge*, 15 Ga. 349, 60 Am. Dec. 698 (18); *King v. Boston, etc., Co.*, 9 Cush. 112 (17); *Curran v. Merchants' Mfg. Co.*, 130 Mass. 374, 39 Am. Rep. 457 (between 14 and 15); *Fones v. Phillips*, 39 Ark. 23, 43 Am. Rep. 264 (nearly 14); *Brown v. Maxwell*, 6 Hill, 592, 41 Am. Dec. 771; *Greenwald v. Marquette, H. & O. Ry. Co.*, 49 Mich. 197, 18 N. W. 513 (17); *Pittsburgh, C. & St. L. Ry. Co. v. Adam*, 105 Ind. 153, 5 N. E. 187 (under 21); *Gartland v. Toledo Co.*, 67 Ill. 498 (under 21); *Fisk v. Central Pacific R. Co.*, 72 Cal. 38, 13 Pac. 144, 1 Am. St. Rep. 22 (12); *Lovell v. De Bardleben Co.*, 90 Ala. 15, 7 South. 756 (where the court construed the declaration to mean that plaintiff was over 14); *Hefferen v. Northern P. R. Co.*, 45 Minn. 471, 48 N. W. 1, 526 (17); *Smillie v. St. Bernard Dollar Store*, 47 Mo. App. 404 (10); *Craven v. Smith*, 89 Wis. 125, 61 N. W. 317 (11). In other cases it has been held that the doctrine exempting the master from liability to one servant for injuries inflicted by the negligence of a fellow servant is based upon the theory that such risks are among those assumed in the contract of employment, and that, "if the injured employé is a child incapable of comprehending that risk, the rule ought not to apply." *Hinckley v. Horazdowsky*, 133 Ill. 359, 24 N. E. 421, 8 L. R. A. 490, 23 Am. St. Rep. 618. In *Houston & G. N. R. Co. v. Miller*, 51 Tex. 270, the court held that, while the fellow-servant rule should apply to one under 21 years of age, it should not be enforced against a child of tender years. See, also, *Evans v. American Iron Co. (C. C.)* 42 Fed. 519. Compare *So. Agricultural Works v. Franklin*, 111 Ga. 319,

323, 86 S. E. 698. From the dissenting opinion in *Atlanta Co. v. Speer*, 69 Ga. 158, 47 Am. Rep. 750, and from the foregoing cases, it will be seen that all the authorities hold that the fellow-servant rule applies to infants over the age of 14. As to those under that age there is a conflict. Some authorities, for cogent reasons, hold that the doctrine is not applicable to infants of tender years. And, without noting the distinction between those over and those under 14, such is the clear intimation in *Augusta Factory v. Barnes*, 72 Ga. 217, 53 Am. Rep. 838. All children are chargeable with the result of failing to exercise the due care which their physical and mental capacity fits them for exercising. Civ. Code 1895, § 2901. They are dally brought into the presence of known dangers which they may be reasonably expected to avoid. But the risk from the negligence of fellow servants, which, as matter of law, is presumed to be assumed in the contract of employment, is the risk of an unknown, contingent, and legal danger, which would make no impression upon the mind of a child of tender years. It is not like a peril obvious to the senses, the very presence of which awakens apprehension, and, when coupled with the fear of pain, is calculated to make the infant avoid it. Nor is it like the responsibility for the violation of a criminal statute, where the minor is to be punished for what it itself does, and where the implied knowledge of the criminal statute is generally aided by the child's conscience and intuitive knowledge that the act is in itself wrong. Pen. Code 1895, § 33. The line must be drawn somewhere, and, with variation below that age depending on its capacity, the time of responsibility has been absolutely fixed at 14. For some purposes after reaching that age infants are classed as adults. They can then make wills (Civ. Code 1895, § 3265); select their guardians (Civ. Code 1895, § 2516); and females can contract marriage (Civ. Code 1895, § 2412). They then become amenable to the criminal law, and, by analogy, are presumed to assume the risks which the law makes incident to their contract of employment. But under that age, while they may be charged with the duty of avoiding dangers of which they know, there is no presumption that they contract to assume the risks which are not patent, of which they do not know, and which relate to the contingent act of a third person. The plaintiff proved her case substantially as laid in the amended petition, and, under the circumstances, a nonsuit should not have been granted; but the matter should have been referred to the jury, to determine whether the fellow servant, in starting the machine, was guilty of an act of negligence in relation to the plaintiff.

Judgment reversed. All the Justices concurring.

(119 Ga. 433)

QUATTLEBAUM v. STATE.

(Supreme Court of Georgia. Feb. 12, 1904.)

MURDER—DEFENSE—INSANITY—INSTRUCTIONS
—OPINION EVIDENCE—MEDICAL BOOKS—AR-
GUMENTS OF COUNSEL—CONTINUANCE.

1. In a prosecution for murder, where the defendant, an epileptic, relied on the defense of insanity at the time of the homicide, he had no cause to complain of a charge that, before the jury could convict, they must find not only that the defendant knew the difference between right and wrong, and was mentally capable to do or not to do the alleged act, but they must also find that he was capable of governing his conduct in accordance with such choice.

2. A party cannot obtain a reversal for an error which he has himself invited.

3. The defendant was found guilty of voluntary manslaughter, and even if, as contended by him, the evidence made out a case of murder or justifiable homicide, he cannot complain because the judge, in compliance with his oral and written requests, charged on the subject of voluntary manslaughter.

4. Under the ruling in *Johnston v. R. & D. R. Co.*, 22 S. E. 694, 95 Ga. 685, books of science and art are not admissible to prove the opinions of experts announced therein; nor can they, without being introduced, be read to the jury in the argument, over the objection of the opposite party.

5. While counsel may quote from memory or even read brief extracts of literary or historical matter to illustrate and make effective a discussion of the facts, nothing which performs the office of evidence, or introduces facts calculated to influence the jury, can first be used in argument.

6. One adjudged insane is responsible for a crime committed during a lucid interval. Pen. Code 1895, § 35.

7. The defendant, an epileptic, was committed to the asylum, there to remain until restored to sound mind and right reason. More than a year thereafter he was openly at large, but there was no evidence as to the reason for his release. The judge charged that the jury must find that he was of sound mind at the time of the homicide before he could be found guilty of any offense. In the absence of a special request so to do, the judge was not bound to charge on any presumption as to the continuance of insanity arising from the judgment on the proceeding *de lunatico inquirendo*. *Lucas v. Parsons*, 23 Ga. 279.

8. One who had served as a juror on such inquiry did not impeach such verdict by testifying, on a subsequent trial of the defendant for murder, as to his knowledge of the defendant's mental condition before and after such verdict, and as to the particular character of insanity with which the defendant had been afflicted. Civ. Code 1895, § 3743.

9. Even if the grounds of the motion for a continuance be treated as complete, and evidence in other parts of the record could be considered, no error appears. The judge exercised a humane and legal discretion. There was no plea of present insanity. The defendant's misfortune would not relieve him of liability to be tried. It did not appear that he would be better able to go to trial at a subsequent term, and there was evidence that he might be actually worse as the result of being confined in jail, for an offense not bailable as matter of right. Civ. Code 1895, § 5138.

(Syllabus by the Court.)

Error from Superior Court, Dooly County;
Z. A. Littlejohn, Judge.

J. A. Quattlebaum was convicted of manslaughter, and brings error. Affirmed.

J. T. Jeter, Crum & Jones, and Shipp & Sheppard, for plaintiff in error. F. A. Hooper, Sol. Gen., and M. P. Hall, for the State.

LAMAR, J. 1. In this distressing case it appears that the defendant had, from his earliest infancy, been afflicted with epilepsy. He has, however, no cause to complain of the charge on the subject of insanity, for the court fully and fairly submitted to the jury the question whether the homicide was committed during a lucid interval, instructing them that, before they could convict, they must find not only that the defendant knew the difference between right and wrong, and was mentally capable of choosing to do or not to do the alleged act, but that they must also find that he was capable of governing his conduct in accordance with such choice.

2, 3. It appeared that the defendant, with others, had been playing ball, and, while returning home, had an altercation, in which the deceased, who had a bat in his hand, used language which greatly incensed the defendant, and according to the testimony for the state the latter thereupon drew his pistol, fired, and instantly killed his companion. At the time the accused used language indicating a settled purpose to kill, and shortly after the shooting fled to his home, where he was later arrested. The defendant insists that under the evidence he was guilty of murder or of justifiable homicide, and that it was error for the court to charge the law of voluntary manslaughter. Even if the evidence had not warranted a charge on the subject of voluntary manslaughter, the defendant can take no advantage thereof, inasmuch as it appears that the court was requested by his counsel, both orally and in writing, to charge the law on that subject. It is well settled that a party cannot obtain a reversal for errors which he has himself committed, nor for an error which he has himself invited. Compare *Howard v. State*, 115 Ga. 244, 41 S. E. 654 (4), and cases therein cited.

4, 5. The almanac, or the Northampton Tables of Mortality (Ga. R. Co. v. Oaks, 52 Ga. 410 [4]), and other similar works of exact science, may be introduced as evidence. For the reasons given in *Johnston v. Railroad Co.*, 95 Ga. 685, 22 S. E. 694, books of science and art are not admissible in evidence to prove the opinions of experts announced therein. It was not error, therefore, to refuse to permit counsel for the accused to read from a book of medical jurisprudence an account of a homicide committed by an epileptic, with the opinion of the author as to whether or not he was criminally responsible. Such book could not have been received in evidence when it might have been met by counter extracts; and, if not admissible in evidence, it was doubly inadmissible to read it first in argument, when there might

be no opportunity to reply in kind. Of course, this ruling does not lead to the conclusion that counsel may not quote from memory, or even read brief extracts of literary or historical matter to embellish or strengthen the argument, or to illustrate and make effective his discussion of the facts. And, while there is some conflict of authorities on the subject (Lawson's Expert and Opin. Ev. [2d Ed.] 217), the ruling in the Johnston Case, and in *Cribb v. State*, 118 Ga. 316, 45 S. E. 396, determines that in this state nothing can be first read in argument which performs the office of evidence, or introduces facts calculated to influence the jury.

6-9. The other assignments of error are sufficiently dealt with in the headnotes.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 455)

TRAVELERS' INS. CO. v. THORNTON.

(Supreme Court of Georgia. Feb. 12, 1904.)

EXPERT EVIDENCE—MEDICAL FACTS—PRINCIPAL AND AGENT—NOTICE—ACTION ON ACCIDENT POLICY—PROOFS OF LOSS—EVIDENCE.

1. An expert may aid the jury, but he cannot perform the functions of a juror, and, under the guise of giving testimony, state a legal conclusion.

2. An expert may give his opinion as to medical facts, but he cannot determine the legal classification of such facts, and testify as to what was or was not "a contributing cause" of an injury.

3. Where it is sought to charge a principal with notice, he is only required to offer the agent to whom the opposite party claims he gave the notice. He need not undertake to prove a negative by producing all of his agents, in order to show that each did not receive the notice.

4. Evidence of notice to the company's agent that plaintiff had hernia was admissible, not to establish a waiver of the terms of the policy, but to meet the plea of fraudulent concealment, and thereby prevent the avoidance of the whole contract. The charge on this subject was in conformity to Civ. Code, §§ 2099, 2101.

5. Policies of insurance do not stand on the same footing as contracts of affreightment by common carriers. Civ. Code, § 2276. There is no standard form of policy prescribed by statute, and the courts must enforce the contract as made, and cannot relieve against results of the assured's failure to comply with lawful stipulations in the policy.

6. Under the terms of the policy here the plaintiff forfeited to the company any sum for which proof of loss was not made within the time stipulated, and was not entitled to recover an amount greater than that stated in the proof of loss. The excess should be written off.

7. There were no pleadings to warrant the admission of evidence as to the value of plaintiff's time.

8. From the very definition of the term, irrelevant testimony is ineffective. Ordinarily, its admission is not cause for the grant of a new trial, unless, from its peculiar nature, or from statements in the assignment of error, it is shown to have an effect prejudicial to the complaining party.

9. The defendant's objection to the admission of testimony as to the plaintiff's character as irrelevant should have been sustained. But there was no claim that it was prejudicial, and the answer of the witness that "he did not know, but supposed it was good," itself shows that this testimony as to character was not harmful. This being a second verdict, a new trial will not be granted for the error.

10. The case was tried in accordance with the former ruling, reported in 116 Ga. 121, 42 S. E. 287, 94 Am. St. Rep. 99. The evidence was conflicting, but sufficient to sustain a verdict for plaintiff for eight weeks' disability. None of the assignments of error present grounds requiring the second grant of a new trial.

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Action by W. J. Thornton against the Travelers' Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed, with directions.

E. A. Hawkins, for plaintiff in error. J. H. Lumpkin, for defendant in error.

LAMAR, J. 1, 2. Under the decision in *Thornton v. Travelers' Ins. Co.*, 116 Ga. 121, 42 S. E. 287, 94 Am. St. Rep. 99, it was left for the jury to say whether the injury was caused by the fall and aggravated by the hernia, or whether the hernia was a contributing cause to the injury. A physician could give an opinion on hypothetical facts on what he had heard other witnesses testify in the case, or on facts discovered by his own investigation. He could state what, in his opinion, would have been the effect of the blow to the plaintiff without a hernia, and what the effect of the blow with the hernia. An expert can testify as to what was the cause of death, or of an injury, or as to the effect of disease, or as to the effect of a blow upon one sound or upon one unsound. He can give his opinion on physical facts or as to the medical facts, but he cannot determine the legal classification of such facts. It was not proper for him to use the language of the decision and testify that the hernia was a "contributing cause." That was a mixed question of law and fact, to be determined in the light of all the evidence; and it would have been as improper to permit such testimony as it would have been in an ordinary case to allow a witness to say that a particular act amounted to negligence, or to contributory negligence, or that another fact was the proximate or remote cause. The expert may aid the jury, but he cannot act as a member of the jury; nor, while on the stand, can he transcend the functions of a witness, and under the guise of giving testimony state a legal conclusion. Civ. Code, § 5287.

3. Where it is sought to charge a principal having many agents with notice, it is not necessary for him to undertake to prove a negative, and produce all of his agents, in order to show that each did not receive the notice. He is only required to offer that

agent to whom the opposite party claimed the notice was given. Civ. Code, §§ 5160, 3027.

4. Several assignments relate to the admission of evidence and to the charge of the court as to notice to the defendant's agent that the plaintiff had hernia at the time of the application. The evidence was admissible, not to establish a waiver of the terms of the policy, but to meet the plea of fraudulent concealment, and thereby prevent the avoidance of the whole contract. The charge was in conformity with Civ. Code, § 2099.

5-10. Defendant's objection to the admission of testimony as to plaintiff's character should have been sustained. It was equally inadmissible for the defendant to prove by the same witness what was the character of the company's agent. But the defendant alone complains, assigning as error that the evidence was irrelevant. From the very definition of the term, irrelevant testimony is ineffective. Ordinarily, its admission is not cause for the grant of a new trial. *Marshall v. Morris*, 18 Ga. 373 (4); *Mayor of Gainesville v. Caldwell*, 81 Ga. 76, 7 S. E. 99 (6). And for it to produce such a result it should appear to have had a prejudicial effect on the minds of the jury. If such is the case, good practice would make it proper, if, indeed, it is not necessary, to point out how that which is alleged to have been irrelevant has become so far relevant as to have affected the verdict. The propriety of such a showing is illustrated here, where, from an inspection of the brief of evidence, it appears the witness testified that he did not know the plaintiff intimately, did not know anything against him, and therefore supposed his character was good. In other words, the witness did not progress beyond the point where the law leaves each witness who has not been attacked. No prejudice being alleged, and this being a second verdict, the error in allowing the question answered over the defendant's objection does not demand a reversal. Civ. Code, §§ 5158, 5159.

The policy required the assured to furnish written notice of the injury and duration of the disability within 13 months from the accident, otherwise all claims thereon were forfeited to the company. Within the time stipulated plaintiff made out his proof of loss, claiming damages for a disability of eight weeks. No amendment or additional claim or proof of loss was subsequently filed within the 13 months. He sued, however, for 10 weeks' disability, and recovered a verdict therefor. Contracts of insurance do not stand upon the same footing as those made by common carriers, in which limitations in a bill of lading are disregarded unless expressly assented to by both parties. Civ. Code, § 2276. There is no standard policy fixed by statute, and no room for implication as to what the agreement was or ought to have been. The rights of the parties must therefore be governed by the terms of the con-

tract. Under that sued on here the filing of the claim and the statement of the duration of the disability within the time limited by the policy was a condition precedent to plaintiff's right to recover. By the terms of the policy, and according to decisions construing similar provisions in other policies, the verdict cannot exceed the amount claimed in the proofs of loss. There are some cases which hold that more than one proof and claim can be filed within the time limit (*Bickford v. Travelers' Ins. Co.* [Vt.] 32 Atl. 232); but under the terms of the policy there cannot be a verdict for a sum exceeding that named in the written proof required by the contract. The excess can be written off.

The case was tried in accordance with the ruling made when it was here before as reported in 116 Ga. 121, 42 S. E. 287, 94 Am. St. Rep. 99. The evidence was conflicting, but sufficient to sustain a verdict for the plaintiff for eight weeks loss of time at \$100 a week; the accident having occurred in a railroad train, and he being entitled to double indemnity. None of the assignments of error present grounds sufficient to require the grant of a new trial.

Judgment affirmed, with direction. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 448)

JORDAN v. STATE

(Supreme Court of Georgia. Feb. 12, 1904.)

BURGLARY—EVIDENCE—IDENTITY—JUROR—QUALIFICATIONS—NEW TRIAL—CHALLENGE.

1. On a trial in December, 1903, there was testimony that "recently, during the first week in November," the store of the witness was broken and entered and goods stolen. The evidence was sufficient to show that the burglary was committed within the statute of limitations.

2. The goods lost had no earmarks, but the coincidence of their correspondence in quantity, variety, and brand with those found in defendant's recent possession, with other evidence, was sufficient identification.

3. A juror having the general statutory qualifications may be specially incompetent to serve in a particular case because of relationship, expression of opinion, bias, or other defect proper affectum.

4. If the losing party was ignorant of the affection or bias of the otherwise competent juror, he may take advantage thereof by motion for new trial.

5. A juror wanting in the statutory qualifications of age or residence, or having other deficiency proper defectum, may yet be rendered specially competent by the failure of the parties to challenge.

6. Ineligibility because of prior service in the same court during the same year renders a juror incompetent proper defectum, and is ground for challenge, but not cause for the grant of a new trial.

7. The enforcement of the law prohibiting too frequent service on the jury is referred primarily to the judges, and incidentally to such action as may be taken by way of challenge by the parties.

8. The policy of preventing too frequent service is met by the counter policy not lightly to set aside a verdict; and, unless the statute ex-

pressly so requires, a new trial cannot be granted because one ineligible under the act approved August 15, 1903 (Acts 1903, p. 83), served on the jury.
(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

George Jordan was convicted of burglary, and brings error. Affirmed.

Glawson & Fowler, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

LAMAR, J. 1. The time and place of the commission of a crime must always appear. While it is best to make specific proof of the date, yet that the offense was committed within the statute of limitations may be established by circumstantial or indirect evidence. What is sufficient must be determined by the special facts of each case. In *Tipton v. State* (Ga.) 46 S. E. 426, it is stated that, where a month is referred to, it will generally be understood to be of the current year, unless from the connection this appears to be impossible. And if this trial had taken place in January, 1904, it is evident that under the language used the jury must have understood that the transaction took place in November, 1903. So, where the trial took place in December, 1903, and the witness testified that "recently, during the first week in November," his store had been broken and entered and the goods stolen, there was proof sufficient to establish that the offense was committed during the year 1903.

2. A number of boxes of White Knight and Capadura cigars, Virginia cheroots, and Violetta soap were stolen. Articles answering the description in kind and quantity of those lost were soon thereafter found in the possession of the defendant. His counsel contends that the merchandise was of a character which could have been obtained at many other stores, that it had no earmarks by which it could be identified, and that the evidence fails to show that it was the same as that lost. And certainly, if the defendant had been found in possession of White Knight cigars alone, without anything further to connect them with those lost, the state's case would not have been made out. But having in possession White Knight and Capadura cigars in quantities corresponding to those stolen, and beyond the amount usually kept by one not a merchant, made the circumstance much more suspicious. The probative value of the coincidence, that the defendant had the quantity and brand of goods lost would increase in geometrical ratio with the finding of each additional article, so that when it was proved that he not only had White Knight and Capadura cigars, but the Virginia cheroots also, the case became far stronger. But having these, with the unusual number of boxes of Violetta soap, was a coincidence so remarkable as to demand an explanation; if, in-

deed, under the law of probabilities, it might not be taken as proof of the fact that they were the goods recently stolen. Failure to offer any explanation, except the statement made to the officer that they had been given to the defendant by two boys, whose names were not stated, or other fact to establish the time, place, or circumstances under which the gift was made, followed by the positive identification of the soap, authorized the verdict.

3-8. The act of August 15, 1903 (Acts 1903, p. 83), provides that any juror who has served at any session of the court shall be "ineligible for duty as a juror at the succeeding term." The plaintiff in error moved for a new trial on the ground that one of the jurors had served at the preceding session, and that he and his counsel were alike ignorant of this fact until after verdict. Previous service was good ground for challenge. But in classing the juror as ineligible the act does no more, in legal effect, than render him incompetent. It leaves the case to be governed by the rule applied to a juror who serves though ineligible or incompetent because under age, over age, nonresident, or because his name is not on the jury list. These are grounds for challenge propter defectum, but are not good reasons for the grant of a new trial. These and like statutory deficiencies are general in their character, and afford reason why the juror's name ought not to have been put in the venire, but have no necessary bearing on the ability of such jurors to impartially decide between the particular parties litigant. Such deficiencies are negative and passive, affecting neither party, or both parties in exactly the same way, and thereby producing a balance. They stand on an entirely different footing from those grounds of challenge for favor which are positive, and actively disqualifying defects propter affectum, where the affections from relationship or prejudice and bias render an otherwise competent juror specially incompetent to decide between the particular parties. His statutory qualification does not cure his personal bias. And where the parties are ignorant of such defects propter affectum the verdict may be set aside. But a juror incompetent propter defectum is made specially competent by the act of the parties in allowing him to serve without challenge, and the verdict will not be set aside for such cause. And while the act of 1903 was no doubt enacted in pursuance of the same policy as that expressed in Pen. Code 1895, § 866 (*Atlanta Co. v. Ray*, 70 Ga. 374), and "to be strictly and energetically enforced by the judges, because intended to prevent service by professional jurors," the enforcement of its provisions is referred primarily to the judges, and incidentally to such action as may be taken by the parties by way of challenge before trial. The policy of preventing jurors from serving too frequently is met by the counter policy

not lightly to set aside a verdict otherwise correct because of some reason which has in no way vitiated the result. In view of the almost unbroken current of authority in this state and elsewhere, a new trial cannot be granted because a juror incompetent propter defectum assisted in making the verdict. An express legislative command to that effect would be necessary to bring about such a result. *Costly v. State*, 19 Ga. 614; *Brown v. State*, 105 Ga. 640, 31 S. E. 557 (1); *Meeks v. State*, 57 Ga. 329 (1); *Hill v. State*, 64 Ga. 453 (1).

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(102 Va. 547)

FLANARY et al. v. KANE et al.

(Supreme Court of Appeals of Virginia. March 10, 1904.)

VENDOR—VENDEE—AFTER-ACQUIRED TITLE—INCUMBRANCE—DEED—CONSTRUCTION.

1. A vendor is estopped from setting up an after-acquired title to the land conveyed by him where the deed of conveyance recites or affirms, expressly or impliedly, that the grantor is seised of a particular estate, which the deed purports to convey, and upon the faith of which the sale was made.

2. A grantor is estopped from acquiring an incumbrance existing upon the land at the time of his conveyance, and asserting it against the land in the hands of his grantee.

3. Where grantors in a deed "give, grant, bargain, and sell and convey" two certain tracts of land, describing them, the deed shows that the grantors intended to convey, and the grantees accepted and received, an estate in fee simple.

On petition for rehearing. Denied.

For former opinion, see 46 S. E. 312.

BUCHANAN, J. John Gilly, one of the appellants in this cause, has filed his petition for rehearing of the decree entered by this court at its January term, 1904, so far as it affects his right to payment out of the Slempp judgments numbered 4, 6, 7, and 8. He attacks the correctness of that decree upon two grounds: "First, because W. N. G. Slempp conveyed to Gilly long before he conveyed to Slempp and Flanary; and, second, because he conveyed to Gilly with general warranty, but did not convey to Flanary and Slempp with general warranty."

The former of these grounds was fully argued when the case was submitted, and carefully considered by the court before making the decree complained of. Upon a reconsideration of that question, we see no reason to change the conclusion then reached.

The second ground relied on was not urged when the case was argued, but the deed to Flanary and Slempp was treated by all parties as a conveyance with a covenant of general warranty; and this court, in passing upon the question involved, so treated it. It now appears that there is no such covenant in the

deed. Although this is true, it does not necessarily follow that Flanary is not entitled to the relief granted him by the circuit court, as modified by the decree which it is sought to have reheard.

A vendor is not only estopped from setting up an after-acquired title to the land conveyed where he warranted the title generally, but he is also estopped from asserting such title, although there is no warranty, where the deed of conveyance recites or affirms, expressly or impliedly, that the grantor is seised of a particular estate, which the deed purports to convey, and upon the faith of which the sale was made. *Reynolds v. Cook*, 83 Va. 817, 3 S. E. 710, 5 Am. St. Rep. 317; *Nye v. Lovitt*, 92 Va. 710, 24 S. E. 345, and authorities cited; *Van Rensselaer v. Kearney*, 11 How. 297, 13 L. Ed. 703; *Rawle on Covenants for Title* (5th Ed.) §§ 245, 247. If the grantor is estopped, under such a conveyance from setting up an after-acquired title, he would be equally estopped from acquiring an incumbrance existing upon the land at the time of his conveyance, and asserting it against the land in the hands of his grantee.

The language of the deed from W. N. G. Slempp and wife, under which Flanary holds, shows clearly that it was not intended to pass a limited or qualified interest in the land, but to convey the land itself. They declare that they "give, grant, bargain and sell and convey * * * two certain tracts or parcels of land," describing them, and referring to deeds of record under which they had acquired title to the land. The deed bears upon its face evidence that the grantors intended to convey, and the grantee expected to become invested with, an estate in fee simple in the land. *Reynolds v. Cook*, supra; *Van Rensselaer v. Kearney*, supra. See *Wynn v. Harman*, 5 Grat. 164.

This being so, we are of opinion that Slempp could not acquire said judgments, which were liens upon the land, and assert them against it, to the prejudice of Flanary.

The petition to rehear must therefore be denied.

(102 Va. 475)

FLIPPO v. LAMB.

(Supreme Court of Appeals of Virginia. March 10, 1904.)

TRUSTS—EVIDENCE TO ESTABLISH.

1. Plaintiff, having entered into a contract for the purchase of land, agreed with defendant that the latter should furnish the purchase price and take the deed in his own name, but that plaintiff was to have a one-half interest in the same, for which he should pay defendant as he became able. Defendant paid the consideration, took the deed, and afterwards sold the timber on the land at a profit above the purchase price. *Held*, there is a direct trust in favor of plaintiff, who is entitled to one-half the profits arising from the sale of the timber, and the defendant cannot charge plaintiff with the costs of procuring the money necessary to pay the purchase price, as that was the obligation he assumed in his contract.

¶ 1. See Estoppel, vol. 19, Cent. Dig. § 313.

Appeal from Circuit Court, Hanover County.

Suit by John A. Lamb, trustee in bankruptcy, against E. J. Filippo. Decree for plaintiff, and defendant appeals. Reversed.

George P. Haw, for appellant. Leake & Carter and Wm. A. Moncure, for appellee.

KEITH, P. On the 28th of November, 1899, John T. Terrell was, upon his own petition, adjudicated a bankrupt in the District Court of the United States for the Eastern District of Virginia, and shortly thereafter John A. Lamb was appointed his trustee. On the 23d of October, 1900, the District Court entered an order directing the trustee to institute such suit at law or in equity as to him might seem proper to enforce a contract alleged to have been entered into between the bankrupt, Terrell, and one Filippo, for the purchase of a tract of land, for the collection of any money or the enforcement of any right which may have accrued to Terrell by virtue of said contract. The trustee filed his bill in the circuit court of Hanover county, and with the bill makes the following contract and exhibit:

"Know all men by these presence, that whereas J. T. Terrell has bought a farm in Caroline County, Va., known as Brook's farm, containing 700 acres more or less for five thousand dollars cash, for which E. J. Filippo agrees to pay for and take the deed in said Filippo's name and charge the said Terrell with twenty-five hundred dollars, being one-half of the purchase money for said farm, whereas the said Terrell is at work for the said Filippo by the month, it is agreed that said Filippo shall deduct the interest on the twenty-five hundred dollars every month out of said Terrell's wages, or on what part thereof that may be unpaid, the said Terrell shall have a right to pay as much of the principal as he can at any time, and whereas the said farm contains a large quantity of timber whenever the timber is manufactured or disposed of one-half of the proceeds after paying expenses of manufacturing shall belong to the said Terrell and sufficient amount of it shall be paid to said Filippo to satisfy whatever part of the twenty-five hundred that is unpaid, in case of any accident by death or otherwise that the said Terrell could not pay all of the twenty-five hundred him or his heirs shall have a clear deed to such proportional part of said farm and improvements thereon that said Terrell has paid for.

"Given under our hands and seals this year of our Lord, 1899.

"E. J. Filippo. [Seal.]"

The subject of this contract is a tract of land in the county of Caroline, valuable chiefly for its timber, which was owned by the children of R. T. Brooke. Terrell called the attention of Filippo, who was in the lumber business, to this land, and suggested its purchase, but Filippo was of the opinion that it could not be bought for a rea-

sonable figure. Terrell went to see Brooke upon the subject, and entered into negotiations which resulted in its purchase for the sum of \$5,000 in cash, as appears by a letter from Brooke to Terrell, and the indorsement thereon, as follows:

"11th October 1899. Mr. J. T. Terrell, Peaks P. O., Hanover Co. My dear sir: I have communicated with my children and they consent to my selling the place for \$5,000.00 (five thousand dollars) cash. I have been paying taxes on 700 acres, and I will sell it as containing 700 acres, more or less. Yours respectfully, R. T. Brooke, P. O. Box 102, Richmond, Va.

"This will be a sale as soon as terms complied with. R. T. Brooke. 14th October, 1899."

Terrell was unable to pay any part of the purchase money, and thereupon the contract above set forth was entered into. There was evidence which tends to show that Filippo was ready to ignore the rights of Terrell, and to deal directly with Brooke for the purchase of this land; but Brooke, having agreed to sell to Terrell, refused to deal with Filippo.

In pursuance of the terms of this contract, Filippo, on the 23d of November, 1899, paid \$2,000 to R. T. Brooke by check, and on the 12th of December he borrowed the sum of \$3,000, and paid the residue of the purchase money.

On November 15, 1899, a deed was made to E. J. Filippo, which was acknowledged November 18, 1899, and was recorded on the 27th of December of the same year. On December 11, 1899, a deed of trust was given to secure the loan, with which Filippo had paid the balance of the purchase money to Brooke, and this deed of trust was also recorded on the 27th of December.

A short time afterwards—on April 16, 1900—Filippo sold the timber upon this land for \$7,000 in cash, and it is to ascertain the interest of John T. Terrell in this sum and in the land, after the timber had been cut from it, that this suit was instituted.

Filippo, in his answer, states that Terrell was in his employment at a salary of \$50 per month for the services of himself and his team; that he (the respondent) was endeavoring to purchase the Brooke farm, when to his surprise Terrell showed him a letter from Brooke offering the farm for \$5,000 cash, and then the agreement was entered into between Terrell and the respondent that they would buy it together, each furnishing one-half of the money; that this agreement, which was not in writing, continued until after the deed was ready for delivery some time in December, 1899, when, Terrell being unable to furnish his part of the money, the respondent borrowed \$3,000, and with \$2,000 he had in hand, paid for the land, and with Terrell's approbation took a deed in his own name, and then signed the written agreement which has been heretofore referred to; that

after this was done Terrell continued to work with respondent until the 31st of March, 1900, and during that time drew his wages and the hire of his team; that after this state of affairs had continued for some time respondent told him that he had not complied with his agreement, and that he could no longer submit to it; that he would sell the timber on the place, if he could, and give Terrell one-half of the land, to which Terrell consented, and agreed that respondent could have for his trouble what he could get over and above what was necessary to pay what the farm had cost, and in reliance upon this made the sale of the timber, and was then much surprised when Terrell made a demand upon him for one-half of the money.

Depositions having been taken, the circuit court was of opinion that the written contract signed by Flippo and dated 1899 was executed at a period subsequent to the date of Terrell's being adjudicated a bankrupt, and that, therefore, the interest of Terrell under this contract did not pass by the decree of the bankrupt court to the plaintiff in this cause; but as Terrell, in his answer, conceded the right of plaintiff to recover, there was nothing to prevent his surrendering whatever interest he had under the contract, and devoting it to the benefit of his creditors; and upon this theory entered a decree in favor of the trustee in bankruptcy, from which Flippo has appealed to this court.

After a careful consideration of the evidence, we have reached the conclusion that Flippo's contract with Terrell was made before the adjudication in bankruptcy, and, as a consequence, the trustee in bankruptcy has a right to sue for and recover whatever interest Terrell had in that contract. We think this conclusion is warranted by the evidence, extrinsic and intrinsic; by the testimony of Terrell, his wife, and his daughter, incidentally corroborated by Brooke, by Gant, and indeed by Flippo himself; by the letter of Brooke, which shows that the terms of the contract of purchase had been reached and agreed upon as early as October 14, 1899; by the deed of bargain and sale from Brooke to Flippo, which bears date November 15, 1899, and is acknowledged November 18, 1899; and by internal evidence to be adduced from the contract itself, which, under the hand and seal of Flippo, shows that at the time of its execution Terrell had bought a farm in Caroline county for \$5,000 cash, for which Flippo agreed to pay, to take the deed in his name, and to charge Terrell with one-half of the purchase money. There is a strong probability that this contract was entered into before the execution of the deed of bargain and sale, and, in our judgment, that probability is sustained by a decided preponderance of the testimony.

This conclusion is decisive of the contro-

versy. The case presents no question of implied or resulting trusts. It is a plain and express trust. Terrell having made the bargain with Brooke for the purchase of this land, and being unable to pay any portion of the purchase money, informed Flippo of the fact. Flippo appears to be an active and energetic man of business, engaged in the purchase, sale, and manufacture of lumber. Seeing a profit in the bargain, he signed the contract, recognizing Terrell as the purchaser, and in consideration, obviously, of being enabled to share in a profitable venture, accepted the result of Terrell's negotiation for the purchase of this land from Brooke as Terrell's input, and on his own part expressly agreed to furnish the entire purchase money. When that contract was signed, the right of Terrell to share in whatever profits accrued was established.

We have no difficulty, therefore, in affirming the decree of the circuit court to this extent.

The appellee claims that there is error in the decree prejudicial to him, which, under the rule of the court, it becomes our duty to consider.

The land having been purchased for \$5,000, and the timber upon it having been sold for \$7,000 in cash, the trustee in bankruptcy would be entitled to one-half of the profits, while the decree appealed from only gave him \$700. This result was arrived at by charging Terrell with what it cost Flippo to negotiate the loan of \$3,000, with which the balance of the purchase money for the land was paid. Flippo was bound by the terms of his contract to pay the entire purchase money. It was not a matter of grace on his part, but of obligation; his contract bound him to it; and it was error to impose upon Terrell or his trustee the cost incurred by Flippo in discharging the obligation of his contract.

It appears from the bill and from a bill of sale dated the 15th of September, 1899, that Terrell transferred certain property, valued at \$1,000, to E. J. Flippo, for which Flippo has never accounted, and it is claimed that this sum should go as a credit upon the share of the purchase money due by Terrell, and, as a result, increase the amount to be recovered by the trustee in bankruptcy.

With respect to this contention we express no opinion, but will reverse the decree of the circuit court in favor of the appellee with respect to the item of \$300, enter a decree in favor of the appellee to that effect, and remand the case to the circuit court for further inquiry as to appellant's liability for the property named in the bill of sale dated September 15, 1899, and which appears in the record as "Exhibit J. T. T. No. 4," with the deposition of J. T. Terrell.

CARDWELL, J., absent.

(102 Va. 500)

COLLINS v. GEORGE.

(Supreme Court of Appeals of Virginia. March 10, 1904.)

APPEAL—BILL OF EXCEPTIONS—INSTRUCTIONS—NEGLIGENCE—FIRE—HARMLESS ERROR.

1. A party objecting to a ruling of the court has a right to have a bill of exceptions which states the truth of the case, and, if necessary, can obtain such a bill by mandamus, but where he has accepted a bill as signed by the judge it is conclusive of what did occur, and its correctness cannot be questioned.

2. The general rule is that it is too late, after a verdict, to object to instructions.

3. Persons in the lawful use of fire must exercise ordinary care to prevent it from injuring others, and what constitutes ordinary care and prudence depends upon the circumstances of the particular case. A failure to have a spark arrester upon a stationary engine is not per se negligence.

4. Where there is sufficient evidence to warrant a verdict, it will not be set aside because it is in conflict with an erroneous instruction given upon the trial.

Error to Circuit Court, Caroline County.

Action by Charles L. Collins against Lewis George. Judgment for defendant, and plaintiff brings error. Affirmed.

Chandler & Chandler, for plaintiff in error.
William E. Ennis, for defendant in error.

BUCHANAN, J. This action was brought by Charles L. Collins to recover damages for injuries done his property by fire, resulting from the alleged negligence of Lewis D. George.

Upon the trial of the cause a verdict was found in favor of the defendant, which the plaintiff moved the court to set aside upon the ground that the court had misdirected the jury by an oral instruction, and because the verdict was contrary to the law and the evidence. This motion was overruled, and judgment entered upon the verdict. To that judgment this writ of error was awarded.

The errors assigned here are the same as the grounds upon which the lower court was asked to set aside the verdict.

The oral instruction complained of was given under the following circumstances, as disclosed by bill of exceptions No. 2:

"After the jury had heard the evidence, had been instructed by the court, and, having heard the argument of counsel, retired to their room to consider of their verdict, and, after being out some time, returned into court, and said they could not agree, the court then told them that if they had disagreed on any question of fact it could not help them, that they were the sole judges of the fact.

"The foreman then told the court that some of the jury could not reconcile the instruction given at the instance of the plaintiff (the one relating to combustible material near the mill) and instruction No. 3 (which had been given at the instance of the defendant, and given by the court without objection

by the plaintiff as given), and, as the court understood, desired some explanation as to 'ordinary care.'

"The court then read over said instruction No. 3, and orally told the jury the first thing they had to determine was whether the fire was the result of the negligence of the defendant; that if they believed from the evidence that the defendant was negligent, and believed the evidence on which the plaintiff's instruction was based, they must find for the plaintiff; that instruction No. 3 referred, for instance, to the question as to whether the fire was or was not an accident. In other words, that if they believed from the evidence the fire could not have been prevented by the exercise of ordinary care and caution on the part of the defendant in the management of his sawmill and mill site, and that the defendant had exercised such ordinary care and caution as might be expected of a man ordinarily prudent under similar circumstances, they must find for the defendant; that whether he was negligent, or whether he had exercised such care and caution, they alone must determine.

"The plaintiff did not except to the foregoing, but just as the jury were about to return again to their room to further consider of their verdict plaintiff's counsel asked the court to call the jury's attention specially to this instruction as to combustible material near the mill, but the court, thinking it had done so in sufficient terms, told the jury they must read all the instructions, and must, on the facts, reach their own conclusions."

The plaintiff insists that the bill of exceptions does not state fully nor correctly the oral instruction as understood by the plaintiff's counsel and the jury, and to sustain this contention a letter from a majority of the jury is filed with the plaintiff's petition for the writ of error.

If the bill of exceptions, as signed by the judge, did not correctly state what occurred when the oral instruction was given, the plaintiff had a right to have a bill of exceptions which did state the truth of the case, and, if necessary, could have obtained such a bill by mandamus. *Collins v. Christian*, 92 Va. 731, 732, 24 S. E. 472. But having elected to accept the bill as signed by the judge, it is conclusive of what did occur when the oral instruction was given, and its correctness cannot be questioned in this court.

As appears from that bill of exceptions, the plaintiff did not except to the oral instruction of the court until after the jury had rendered their verdict and been discharged. The general rule is that it is too late after a verdict to object to instructions. *Newport News, etc., Co. v. Bradford*, 99 Va. 117, 118, 37 S. E. 807; *Richmond & Danville R. R. Co. v. Medley*, 75 Va. 499, 503, 40 Am. Rep. 734. But if there be exceptions to the general rule, and this case be within the exceptions, the oral instruction is a correct statement of law, and the action of the court in giving

it and in refusing to further instruct the jury upon a question as to which they had already been instructed, and very favorably to the plaintiff, could not have misled the jury to his prejudice.

The other error assigned, as before stated, is the refusal of the court to set aside the verdict because contrary to the law and the evidence.

The certificate of the court as to the testimony in the case purports to be a certificate of the facts proved during the trial. It sets forth that on the 17th day of July, 1902—the date of the fire in question—the defendant was engaged in manufacturing lumber upon a sawmill operated by a steam engine located on land adjoining the land of the plaintiff; that sparks from the engine escaped, and ignited some laps of trees which the defendant had cut down and allowed to remain just beyond the sawdust pile of the defendant; that the fire was discovered by an employé of the defendant engaged in hauling logs to the mill, who at once told the sawyer, and then tried to extinguish the fire; that the sawyer, after finishing the line he was cutting in the log on the saw carriage and running his saw back, went with the mill hands and attempted to put out the fire with water, and used other means to prevent it from escaping or from doing damage to the defendant's plant; that a spark was carried by the wind from where the fire started to a point about 50 yards distant in the woods; that the employés of the defendant pursued the fire which had thus escaped, and attempted by burning against it and by other means to arrest its progress; that the weather was hot and dry, with "considerable" wind blowing from a southwesterly direction, which carried the fire across the land occupied by the defendant and upon the land of the plaintiff, and burned over 444 acres of the same, destroying cedar, pine, and other growth of timber, damaging the plaintiff from \$150 to \$3,000, as variously estimated by the witnesses; that the defendant's employés did all they could to arrest the progress of the fire and to prevent its spreading; that the defendant kept constantly on hand a barrel and buckets filled with water for use in case of fire; that they were so filled and used on the day of the fire; that the defendant is an experienced sawmill man, having been in the business 23 years, owns four sawmills and a planing mill, but was not at the mill on the day of the fire; that at the time the defendant placed his sawmill upon the land where it was when the fire originated he cleared off a good millyard 100 yards around the plant, and took all the usual precautions in clearing and preparing the same, but after this he had cut down near the sawmill and engine some trees, whose laps fell together, which were allowed to remain just beyond the sawdust pile; that the outer top end of the sawdust pile was by actual measurement 95 feet from the smokestack of defendant's engine; that

on the outer edge of the sawdust pile was a cartway along the far side of which the fire had turned, which was within 83½ feet of the sawmill; that the distance from the engine to the laps had never been measured, but the defendant and his witnesses estimated it at 75 yards; that the engine and its equipment were in thorough order, but the engine was not at the time of the fire, and never had been, supplied with a spark arrester or other appliance to prevent the escape of sparks; that it was not the usual practice in the county to have such appliances affixed to sawmill engines, though in some instances a few years ago they had been used; that no up to date, and what is considered a properly equipped, sawmill engine is now sold with a spark arrester, unless ordered specially with the engine; that, although the defendant's engine had no spark arrester, it was considered a modern, up to date sawmill engine fully equipped, except it had an old smokestack, which was 20 feet high; that there was no difference between the defendant's smokestack and a new one; that the use of a spark arrester impeded the powers of an engine, and measurably prevented it from generating steam; that their use requires engines with more power than usual, and because of the invariable use of green wood in sawmill engines they would not draw so well with a spark arrester attached, and that the meshes of the arrester would clog, but, if dry fuel was used, these difficulties would be overcome; that some years ago a sawmill man of the county had used an arrester, but did not always keep it closed; that another sawmill man doing business in the county of King George had some years before operated a sawmill engine with a spark arrester put in at the instance of a very particular old man; that a high smokestack would not be so apt to emit sparks, but when it did the sparks would go a greater distance before reaching the ground than those escaping from a short smokestack; that stationary engines in the county used in the manufacture of excelsior fiber are usually equipped with spark arresters, but they burn dry wood, while green wood is used in sawmill engines; that one of the plaintiff's witnesses, who was the manager of a sawmill for plaintiff's son, testified that he considered the defendant's yard a good one, and that any sawmill yard was liable to catch on fire in the summer time.

The contention of the plaintiff is that upon the facts proved the verdict of the jury was in direct contravention of the rulings of the court, to which no exception was taken by the defendant.

Instructions "a," "b," and "c" given for the plaintiff were based upon the hypothesis that the defendant had permitted combustible material to accumulate so near to his engine as to be easily ignited by sparks escaping therefrom.

The evidence as to the location of the laps,

the alleged combustible material, is conflicting. The plaintiff's evidence places them just beyond a pile of sawdust, the outer top of which was only 95 feet from the engine, whilst the defendant and his witnesses locate them 75 yards, or 225 feet, from the engine. It does not appear when the trees were cut whose laps caught on fire, nor of what kind of timber they were, nor whether they were so combustible as to be likely to catch on fire easily. The mere fact that they did catch on fire on a hot, dry, and windy day was not conclusive evidence that they were dangerously inflammable, or likely to take fire the distance they were from the engine. Upon all the evidence the jury may not have been satisfied (and the question was for them) that the defendant had allowed combustible material to accumulate so near his engine as to be easily ignited by sparks therefrom. If they were not, their verdict was not in contravention of either instruction "a," "b," or "c."

The verdict of the jury not being in conflict with those instructions, and there being no objection to them, it is unnecessary to consider whether or not they correctly state the law.

The plaintiff's other instruction, "d," to the giving of which there was no objection, told the jury that if they believed from the evidence that the plaintiff sustained damages by fire about the 17th day of July, 1902, and that said fire originated from an engine operated by the defendant, and that the defendant operated the said engine without the use of the latest and best known appliances to prevent the emission of sparks from said engine, the defendant assumed the risk of so operating said engine, and they must find for the plaintiff. If the jury had followed this instruction, they could not have found the verdict they did, for there is no question that the fire did originate from the defendant's engine, and that he did not have the best known appliances to prevent it from emitting sparks.

The general rule is that persons in the lawful use of fire must exercise ordinary care to prevent it from injuring others. What constitutes ordinary care and prudence depends upon the circumstances of the particular case. The greater the danger of communicating fire to the property of others, the more precautions and the greater vigilance will be necessary in order to measure up to the requirements of ordinary care. It is the settled law of this state that a railroad company is liable where the fire is attributable to the want of proper spark arresters upon its locomotives. *Brighthope Ry. Co. v. Rogers*, 76 Va. 443, 450; *Patteson v. C. & O. Ry. Co.*, 94 Va. 16, 21, 28 S. E. 393; *Kimball & Fink v. Borden*, 95 Va. 203, 28 S. E. 207. But it is a matter of common knowledge that locomotive engines, propelled by steam, are

exceedingly dangerous, and liable to cause unintentional fires. Such great danger and the frequency with which such fires occur have doubtless caused the courts to hold that the failure of those operating such machinery to use spark arresters or other appliances to prevent the emission of sparks makes them *per se* guilty of negligence. There is not the same degree of danger and liability to cause unintentional fires by stationary steam sawmill engines operating in the country. The operators of such engines can minimize the danger of causing such fires by removing dangerous combustible material a greater distance from their engines than can railroad companies operating their locomotives over hundreds of miles of road on their narrow right of way. Again, operators of stationary engines can keep on hand appliances and means of putting out fires caused by their engines, which it is impossible for railway companies to do. See *Peers v. Elliott, etc.*, 21 Can. Sup. Ct. 19; *Atkinson v. Goodrich, etc., Co.*, 60 Wis. 141, 167, 18 N. W. 764, 50 Am. Rep. 352; *Holman v. Land Co.*, 20 Colo. 7, 13, 36 Pac. 797; *Crandall, etc., v. Goodrich, etc., Co. (C. C.)* 16 Fed. 75.

The proof in this case shows that the use of spark arresters on sawmill engines was not customary in that county; that such arresters impede the powers of engines, and measurably prevent them from generating steam, when green wood is used for fuel (as is invariably the case with sawmill engines); the meshes of the arresters become clogged, and the draught of the engines lessened; and that no up to date and what is considered a properly equipped sawmill engine is now sold with a spark arrester.

We are of opinion that, while the failure to use a spark arrester upon a stationary sawmill engine is a circumstance from which negligence may often be inferred, it cannot be said that such failure is *per se* negligence, and that instruction "d" was therefore erroneous.

Had the verdict been in conformity with the instruction, great difficulty might arise in interfering with it, because a party objecting to an erroneous instruction must do so at the time; otherwise, in general, he will be considered as having waived the objection. But as the verdict was in favor of the defendant, against whom the erroneous ruling was made, it will not be set aside because it is in conflict with that ruling, if upon the whole case there was sufficient evidence to warrant the verdict. *Richmond & Danville R. R. Co. v. Medley, supra*.

Upon the evidence before the jury, as hereinbefore set out, the jury might properly have reached the conclusion they did. At least we cannot say that the evidence is plainly insufficient to sustain their verdict.

The judgment of the circuit court must be affirmed.

(102 Va. 519)

LOYD v. LOYD'S EX'R et al.

(Supreme Court of Appeals of Virginia. March 10, 1904.)

WILLS — CONSTRUCTION — TRUST — DISTRIBUTION OF PRINCIPAL — PERPETUITIES.

1. A will, after empowering the executor to invest testator's estate; declaring testator's children living at the time of his death, and the descendants of any of them then dead, entitled to the net income, in equal shares, except that a half share only should be paid to J., or, he being then dead, to his descendants; and providing that the fund should be held by the executor, undivided, except as thereafter directed, but, subject to the conditions declared, should be held as the property of testator's children living at his death, and the descendants of those then dead, in the proportions named, to be observed in ultimately dividing the principal—declared that on the death of any of testator's children, or of any descendant of any child dead when the will took effect, if such person leave descendants, there should be paid to such descendants the share which under the will belonged to their immediate ancestor, but "if such person have no descendants then said share shall lapse into my estate and become a part thereof to be divided thereunder," except that where the person so dying was a descendant of one of testator's children, and there be other descendants then living of the same child, the share of the person dying should pass and be paid to said other descendants of the same child. *Held*, that where, after testator's death, one of his children died without descendants, his share in the principal did not immediately become divisible among the surviving children, but remained part of the trust fund, as though there had been no such child.

2. A devise of property for lives in being is valid, though it is possible that the limitation over may not take effect, because of failure of the class to take thereafter.

3. A devise in trust to pay the income to testator's children for life, the share of the principal of a child dying with descendants to be then paid to them, but the share of one dying without descendants to lapse into testator's estate, and be divided among the descendants of testator's children dying, leaving descendants, does not violate the statute of perpetuities.

Appeal from Circuit Court of City of Lynchburg.

Suit by James E. Loyd against William H. Loyd's executor and others. From an adverse decree, complainant appeals. Affirmed.

Lee & Howard and E. E. McKay, for appellant. Wilson & Manson and Leon Goodman, for appellees.

WHITTLE, J. This controversy involves the construction of certain clauses of the will of William H. Loyd, deceased.

Testator was survived by seven children and six grandchildren. Two of the children, Ardella and Sarah A. Loyd, died after the testator, unmarried and leaving no descendants. Whereupon appellant, James E. Loyd, a son of testator, filed a bill in equity in the circuit court of the city of Lynchburg against the executor and beneficiaries, in which he maintains that, according to the true construction of testator's will, upon the death of appellant's two sisters, leaving no descendants, their shares in the principal fund of the estate immediately became divisible

among the surviving children. The bill prays that an account may be taken to ascertain those shares, and that the executor be required to pay to complainant and the other surviving children their respective and proper proportions of such shares, and also that a similar disposition be directed to be made of the share of any other child thereafter dying without descendants.

On the hearing the circuit court, in denying the prayer of the bill, decreed:

"That, under the provisions of said will, when any child of William H. Loyd died, or hereafter dies, leaving no descendants, the share of the principal of such dead child remained or will remain a part of the corpus of the trust estate created by the will, as completely as though such child had died without descendants before the testator; and the contention of the plaintiff that such share is divisible at the death of such child, and ceases to be a part of the trust estate created by the will, to be held by the executor, is unsound, and the action of the executor in refusing to distribute and pay over the shares of Ardella Loyd and Sarah A. Loyd, who have died since the testator without descendants, to the other children of William H. Loyd, deceased, * * * was in accordance with the true interpretation of the will of William H. Loyd, deceased, as the said shares remained a part of the trust estate to be held by the executor."

The clauses of the will affected by this litigation are as follows:

"VII. All the residue of my estate, both real and personal, including the reversion in the real estate given to my wife for life, I desire shall be held by my executor and invested, and reinvested in such safe and profitable property, real or personal, as he may deem most advantageous to the beneficiaries in said fund. And to that end he is authorized and empowered to sell and convey any part of my estate, either real or personal, which he may deem most conducive to the welfare of those interested, holding the new investment subject to the same powers of sale and conveyance herein granted and to the same trusts and conditions herein prescribed. Purchasers from my said executor shall not be required to look to the application of the purchase money.

"VIII. The net income from the fund created by the last clause I desire my executor to divide in the proportions hereinafter declared, amongst my children living at my death, and the lawful descendants of any of them who may be then dead, said descendants to take only such proportion as the child from whom descended would have taken had such child been living when this will takes effect; and hereafter in this will whenever the term child or children is used it is to mean my child or children, and is to include the descendants of such child or children, should such child or children be dead when this will takes effect, in which case such de-

scendants shall take only that proportion of the income or principal which the child or children from whom descended would have taken had such child or children been living when this will takes effect.

"IX. The net income from the fund above created and held by my executor, I desire my executor to divide and pay over semiannually to my children living at my death (the descendants of those then dead to take the share of the child from whom descended), but he shall pay to my son James E. Loyd only one-half as much as to my other children, it being my intention to give him and his descendants, should he be dead, only one-half as much as I give each of my other children and their descendants, he having already received large sums from me.

"X. The said fund shall be held by my executor undivided except as hereinafterwards directed, but it shall be held by him subject to the terms, conditions and trust herein declared, as the property of my children living at my death and the descendants of those who may be then dead; but in such proportions that the share of my son James E. Loyd and his descendants therein shall be equal only to one-half the value of the share of each of my other children and their descendants, and in ultimately dividing the principal of said fund, my executor will see that the division is so made that this proportion shall be carefully preserved. My intention is to give each of my other children double as much of my estate as I hereby give to my said son James E. Loyd, and to make the shares of my said other children all equal.

"XI. On the death of any one of my children or of any descendant of any child who may be dead when this will takes effect, if such person leave descendants, it shall be the duty of my executor to pay over to such descendants the share which under the provisions of this will belonged to their immediate ancestor. If such person have no descendants then said share shall lapse into my estate and become a part thereof to be divided hereunder, except that where the person so dying was a descendant of one of my children, and there be other descendants then living of the same child, the share of the person dying shall pass and be paid to said other descendants of the same child according to the statute of descents and distribution in Virginia."

By the seventh clause, testator empowers the executor to invest his estate in such safe and profitable property, real or personal, as he may deem most advantageous to the beneficiaries of the fund.

Clause 8 declares who are entitled to the net income arising from the principal fund created by the previous clause; while clause 9 directs the executor to divide and pay over such net income semiannually to testator's children living at his death (the descendants of those then dead to take the share of the child from whom descended), except that he

is to pay to James E. Loyd a half share only. These three clauses, it will be observed, apply to and affect merely the net income from the estate; while the two succeeding clauses, 10 and 11, deal with the capital or principal fund.

Clause 10 provides that the principal fund shall be held by the executor undivided, "except as hereinafterwards directed, but it shall be held by him subject to the terms, conditions and trust herein declared, as the property of my children living at my death and the descendants of those who may be then dead; but in such proportions that the share of my son James E. Loyd and his descendants therein shall be equal only to one-half the value of the share of each of my other children and their descendants, and in ultimately dividing the principal of said fund, my executor will see that the division is so made that this proportion shall be carefully preserved. My intention is to give each of my other children double as much of my estate as I hereby give to my said son James E. Loyd and to make the shares of my said other children all equal."

Clause 11 provides for the ultimate disposal of the capital or principal fund.

From an attentive consideration of the foregoing clauses, it will be seen that it was the primary purpose of testator to limit the interest of the first takers under his will to the income from his estate only. Presumably that precaution was taken by testator with the intention of insuring a certain support to the first takers for life, by protecting the corpus of the estate against their improvidence or other fortuities.

Clause 11 contains the limitation over after the death of the first taker, and provides for three contingencies:

(1) The death of the first taker leaving descendants, in which event the trust, as to that share, is to determine; the language of the will being: "It shall be the duty of my executor to pay over to such descendants the share which under the provisions of this will belonged to their immediate ancestor."

(2) "If such person"—that is, the first taker—"have no descendants, then said share shall lapse into my estate and become a part thereof to be divided hereunder." And

(3) "Where the person so dying was a descendant of one of my children, and there be other descendants then living of the same child, the share of the person dying shall pass and be paid to said other descendants of the same child, according to the statute of descents and distributions in Virginia."

At the death of the first taker, upon the happening of either the first or third contingency, his share in the principal fund must be immediately distributed. That is to say, if the first taker dies, leaving descendants, the executor is not authorized to hold that share any longer, but must pay it over to such descendants. So, if the first taker were himself a descendant of a child who had died

in testator's lifetime, and there were other descendants of the deceased child living, it would be also the duty of the executor to pay over the share of the first taker, upon his death, to the surviving descendants.

But in the second contingency, where the first taker dies, leaving no descendants, the will not only does not provide for the payment of such share to the surviving first takers, as appellant contends, but specifically prescribes that the share shall lapse into testator's estate, and become a part thereof, to be divided thereunder.

To sustain appellant's contention would not only do violence to the plain language of the will, but would likewise defeat the manifest object of the testator to limit the estate of the first taker to the usufruct of his share in the principal fund for life, without encroaching upon the corpus of that fund.

As remarked, in the first and third contingencies the will clearly provides for an immediate distribution of the first taker's share of the principal fund; but in the second contingency it as plainly declares that there shall be no immediate distribution of such share, but that it shall lapse into the estate. The requirement "to be divided hereunder," in light of the context, imports that the share is to be divided as other parts of the principal fund are to be divided, not among the first takers, but among the second takers. The contention that testator resorted to this involved method of effectuating an immediate distribution of the share in the principal fund among the surviving first takers upon the happening of the second contingency, in order to preserve the scheme by which appellant and his descendants were to receive only half portions in the shares of other distributees, cannot be maintained without a plain departure from the literal import of the language employed. It is inconceivable that the draftsman of the will, who has so clearly and intelligently expressed the wishes of the testator in all other particulars, should have been so infelicitous in dealing with this important branch of the subject. Indeed, the purpose attributed to testator in that regard, of limiting appellant and his descendants to half portions in the estate, had already been adequately safe-guarded by clause 10 of the will.

The third contingency, provided for by the eleventh clause, can never arise, because none of testator's children died during his lifetime. So that only two contingencies demand consideration, namely, (1) the death of a child with descendants; and (2) the death of a child without descendants. Both contingencies are clearly provided for by the will. In the former case, upon the death of the first taker his share in the principal fund is to be immediately divided among his descendants, while in the latter the share of the first taker lapses into the estate, to pass, not to the surviving first takers, but as a substitutional bequest, under the general scheme

of the will, to the descendants of such other first takers as may die, leaving descendants.

By the death of Ardella Loyd and Sarah A. Loyd without descendants, the last contingency has happened, and there can be no distribution of their shares in the principal fund among the surviving first takers; but, as indicated, those shares, by provision of the eleventh clause, lapse into the estate, and become a part of it, to be held by the executor and divided in accordance with the requirement of the will, upon the happening of the contingency provided for in that clause, and in the proportions prescribed by the tenth clause.

It is true that if the unexpected should happen, and the six grandchildren living at the commencement of this litigation should die before their parents, and no other children should be born and survive their parents, upon the death of the last surviving child without descendants an intestacy would ensue as to the undistributed shares in the principal fund. But the circumstance that some of these limitations over may never vest cannot impair the validity of those that do vest; the general rule on the subject being that where a valid disposition of property is followed by a limitation over, which from some cause fails to take effect, that fact does not invalidate the previous disposition. *Gore v. Gore*, 2 P. Wms. 28; *Goldsborough v. Martin*, 41 Md. 488; *Heald v. Heald*, 56 Md. 800; *Lawrences' Estate*, 136 Pa. 354, 20 Atl. 521, 11 L. R. A. 86, 20 Am. St. Rep. 925; *Saxton v. Webber*, 83 Wis. 617, 53 N. W. 905, 20 L. R. A. 509. The limitations in this instance must all vest in interest, if at all, during a life or lives in being, and 10 months and 21 years thereafter. They do not, therefore, violate the rule against perpetuities. *Frazier v. Frazier's Ex'rs*, 2 Leigh, 642; 2 Min. Inst. (2d Ed.) 376 et seq.

In the case of *Bulkley v. Depeyster*, 26 Wend. 21, "where a testator by his will bequeathed annuities to five of his children, and directed that on the death of either without issue the annuity bequeathed to the child dying should be equally divided among the survivors, but, if there was issue, then the annuity to be paid to such issue during the lifetime of the wife of testator, and on her death the principal of such annuity; that, upon the decease of any of the five children after the death of the wife of testator, a like portion of the principal of his estate should be paid to the issue of the child so dying; and that a final distribution and settlement of his estate among his grandchildren should be had immediately after the death of the survivor of his children—it was held that the vesting in possession of the several portions of the estate was not postponed beyond two lives in being at the time the will took effect, and consequently that the will was a valid and operative instrument, within the provisions of the statute."

The rule is directed against future contin-

gent interests only, and has no application where the limitation must take effect, if at all, immediately upon the death of life tenants in whom the previous estate is vested.

It follows from these views that the decree complained of is without error, and must be affirmed.

(102 Va. 568)

STANDARD SEWING MACH. CO. v. GUNTER.

(Supreme Court of Appeals of Virginia. March 10, 1904.)

PAYMENT—PART PERFORMANCE—COMMON-LAW RULE—CODE MODIFICATION—BURDEN OF PROOF—EVIDENCE.

1. At common law an acceptance by a creditor of a less sum than that due will not satisfy the demand.

2. The burden of proof is on a debtor to bring himself within Code 1887, § 2858, providing that part performance of an obligation expressly accepted by the creditor in satisfaction shall so operate, though without any new consideration.

3. Evidence held insufficient to establish that plaintiff accepted from defendant, its agent, \$3,400 in full satisfaction of demands aggregating over \$4,300.

Appeal from Law and Chancery Court of City of Norfolk.

Bill for injunction and for a receiver by the Standard Sewing Machine Company against C. C. Gunter. From a decree for defendant, plaintiff appeals. Reversed.

A. G. Collins and R. Randolph Hicks, for appellant. Burroughs & Bro., for appellee.

KEITH, P. It appears from the record that the Standard Sewing Machine Company from time to time furnished C. C. Gunter with sewing machines, to be disposed of by him as its agent, and to be accounted for at prices stipulated in the several contracts. Gunter's compensation was to consist of the difference between what the company was to receive, and the price at which the sewing machines were sold upon the market. Without going into the details of these transactions, it is sufficient to say that Gunter failed properly to account to the sewing machine company, and that he was investing the money, which he should have paid to his principal, in real estate.

In July, 1901, Gunter was largely indebted to the company, and on July 10, 1901, he executed a deed of trust, in which his wife united, conveying the real estate which had been thus purchased by him with the money of the Standard Sewing Machine Company, and certain other real estate, to Allen G. Collins, trustee, to secure the balance due, evidenced by a note for \$3,326.95, payable on demand. By another writing, dated July 10, 1901, filed as Exhibit G, it was agreed that this note, secured as aforesaid, was to be held as security also for any additional balance which might become due under two agreements of the same date, filed as Ex-

hibits D and E, by the first of which Gunter acknowledged that he had in his hands, as of that date, leases with the parties named, showing the amounts due under said leases, aggregating \$5,254.35, which are in the name of C. C. Gunter & Co., and are for sewing machines sold for account of the Standard Sewing Machine Company, and which Gunter admitted were in his hands for collection only, and for which collections he agreed to make weekly reports, accounts, and settlements. And by Exhibit E the Standard Sewing Machine Company agreed to deliver on consignment to Gunter from time to time sewing machines and parts of sewing machines as manufactured by said company, in such quantities as the officers or agents of said company might deem sufficient to meet the trade or business of Gunter. Then follow the prices at which these machines were to be listed to Gunter, and the obligation on the part of Gunter to employ himself diligently in selling these machines to responsible parties, that he would not sell at a price less than 10 per cent. above the listed price thereof, that he would make monthly reports, and that he would remit and pay over weekly the money received by him; and concludes with the provision that at any time, upon a settlement between Gunter and said company, "the said company will take into its possession all machines of its make and all contracts of lease or sale and will proceed to collect such contracts of lease or sale and pay the costs and expenses thereof, and after the net receipts shall amount to the value of such consigned machines and parts of machines, then it will pay to said Gunter an amount equal to the surplus of sales and leases of such sewing machines over and above the consigned values, such amount to be payable in the uncollected contracts of sale or lease of machines at their face values and not in money."

After July 10, 1901, pursuant to its agreement set forth in Exhibit E, of July 10, 1901, the sewing machine company consigned many machines and attachments to Gunter, for part of which he failed to account. In the month of July, 1902, there was due from Gunter to the sewing machine company, as appears from his answer, a balance, over and above the note for \$3,326.95, of \$889.84, making a total of \$4,216.79, with some accumulations of interest to be added.

The sewing machine company having directed Collins, as trustee, to sell the property conveyed to him, Gunter requested S. B. Lucy, the manager of the sewing machine company, to come to the city of Norfolk, with a view to the settlement of this affair; and accordingly Lucy, with his counsel, Allen G. Collins, went to Norfolk, and on the 21st of August had an interview with Gunter. Gunter stated that he had made arrangements by which he would be enabled to pay \$3,500, but the sewing machine company declined to take that sum in satisfaction of its

demands. After further conference, Gunter stated that he would be able to raise \$3,700, and it was finally agreed between him and the sewing machine company that that sum would be accepted in full settlement of all obligations upon the part of Gunter to the sewing machine company. This sum of \$3,700 Gunter expected to procure from E. M. Baum, representing a building and loan company; and on the same day they had an interview with Baum, who informed them that his company had agreed to lend Gunter \$3,700 and take a deed on the property, and that he would get the money on the following day. On the next morning, which was August 22d, Lucy and Collins went to the office of Baum, who then stated that Gunter had executed the necessary papers, but that Mrs. Gunter had not, and then, for the first time, told them that, before Gunter could withdraw the \$3,700, he would have to pay to the company \$300—in other words, that the sum available to Gunter upon the loan would be only \$3,400. Collins then went to Gunter's store, and told him that Baum was ready for Mrs. Gunter to execute the papers, and also what Baum had said about the \$300. Gunter said he knew nothing about it, and knew of no reason why the \$300 should be deducted, and that his understanding was that he would receive \$3,700. Thereupon Gunter set out in company with Collins to go to the office of the building association. Upon arriving at the door, Gunter suggested that Collins should go up to Baum's office, on the upper floor, while he went into the office of the association to speak to the treasurer, and that he would come up at once. Collins went up to Mr. Baum's office, where Lucy was awaiting him, and in a few minutes Mr. Baum came in. When asked if he had seen Gunter, he replied that he had just left him, and that he did not know where Gunter had gone, but he was instructed by Gunter to turn the money over to the sewing machine company, and to take such papers as the sewing machine company would give to him, and stated that Gunter would pay only the sum of \$3,400, a check for which was in Baum's possession. Collins and Lucy informed Baum that such was not their understanding, that they were to receive \$3,700, and that they were not willing to accept the sum of \$3,400. They went at once to Gunter's place of business, but he was not there, and they spent a large part of the remainder of the day trying to see him. They sent word to him, through his clerk, that they would be back on the following morning at 8 o'clock, and that they were not willing to take \$3,400 in full settlement, and were anxious to see him. On the morning of the 23d of August they again went to his office at the appointed hour, and were told by Gunter's clerk that Gunter said it was unnecessary for him to see them, and that he was worried; and thereupon they returned to Baum's office, and Baum asked them to cancel Exhibits 1,

2, 3, and 4 filed with the answer of Gunter, the first two of which are contracts between the sewing machine company and Gunter for the consignment of sewing machines, dated the 8th of February, 1898, and the 12th of January, 1899; Exhibit No. 3 bearing date July 10, 1901, and which is identical with Exhibit C of plaintiff, and Exhibit No. 4 being a second contract of the same date, which is identical with Exhibit D, filed with plaintiff's bill. Thereupon Lucy complied with this demand, and turned over to Baum the leases made from time to time in the name of C. C. Gunter and C. C. Gunter & Co., and received from Baum the check for \$3,400. During the interview between Baum, Collins, and Lucy on the 23d of August, Mr. Collins said to Baum that he had on the night before prepared a writing setting forth the extent of the settlement, and offered it to Mr. Baum to read, who replied: "I am not Mr. Gunter's counsel, and do not intend to sign any paper. He simply instructed me to hand you the money, and take from you such papers as you gave me, and you would know what papers they were."

This is the substance of the transaction as stated by Collins and Lucy. It appears from their testimony that they from the beginning declined to accept in satisfaction of their claims against Gunter a less sum than \$3,700, and that their position was fully understood by Gunter.

Baum's account of the transaction is that they declined in the first place to receive any sum less than \$3,700; that he informed them that he was authorized to enter into no negotiations; that he was Gunter's agent only to the extent of receiving from them certain papers and paying them the sum of \$3,400, which he understood was to be received by them in full satisfaction of all their demands against Gunter.

The preponderance of the evidence is with the appellant. When we consider that Gunter's original proposition was to pay \$3,500 in full settlement; that it was declined; that he then, as he supposed, consummated an arrangement by which he would be enabled to pay \$3,700, which his creditor agreed to accept in full satisfaction; that, when it appeared that the building association would only advance the sum of \$3,400, Gunter concealed himself from his creditor, and left the affair in the hands of Baum, with vague instructions to take from the sewing machine company such papers as it would deliver; that when, at the final interview between Baum, representing Gunter, and Lucy and Collins, representing the sewing machine company, as appears from the evidence of two of the three witnesses, Baum was expressly told that they would not receive the \$3,400 in full satisfaction, and that to this declaration he replied, "I don't blame you, for he [Gunter] has treated you very badly"—it is impossible for us to say that the \$3,400 was expressly accepted by the creditor

in full satisfaction of his demands. There is no doubt, from Gunter's own statement, that his debt at this time amounted to more than \$4,300. At common law, no sum less than that would satisfy the demand.

"A party never can be held to surrender his rights under contract unless it appears that he made the surrender understandingly, and intentionally and freely, nor can such surrender or release be implied by his act unless he understood at the time that such would be the effect of his act. It never can be implied by the act of a party, accepting a part of what he had a right to demand, that he released the security for the balance without consideration." *Lee v. Harlow*, 75 Va. 29; *Smith v. Phillips*, 77 Va. 548; *Seymour v. Goodrich*, 80 Va. 303.

That such was the law prior to the Code of 1887 is conceded. By section 2858 of the Code it is provided: "Part performance of an obligation, promise or undertaking, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction, and rendered in pursuance of an agreement for that purpose, though without any new consideration, shall extinguish such obligation, promise or undertaking."

The burden of proof was upon Gunter to bring himself within the influence of that statute, and to show that the sum of money which he paid in part performance of his obligation was "expressly accepted by his creditor in satisfaction, and rendered in pursuance of an agreement for that purpose," and this he has not done.

It further appears from the record that after the transactions just narrated, which resulted in the release of the deed of trust, and the surrender and cancellation of certain papers, Gunter proceeded to notify those who owed balances upon sewing machines purchased through Gunter, as the agent of the Standard Sewing Machine Company, that he alone was authorized to collect from them, and that he would hold them responsible if they paid any other person. The Standard Sewing Machine Company, as appears from Exhibit H with its bill, dated August 30, 1902, notified Gunter "not to reclaim any machine which has been sold or leased in the name of the Standard Sewing Machine Company. We hereto attach a list of contracts marked exhibit 'A,' which shows the balances due as reported by you as of June 1, 1902. You are specially notified not to collect anything in full or on account of any lease or contract made in the name of the Standard Sewing Machine Company. * * * We hold the original contracts listed and will proceed to collect the balances due, and will look to you to strictly verify those balances." Gunter disregarded this notice, and proceeded with his efforts to collect the balances due upon the leases and contracts above referred to; and thereupon the Standard Sewing Machine Company filed its bill, charging that Gunter was insolvent, and that he had mort-

gaged his real estate to its full value, and, should he collect these contracts or leases, the company would be unable to recover anything from him. The bill concludes with a prayer for a receiver and an injunction, and that Gunter may be required to account as bailee or consignee for all moneys collected by him since June 1, 1902. Upon the coming of the answer and the proofs, the court of law and chancery was of opinion that the allegations of the bill were not sustained; that the sum of \$3,400 was paid by the defendant on the 23d of August, 1902, and accepted by the plaintiff in full settlement of all claims against him, and he thereupon became entitled to all the leases in the bill and proceedings mentioned.

We having reached a different conclusion, it follows that the decree of the court of law and chancery must be reversed, and the cause remanded for further proceedings to be had therein, not inconsistent with this opinion.

(102 Va. 541)

C. C. VAUGHAN & CO. v. VIRGINIA FIRE & MARINE INS. CO.

(Supreme Court of Appeals of Virginia. March 10, 1904.)

INSURANCE—FRAUD—EVIDENCE.

1. Evidence in an action on a fire policy held insufficient to furnish an explanation, required of insured, of the presence of false invoices in the proofs of loss.

2. The unexplained presence of false invoices in the proofs of loss avoids the policy for fraud, though enough goods actually covered by the policy are burned to have authorized recovery of the full amount of insurance.

Error to Circuit Court, Greensville County.

Action by C. C. Vaughan & Co. against the Virginia Fire & Marine Insurance Company. Judgment for defendant. Plaintiffs bring error. Affirmed.

See 14 S. E. 754.

Davis & Davis, for plaintiffs in error.
Leake & Carter, for defendant in error.

BUCHANAN, J. This is the second time this case has been before this court. Upon the former writ of error, all questions of law involved in the case were settled, the verdict of the jury set aside because not sustained by the facts, and the cause remanded for a new trial. The proceedings had in the cause prior to that time are fully set out in the opinion of the court, and reported in 88 Va. 832-842, 14 S. E. 754.

After the case was remanded, a new trial was had, in which there was a verdict for the plaintiff. That verdict was set aside by the circuit court, and a new trial granted. Upon the new trial precisely the same evidence was introduced by the parties as was before the jury upon the last preceding trial. To that evidence the defendant demurred.

which demurrer was sustained by the court, and a judgment rendered in favor of the defendant. To that judgment this writ of error was awarded.

As stated by the plaintiff in error in his petition, the only question for our determination is whether or not, under the rules applicable to a demurrer to evidence, it appears from the record that the plaintiff's claim has been forfeited under the provision of the policy that the company should not be liable thereunder for loss or damage, if there be "any false swearing or fraud, or attempt at fraud, before or after loss or damage by him [the assured] in support of his claim for loss or in proofs of loss hereinafter mentioned."

One of the defendant company's defenses was that Lassiter, the assured, and the assignor of the plaintiff, was guilty of false swearing and of an attempt at fraud, in furnishing preliminary proofs of loss.

A day or two after the fire, the adjuster of the company went to Franklin, Va., to adjust the loss. When he reached there, he was informed by Lassiter that all his books and papers, except an inventory taken about a month before, were lost. Lassiter made a statement of his loss, and was then requested to furnish the company duplicate invoices for the bills which had been burned. This he agreed to do. Duplicate invoices were furnished, aggregating the sum of \$3,028.51, which were listed and afterwards sworn to by Lassiter. The evidence as to the circumstances under which and by whom the list was made out is conflicting, but, on a demurrer to the evidence, it must be treated as made out by the adjuster of the defendant company. It was forwarded to the solicitor of the company at Franklin, with the request that he get Lassiter to sign and swear to it, and return it to the company. This was done. The certificate appended to the list which Lassiter signed, and to which he made oath, is as follows:

"I hereby certify that the duplicate invoices furnished as per above statement, amounting to three thousand and twenty-eight $\frac{51}{100}$ dollars said invoices being in the names of M. L. Beale & Co., D. Lassiter & Co., and D. Lassiter, all of which form a part of my loss, are correct and were received by me at Franklin Va. and constituted the goods burned on the morning of December 6th, 1888."

Among the duplicate invoices furnished, listed, and sworn to, are several bills for goods and items in other bills which the evidence conclusively shows did not constitute any part of the goods burned, but which had been so charged as to make it appear that they were a part thereof. One of these was a bill of goods sold to M. L. Beale, August 13, 1888, for \$328.50. It was changed so as to make it appear that it was sold to "M. L. Beale & Co." on October 13, 1888. The members of the firm of M. L. Beale & Co. were M. L. Beale and D. Lassiter, and they did

not go into business together until September 27, 1888. Their firm name was soon afterwards changed to D. Lassiter & Co., and on the 27th of October following the policy of insurance sued on was taken out in the name of D. Lassiter & Co. On the 12th of November, Beale withdrew from the firm, and on the 5th of December he assigned his interest in the policy to Lassiter. Beale, prior to and during the time he was in partnership with Lassiter at Franklin, was doing business in Courtland on his own account. The \$328.50 worth of goods, as above stated, were sold to M. L. Beale on the 18th day of August, 1888, and shipped to him at Courtland.

Another of the invoices listed and sworn to was a bill for \$171.39 for goods sold to D. Lassiter by Adelsdorf Bros. on the 18th day of September, 1888. This bill was so changed as to make it appear that the goods were sold to D. Lassiter & Co. on the 28th of September, 1888.

Another of the charged invoices was a bill of \$14.40 for goods sold by the Norfolk Bottling Company in October and November, 1888. The goods were sold and shipped to M. L. Beale, Courtland, Va., and the bill, which was made out against "Mr. M. L. Beale" was changed to Mess M. L. Beale & Co." It further appeared that the Norfolk Bottling Company never had any account with M. L. Beale & Co.

Another of the invoices was for a bill of \$134.93 for goods sold and shipped to M. L. Beale, Courtland, Va., on the 29th day of August, 1888, and which was so charged on the books of the seller, yet the bill was made out in the name of M. L. Beale & Co. by the bookkeeper at the request of some one—whom, he does not remember—and the date changed, after the bill was made out and delivered, from August 29 to October 21, 1888.

A business house in Petersburg had sold M. L. Beale & Co. on October 3, 1888, a bill of goods of the value of \$59.40. Among the invoices listed and sworn to, there is a bill of the same date for \$304.03, for goods sold to that concern. The evidence is clear that no such bill of goods was sold to that firm, or ever became a part of the stock of goods insured.

In another of the invoices—a small purchase made by Lassiter on the 6th of September, 1888—the date is changed to September 27th of that year, the day on which M. L. Beale & Co. commenced business.

It further appears that, the day after the list of duplicate invoices was signed and sworn to by Lassiter, he assigned the policy of insurance for \$1,100—\$400 less than its full amount.

Under these circumstances, as was said by this court upon the former writ of error, "it was undoubtedly incumbent upon the plaintiff, to entitle him to recover, to remove the suspicion which the facts proved in connection with the invoices in question justly excite, for nothing is better settled than that

the assured must observe, in dealing with the insurer, the utmost good faith, without which there can be no recovery. *Moore v. Va. Fire & Marine Ins. Co.*, 28 Grat. 508, 523 [26 Am. Rep. 373].” Because there was no such explanation offered on the first trial touching the false statements made under oath in furnishing the preliminary proofs of loss, the verdict of the jury was set aside and a new trial ordered.

An effort was made on the last trial to furnish such explanation by the examination of the solicitor of the company, who forwarded some, or perhaps all, of the duplicate invoices to the defendant company as they were furnished him by Lassiter, by showing that such invoices were not changed when he forwarded them to the company. But it is clear from the solicitor's evidence that he paid very little attention to those papers when they were handed him, and that he did not examine them with any such care as would enable him to say whether or not they were changed when he forwarded them to the company. Lassiter died before the last trial, but he was living at the date of the first trial, and did not testify, or attempt to explain at that time why or how the false and fraudulent duplicate invoices were furnished to the company. It is argued that Lassiter was not guilty of fraud, or an attempt at fraud, in furnishing proofs of his loss, because the goods destroyed, exclusive of the alleged fraudulent items, the proofs show, were worth more than \$2,000, and that the plaintiff could in no case recover more than \$1,500. This contention was fully answered by Judge Lewis, speaking for the court, upon the former writ of error, and need not be repeated, for, as was said then, “however that may be, the undisputed facts are that he swore to a loss in excess of the actual loss, and furnished false vouchers, for which no explanation has been offered. We must therefore infer that his sworn statements were known to him to be false, and, being upon a material matter, the law presumes that they were made with intent to deceive.”

We are of opinion that the conclusion reached by the circuit court upon the demurrer to the evidence was plainly right, and its judgment should be affirmed.

CARDWELL, J., absent.

(55 W. Va. 46)

STATE v. KYER.

(Supreme Court of Appeals of West Virginia.
Feb. 16, 1904.)

GAMING—INDICTMENT—PUBLIC PLACE.

1. An indictment which charges that the defendant “did at and in a certain room in the hotel of Lahew Nutter, near the town of Spencer, in said county, said room then and there being a public place and a place of public resort, bet and play at a certain game played with cards, which said game is commonly called and known as the game of draw poker,” etc., is good

as an indictment for playing at a public place, but is not good as an indictment for playing at a hotel or tavern.

2. If the prosecutor fails to show that the room was a public place, or a place of public resort, he cannot have such indictment held good as charging the unlawful gaming to have been done at a hotel or tavern.

(Syllabus by the Court.)

Error to Circuit Court, Roane County; Linn Brannon, Judge.

Forest Kyer was convicted of gaming, and brings error. Reversed.

J. W. C. Armstrong and Thos. P. Ryan, for plaintiff in error. The Attorney General, for the State.

DENT, J. Forest Kyer obtained a writ of error to the judgment of the circuit court of Roane county fixing a fine of \$5 against him for unlawful gaming, and now insists that such fine was improperly imposed upon him for the reason that the evidence did not show him guilty of the offense charged in the indictment. The indictment is as follows: “State of West Virginia, Roane County, to-wit: In the Circuit Court of said County: The grand jurors of the state of West Virginia, in and for the body of the county of Roane, and now attending said court, upon their oaths present that Forest Kyer upon the — day of —, A. D. 1902, in the said county of Roane, did unlawfully at and in a certain room in the hotel of Lahew Nutter near the town of Spencer in said county, said room then and there being a public place and a place of public resort, bet and play, at a certain game played with cards, which said game is commonly called and known as the game of draw poker, with divers persons whose names are to the grand jurors unknown, and which said game was not the game of bowls, chess, backgammon, drafts, or a licensed game; against the peace and dignity of the state. Upon the information of E. A. McCrosky sworn in open court, and sent before the grand jury to give evidence on this indictment. J. A. A. Vandale, Prosecuting Attorney.” This is a good indictment for playing cards at a public place, but is not a good indictment for playing at a hotel or tavern, as the words “in the hotel of Lahew Nutter” are merely descriptive of the place, and not of the essence of the offense. As used, they may mean a private boarding house or other building designated as the “Hotel of Lahew Nutter.” The indictment does not charge the offense as committed at a hotel known as the “Hotel of Lahew Nutter,” but it charges the offense as committed in a certain room, it being a public place and a place of public resort. But we are asked to treat all the allegations in regard to the room as surplusage, because the evidence fails to show that the room was a public place or a place of public resort. If, on the other hand, the evidence had shown that the room was a place of public resort, although not in a public hotel, and the defendant had claimed

that he should be discharged for the reason that the indictment charges that the playing was done at a hotel or tavern, the state's attorneys would have then insisted that the words "in the hotel of Lahew Nutter" were merely descriptive of the place, and not of the essence of the offense, and should be treated as surplusage. Thus the indictment could thus be made to cover two distinct offenses, which would render it bad on motion to quash. The state's attorneys cannot frame the same count in an indictment to cover several distinct offenses, and then have the allegations as to the several offenses which are unsustained or wholly disproved treated as surplusage, for the defendant is entitled to plainly know the offense with which he stands charged, so that he may be able to meet it with his proof. If he is indicted for playing at a hotel or tavern, the indictment should plainly inform him of the offense. On the other hand, if he is indicted for playing in a room which is a public place or place of public resort, he should be so informed. The prosecuting attorney cannot make a conglomeration of the two, and then, when the proof is in, select which one of the two was the real offense charged in the indictment. This can hardly be regarded as the lesser offense included in the greater, for in this case the offense charged appears to have been included in the offense not charged; for the public place so charged in the indictment turns out not to have been a public place, but is within another public place not so charged in the indictment. The proof shows that the room in which the card playing was done was securely locked during the progress of the playing, and no one was permitted to enter but those engaged in the game. Hence it was not a public place or place of public resort. The words "in the hotel of Lahew Nutter" being merely descriptive of the room, and not of the essence of the offense, the indictment could not be treated as an indictment for unlawfully playing at a hotel. This case is clearly governed by the case of *State v. Brast*, 31 W. Va. 380, 7 S. E. 11.

The trial of the issue having been submitted to the judge in lieu of a jury, and he having found for the state, and given judgment accordingly, the judgment is reversed, and judgment entered for the defendant.

(55 W. Va. 13)

WENGER v. FISHER et al.

(Supreme Court of Appeals of West Virginia.
Feb. 16, 1904.)

INJUNCTION—LOCATION OF PUBLIC ROAD— PARTIES—NOTICE OF ORDER.

1. An injunction is the proper remedy to prevent the location and establishment of a public road through private property, without prior compliance with the requirements of law.

2. In such case it is not improper to join as defendants the county court or other tribunal, charged with the establishment and maintenance

of public roads, the surveyor of roads of the proper road precinct, and the road contractor.

3. Where a party has actual notice of an order of injunction, although it may not have been yet served, or be defectively served upon him, the order becomes operative on him from that time.

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County; John Homer Holt, Judge.

Bill by John Wenger against Charles Fisher and others. Decree for defendants, and plaintiff appeals. Reversed.

W. B. Maxwell, for appellant. Harding & Harding, for appellees.

MILLER, J. John Wenger, the appellant, presented to the judge of the circuit court of Randolph county his bill in chancery against the appellees Charles Fisher, Jacob Helmick, and J. W. Goddin, Omar Conrad, and Patrick Crickard, as commissioners, composing the county court of said county, and the county court of Randolph county, a corporation, praying that said Fisher and Helmick, their agents, employés, and all other persons, be restrained and enjoined from making changes or alterations in a certain public road, as proposed by them, through plaintiff's land, as shown by his bill; and that said county court be also restrained and enjoined from appropriating to public use the plaintiff's land, or any part thereof, without rendering to him just compensation therefor. On the 5th day of March, 1901, the injunction was granted as prayed for. On the 19th day of March, 1901, the required injunction bond was given. On the 21st day of March, 1901, it was approved by the clerk of the court. On that day summons, with the said order of injunction, was issued. On the 26th day of March, 1901, it was served on Fisher, and on the 28th day of the same month was served on Helmick. It was also duly served on the other defendants.

The plaintiff, in his bill, alleges that he is the absolute owner in fee simple of a tract of land situate in Middle Fork District of said county, containing 62½ acres; that he bought the land in 1884, obtained his deed therefor some two years afterwards, and has been in the absolute and exclusive possession of said land ever since; that the said Charles Fisher is acting as surveyor of roads in Precinct No. 1 of said district under and by virtue of appointment to said office by the said county court; that said Fisher is about to take for the purpose of a public road a part of plaintiff's said land, without plaintiff's consent, or without having purchased said land from plaintiff, or without having it condemned according to law, or without just compensation therefor having been paid to plaintiff. The strip of land proposed to be so taken is alleged to be 65 rods in length and 30 feet in width, and very valuable to the plaintiff. A diagram of the old road and the proposed new road is filed with the bill. The defendants demurred to the bill on the

alleged grounds that there is a misjoinder of defendants, and that the bill is without equity. The court overruled the demurrer, and properly so. In *Foley v. County Court* (W. Va.) 46 S. E. 246, it is held that, where private property is being taken for public use without compensation, equity has jurisdiction to enjoin the act. In the opinion of the court by Brannon, J., it is said: "This is not a mere trespass, transient and passing, slightly affecting the freehold, because the bill alleges, and the answer admits, that the county was taking the strip of land for permanent public use, without compensation, forever wresting the land from the plaintiff, if her property; and it is settled that, where a town or county is taking property for public use without compensation, not merely injuring it, there is no legal remedy answering the emergency, and injunction will lie. *Boughner v. Clarksburg*, 15 W. Va. 394; *Yates v. West Grafton*, 33 W. Va. 507, 11 S. E. 8; *Mason City S. & M. Co. v. Mason City*, 23 W. Va. 211; *Ward v. Ohio R. R. Co.*, 35 W. Va. 481, 14 S. E. 142; *Spencer v. Railroad*, 23 W. Va. 406." An injunction will be granted to prevent the laying out and establishing a road through a farm and improvements without prior compliance with the requirements of the law in such cases. 1 *Spelling, Inj.* §§ 295, 354. We think there is no misjoinder of parties. Under the law the county court is charged with the establishment, regulation, and maintenance of public roads. Fisher was the road surveyor, and Helmick the road contractor, who was assuming to open the proposed road on appellant's land, under an alleged contract with Fisher as road surveyor. Fisher answered the bill, and admitted plaintiff's ownership and possession of the land as alleged. He also admitted that he was road surveyor, and acting as such, but denied that he was about to take the said strip of land for the purpose of a public road without plaintiff's consent. He further averred that the location of the road, marked on the said diagram, "Present Road," was such as to make the road along that line practically impassable on account of the steepness thereof at certain points, and for other reasons; that respondent, deeming a change of the road from the location necessary, asked and received from plaintiff his unqualified consent that such change should be made from the then location to the line marked as the "Proposed New Road" on said diagram; that at the first sale at which respondent offered the making of this proposed new road for sale plaintiff was a bidder therefor; that said new location places the road on better ground, does not increase the length thereof, reduces the grade, does not require more work to keep it in repair, does not render said road in any respect worse than it was before; and that on the 9th day of February, 1901, he, as road surveyor, sold the making of said road upon the changed line

to said Helmick. Respondent further avers that the change in said road was made with the full knowledge and consent of the plaintiff. The said county court, as individuals and as such court, also answered the bill, and admitted the appointment of Fisher as road surveyor under the alternate road law of 1881, and his full authority to act as such; that they had knowledge of the change made in the road complained of by said plaintiff, but were not intimately acquainted with the ground; that they had been informed and believed that said change was made pursuant to law; that the county court did not by any proceeding, such as condemnation or purchase, acquire the right to make such change, but that they understood that said surveyor was having it done legally and properly, by virtue of his statutory authority; and that, if he had exceeded the same, they are in no way responsible therefor. Helmick filed his answer, in which he, among other things, says that plaintiff was fully cognizant of the advertising and selling of said road, and of the purchase by respondent of the making of the same, and that he had completed the making of said road several days before he was served with the order of injunction in the cause. Depositions were taken by both plaintiff and defendants, and filed in the cause.

The determination of the case depends upon the evidence as to whether or not the plaintiff consented that his land might be taken for the proposed change in the public road. Plaintiff was asked: "Q. State whether or not you consented for the county court of Randolph county, or Charles Fisher, or any one else to change the present road through your land, and place it where the map shows the 'proposed new road.' A. No, never. On the contrary, I told the county court I would never consent to it. Q. State whether or not the county court ever gave you any notice that it proposed to make said change. A. No, sir; never. Q. State whether or not Charles Fisher, or any road surveyor or road official of your district, ever gave you any notice that they proposed to make the said change. A. No, sir; they did not." He further testified that the work on the change was commenced soon after February 9, 1901, and was "got done with soon after the 16th day of March—anyhow before the last of March"; that the work was completed on the 25th or 26th of March; that Jacob Helmick was the contractor who made the change; that the road, as changed, runs 98 rods through his land; that about 50 or 58 rods of it were completed when Fisher and Helmick were notified of said injunction; and that plaintiff, on the 16th day of March, 1901, served notice in writing on Fisher and Helmick that he had, on the 5th day of March, 1901, obtained from the judge of the circuit court the injunction. The notice referred to is a part of the record, bears date on the 5th day of March, 1901, is ad-

pressed to Charles Fisher and Jacob Helmick, and notifies them that plaintiff had on that day obtained from the judge of the circuit court of Randolph county an injunction restraining and enjoining them and their employes from making the change in the public road through plaintiff's land, upon which they were then engaged. The notice is signed by said Wenger, and appears to have been served on Fisher and Helmick in person, by copies thereof, on the 16th day of March, 1901.

On behalf of defendants, said Fisher testified that he was authorized by the county court to make the change in the road on Wenger's land without any extra expense, and that he also had Wenger's consent; that Wenger agreed to the change when he bought that section of road. It appears from the record that at a road sale made by Fisher on the 4th day of April, 1899, said Wenger, the plaintiff, bid in sections 2 and 3, said section 2 being the road running through his land. The specifications of No. 2 state: "This section has a change to be made in it near John Wenger's place," etc., "sold to John Wenger." The bond of Wenger given as contractor recites that "the above-bound John Wenger was on the 4th day of April, 1899, awarded the contract for repairing and keeping in repair section 2 in Precinct 1 of Middle Fork District and also to make change in said section for the sum of \$17 per year for the term of 3 years." It is also proved that at the time of this sale the said proposed change had not been located; that when Wenger made his said contract for section 2 he was not shown what the change was to be; that the change was not located by the road surveyor until about the 1st of June following; and that Wenger then objected to a change, and wrote Fisher a letter objecting to the work. It is further shown that Wenger did no work under his said contract or otherwise on said alteration, but surrendered his contract, and that about the 9th day of February, 1901, the work on the road, as attempted to be changed by the road surveyor, was sold to defendant Helmick. The notice under which said second sale was made recites that "the undersigned, Charles Fisher, surveyor of roads, will sell to the lowest and best bidder the constructing of a piece of public road near John Wenger's on the Pickens and Newlon Road, distance not exceeding $\frac{1}{4}$ of a mile. Said change was made by the Randolph county court at its last regular session, and ordered made," etc. There are a number of other depositions in the record, showing the advantage of the change to the public, and that when Wenger bought section 2 at the first sale it was fully understood that a change was to be made in the location of the road. The said contract indicates as much. But it is undisputed that no change had then been located, or agreed upon between Wenger and Fisher, and that the surveyor did not go

upon the land of Wenger to locate the change until the following June.

The evidence and circumstances of the case, including the contradictory statements in the answers, preponderate very much in favor of Wenger's contention that he at no time consented to the location of the change in the road as made and as shown by the diagram filed. An evasion of the injunction is sought by showing that the order had not been served on Fisher and Helmick until after they had completed the work thereby enjoined. It is proved, and not disputed, that they had notice of the injunction before the work was much more than half done. Beach on Injunctions, vol. 1, § 248, says: "Persons who have actual knowledge of the existence and effect of an injunction order are bound by it, though it is not personally served on them." In considering the question of a defendant's liability for a breach of injunction, it is to be borne in mind that the injunction becomes operative from the time of the order being made, and not from the date of the writ itself, or from the time of its being drawn up. The mandate of the court being effectual upon all parties having notice thereof, from the time it is given, to fix defendant's liability for a violation, it is only necessary to show that he was actually apprised of the existence of the order at the time of committing the acts constituting the violation. High on Inj. vol. 2, § 1421; Osborn v. Glasscock, 39 W. Va. 761, 20 S. E. 702.

It seems that the injunction should not have been dissolved. Therefore the decree of the circuit court must be reversed, and set aside, and the injunction granted by the judge thereof perpetuated here.

(55 W. Va. 4)

LAW v. LAW et al.

(Supreme Court of Appeals of West Virginia.
Feb. 16, 1904.)

BILL OF REVIEW—SETTING ASIDE DECREE— AMENDMENT.

1. If a decree in a cause has been procured by fraud, discovered after the decree is entered on the record, and after the adjournment of the term at which it is entered, it can be set aside only by an original bill in a new suit, and cannot be annulled by a bill of review.

2. Where a bill of review is filed in a cause to set aside certain decrees therein, alleged to have been procured by fraud, and a demurrer is sustained to said bill as a bill of review, and the plaintiff therein asks leave to amend the same, and have it taken and treated as an original bill, for the purpose of setting aside said decrees for fraud, and said bill can be so amended as to make it a bill sufficient in substance for the purpose sought, it is error in the court to refuse to allow such amendment to be made therein, and to treat the same, when so amended, as an original bill.

(Syllabus by the Court.)

Appeal from Circuit Court, Lewis County;
W. G. Bennett, Judge.

Bill by Marie E. Law against Thomas E. Law and others. Decree for defendants, and plaintiff appeals. Reversed.

Linn & Bland, for appellant. Geo. C. Cole, for appellees.

MILLER, J. Thomas F. Law, as administrator of the estate of F. E. Law, deceased, instituted in the circuit court of Lewis county his suit in chancery against Marie E. Law, widow, and Adda Law, Thomas F. Law, and J. W. O. Law, children and heirs at law, of said F. E. Law, deceased, and Joseph Evans and Howard Neely, trustee. The bill was filed at the June rules, 1899. The object of the suit was to subject to sale certain lands owned by F. E. Law at the time of his death to the payment of his debts. The indebtedness of the decedent was ascertained, a gross sum was decreed to said widow in lieu of her dower in the lands of which her husband died seised, and the said lands were sold free from her dower, at which sale one M. L. Law became the purchaser. At September rules, 1902, Marie E. Law, widow, filed in the clerk's office of the circuit court of said county what she styles "The Bill of Review of Marie E. Law against Thomas F. Law, Administrator of F. E. Law, Deceased; Adda Law and J. W. O. Law, Children and Heirs at Law of the Said F. E. Law, Deceased; Joseph Evans; Howard Neely, Trustee; W. W. Brannon, Special Commissioner; M. L. Law; and W. O. Law"; the said Brannon being the person who sold said land under decree, and the said W. O. Law being the surety on the notes given by M. L. Law for the deferred installments of the purchase money for the land so sold. The said bill of review avers that the bill in said original cause was filed at June rules, 1899, and that said cause was ended at the March term, 1901; that in the original bill the plaintiff therein alleged that at the time of said F. E. Law's death he was the owner in fee of certain real estate situate on the waters of Hacker's creek, in the county of Lewis; that two tracts of said land had been conveyed to Howard Neely, trustee, by said F. E. Law and wife, by deed, and, as it otherwise appears, to secure a debt which F. E. Law owed to said Evans, and that Law was the owner of another tract, known as his home farm; that the plaintiff averred that said F. E. Law at the time of his death owed other debts to other parties; that the amount of said debts was unknown to the plaintiff, but was not less than \$5,000; that the plaintiff further averred that the rights of the said Evans under his deed of trust were superior to the dower right of the widow of said F. E. Law, by reason of the fact that she united in the deed of trust aforesaid; that the said widow would be entitled to the interest which the law would give her in the surplus proceeds of the sale of the said two tracts covered by the said Evans deed of trust, but that she desired to relinquish any

claim to such proceeds, or any part thereof, on account of her dower right, and wished the whole net amount of such proceeds to be devoted to the discharge of the debts of the said F. E. Law, so as to leave, as far as possible, the home farm undisturbed, and, should the court be of opinion that, by reason of her relinquishment of her interest in such net proceeds of sale, her demands in the other tract would be augmented, she might thereafter claim the same. The said original bill prayed that the accounts of the administrator might be settled; that the net amount of personal estate be ascertained and fixed; that the debts against the said decedent, together with their amounts, and priorities thereof, be also ascertained and fixed, according to law, both as to the personal and real estate; that the said two tracts of land described in the Evans deed of trust, after the application of the personal estate to the indebtedness, be subjected to sale in satisfaction of the debts; and that such portion of the other farm as might be necessary, and as would be least injurious to the said widow and heirs, be also subjected to sale in satisfaction of the balance of said indebtedness. The bill of review further avers that, in said original suit, George Woofter was, at the rules, appointed guardian ad litem for the said defendant J. W. O. Law, who was a minor; that said minor, by his said guardian ad litem, filed an answer to the original bill; and that on the 28th day of June, 1899, a decree of reference was entered in said cause, in which decree it is recited that the "adult defendants appeared and demurred to the bill, in which demurrer the plaintiff joined, and the court, having considered the questions arising on said demurrer, overruled the same. Thereupon the said demurring defendants waived their right to answer the bill. And the cause came on to be heard upon the bill taken for confessed against said adult defendants, exhibits, answer of said infant defendant by his guardian ad litem, process, and was argued by counsel." On consideration of all of which the said cause was referred to W. J. Smith, commissioner, who was directed to ascertain and report certain matters specified in the decree. It is further averred that on the 17th day of October, 1899, a further decree was pronounced in said cause, the same having been on that day heard upon the papers read on a former hearing, former orders and decrees, and upon the report of Commissioner W. J. Smith, filed on the 14th day of October, 1899, "upon the waiver of notice from said commissioner, by W. W. Brannon, the only attorney of record, to which report there was no exceptions," and thereupon the estate of F. E. Law was decreed to pay to its creditors the several sums therein mentioned; and it was ascertained by said decree that the age of the widow of said F. E. Law was 51 years. It was also adjudged, ordered, and decreed thereby that W. W. Brannon, special commissioner,

should sell the two tracts of land therein mentioned in the manner and upon the terms specified, unless the debts, interest thereon, and costs decreed against the said estate should be paid within 30 days. It was further decreed that both of the said tracts of land should be sold free from the dower of said widow, and that, on her motion, she might look to any surplus proceeds of the sale of the said tract of 115 acres over and above the Evans debt and interest, and to the entire proceeds of the sale of the other tract of 105 acres (the home farm) for a gross sum, in lieu of her dower, to be fixed upon the incoming of the report of sale. The bill of review further shows that a sale of said lands was afterwards made to said M. F. Law; that W. O. Law signed the purchase-money notes given therefor, as surety; that by decree made and entered in said cause on the 25th day of June, 1901, said sale was confirmed; that the cause was then referred to a commissioner to ascertain and report the gross sum, in lieu of dower, to which said Marie E. Law was entitled out of the proceeds of the sale of each of said tracts of land; that by decree made and entered in said cause on the 29th day of October, 1901, it was "adjudged, ordered, and decreed that the said Marie E. Law is entitled to the sum of \$702.83, as a gross sum in lieu of her dower, from the proceeds of the sale of the tract of one hundred and five acres of land theretofore sold under decree herein."

Plaintiff in said bill of review alleges that she is aggrieved by the said decrees of October 17, 1899, and October 29, 1901, respectively; that she ought not to be bound by either of them; that both of said decrees are erroneous, and should be reversed; and, for assignment of error therein, she further alleges that said decrees show upon their face that said cause in which the same were pronounced was heard upon the plaintiff's bill therein taken for confessed as to her and the other adult defendants thereto; that she was not represented by counsel therein, and that no one had authority to bind her. She avers that, although it appears that she demurred to the bill, as a matter of fact that statement is untrue, and that such appearance on her behalf was unauthorized and fraudulent, and that she is not bound by the allegation in the plaintiff's bill that she was willing to accept a gross sum in lieu of her dower. She charges, upon information and belief, that W. W. Brannon, Esq., was the only attorney of record in the said cause, and that he was counsel for the plaintiff therein, she being a defendant, as hereinbefore shown. It is admitted in the briefs that said Brannon filed said demurrer and made said appearance on her behalf. She further alleges that she never at any time employed said Brannon to represent her in said cause, and never authorized any other person to employ him for her. Plaintiff charges, upon information and belief, that the defendant M. L. Law,

who afterwards became the purchaser of said land, procured said Brannon to appear for her as attorney in said cause the said M. L. Law, having represented to Brannon that plaintiff desired him to represent her as her counsel; that said M. L. Law conspired against her for the purpose of having the said property sold free from her dower right therein, and in order that he might be in position to purchase the same free from her claim of dower therein; that Law misrepresented the true situation to said Brannon, imposed upon him, and made him the victim of false representation and fraud. She also avers that dower in said lands was not assigned to her in kind before said decree of sale, and that she at no time elected to take the value of her dower in said tract of 105 acres in money; that there is nothing in the record of the said cause showing an election made by her to accept a sum of money in lieu of dower; that she has never accepted the said gross sum decreed to her; and she charges that it was error to decree to her said sum in lieu of her right to dower in said 105 acres. The bill prays that said decrees of October 17, 1899, and October 29, 1901, respectively, be reviewed and altered to the extent of decreeing to her, as the widow of F. E. Law, deceased, dower in kind in the said tract of 105 acres of land, instead of the value of such dower in money; that all proper orders and decrees in respect to said dower be entered; and for general relief. To this bill of review the defendant M. L. Law on the 28th day of October, 1902, filed his demurrer, assigning therein several reasons why the same should be sustained. No appearance of any kind was made to said bill by any of the other defendants thereto. On consideration thereof, the court sustained the demurrer. Thereupon the plaintiff asked leave to amend her said bill by inserting therein, on the seventh page thereof, after the words "was unauthorized and fraudulent," the following: "She avers that no process in said cause was ever served upon her, and the decrees so obtained were without process as to her, and without her knowledge or consent;" and also by inserting in the prayer of the bill the following: "And if the relief herein prayed for cannot be granted upon this bill, treated as a bill of review, that the same be treated and held as an original bill for relief upon the facts herein alleged;" to which amendments the defendant M. L. Law objected, and the court sustained the objection, refused to allow said amendments, and dismissed the bill, at the costs of the plaintiff, but without prejudice to the right of plaintiff to file an original bill, to impeach the decrees complained of, for fraud. Plaintiff, Marie E. Law, was granted an appeal from that decree, and complains that the circuit court erred in sustaining said demurrer, and in refusing to allow said proposed amendments.

The decrees complained of are based upon

the bill taken for confessed as against Marie E. Law and her adult codefendants. The bill of review is not for newly discovered evidence. It would not lie for that cause to a decree taken pro confesso. *Camden v. Ferrell*, 50 W. Va. 119, 40 S. E. 368; *Hogg's Eq. Proc.* vol. 1, § 210. If the present bill can be maintained for any reason, it must be on the ground that there is error of law apparent on the face of the said decrees, such as appear in the decrees themselves, the opinion of the court, or from the pleadings in the cause, and exhibits filed therewith, or from such error as arises from facts, either admitted by the pleadings, or stated as facts settled, declared, or allowed by the decree. Neither the depositions nor the other evidence in the cause can be looked to, to show error. *Dunn's Ex'rs v. Renick*, 40 W. Va. 349, 22 S. E. 66; *Hogg's Eq. Proc.*, supra, § 211.

What errors of law are apparent on the face of the decrees? The court had jurisdiction of the subject-matter of the suit in which the said decrees were made and entered. Code 1899, c. 86, § 7. Process had been issued therein, but whether or not service thereof had been made upon the defendants, or any of them, the record does not state. The infant defendant answered the bill by guardian ad litem, and, as recited in the record, "the adult defendants appeared and demurred to the bill, in which demurrer the plaintiff joined; and the court, having considered the questions arising on said demurrer, overruled the same. Thereupon the said demurring defendants waived their right to answer the said bill. And the cause came on to be heard upon the bill taken for confessed against said adult defendants, exhibits, answer of said infant defendant by his guardian ad litem, and process, and was argued by counsel." As shown by the face of the record, the court also had jurisdiction of the parties to the suit. Upon examination, we find no error of law on the face of the record. The decrees are such as are warranted by the pleadings and the facts admitted therein. In *State v. Vest*, 21 W. Va. 796, it is held that "a record imports such absolute verity, that no person against whom it is pronounced will be permitted to aver or prove anything against it." Judge Green, who delivered the opinion of the court in that case, says upon that point: "It is certainly a rule invariably recognized by the courts that a record imports such absolute verity, that no person against whom it is pronounced will be permitted to aver or prove anything against it. This rule is well established, and we now here refer to but a few of the many cases in which this doctrine has been held. See *Rex v. Carlile*, 2 Barns. & Ad. 971; 23 Eng. Ch. R. 226; *Braden v. Reitzenberger*, 18 W. Va. 286; *Carper v. McDowell*, 5 Grat. 212, 226; *Harkins v. Forsyth*, 11 Leigh, 294; *Taliaferro v. Pryor*, 12 Grat. 277; *Vaughn et al. v. Commonwealth*, 17 Grat. 386; *Quinn et al. v. Commonwealth*, 20 Grat. 188. Whatever,

therefore, on the face of a book of record, has been duly authenticated by the signature of the judge, must be held to be an absolute verity, and it cannot be contradicted; and so, also, any paper actually referred to on the record book as filed or as constituting a part of the record is to be regarded as a part of the record, and is as much a verity as if it had been spread out at length as a part of the record." But in *Springston v. Morris*, 47 W. Va. 50, 34 S. E. 766, it is also held that the recitals of a decree which is directly attacked for fraud are not presumed to be absolute verities, but are subject to impeachment. Judge Dent, speaking for the court, says: "Defendants insist that the plaintiffs have no right to question the recitals of the decree confirming the sale. *State v. Vest*, 21 W. Va. 796. This is not the rule where a decree is directly impeached for fraud or surprise in its procurement. It may be an absolute verity as to what occurred in court and was there recorded, but not as to the recitals therein contained as to what occurred other than in the presence of the court at the time of the entry of the decree. *Black. Judgm.* § 238. If such rule were to be held good in all cases, no decree could be impeached for fraud or surprise, and yet such is ordinary equity jurisdiction. *Bart. Ch. Prac.* (2d Ed.) p. 841. The doctrine of the absolute verity of the record must always yield to that higher equitable doctrine that fraud vitiates all things. 'It is the just and proper pride of our mature system of equity jurisprudence that fraud vitiates every transaction; and, however men may surround it with forms, solemn instruments, proceedings conforming to all the details required in the laws, or even by the formal judgment of courts, a court of equity will disregard them all, if necessary, that justice and equity may prevail.' *Warner v. Blakeman*, *43 N. Y. 507; *Freem. Judgm.* § 489. The proper way in which to attack such decree, when the object is merely to set aside the decree, and then permit the original suit to continue to final hearing, is by an original bill in the nature of a bill of review. *Manion v. Fahy*, 11 W. Va. 482."

Therefore the demurrer to plaintiff's bill, treated as a bill of review—there being no error of law apparent on the face of the record—was properly sustained. Plaintiff, however, asked leave to amend her bill, as hereinbefore stated. Such amendments would not contradict any recitals in the record. It does appear that the cause was heard upon process, but it is not stated that the process had been served. If the proposed allegations be true, the plaintiff had the right to aver and prove them in some appropriate proceeding. The learned judge who decided the case evidently thought that plaintiff had the right to maintain an original bill for the purpose of impeaching the decrees complained of, for fraud. Such seems to have been the opinion of this court in the case of *Man-*

ion v. Fahy, 11 W. Va. 491. It is there said: "If a decree has been procured by fraud, discovered after the decree is entered, but before it is enrolled, the proper mode of correcting it, by the English practice, is neither by a petition for a rehearing, nor by a supplemental bill, in the nature of a bill of review, but the correction must be asked by an original bill in the nature of a bill of review. See *Mussell v. Morgan*, 3 Bro. Ch. R. 74, 79. Such a bill is not a continuance of the former suit, as a supplemental bill in the nature of a bill of review is, but it is a new suit; and, like any other original bill, it may be filed without the leave of the court. After the decree has been enrolled, no matter what may be the character of the decree—whether it be an interlocutory decree, in the sense in which we use the term, or a final decree—it can, according to the English practice, be modified or annulled by the court who pronounced the decree only by bill of review, which may be filed for error of law apparent on the face of the record, or because of newly discovered matter. If, however, this enrolled decree was procured by fraud, it can only be set aside by an original bill in a new suit, and cannot be annulled by a bill of review. *Mussell v. Morgan*, 3 Bro. Ch. R. 74." Plaintiff asked the court not only to allow her to amend her bill, but also to then treat it as and for an original bill for relief upon the facts therein alleged. When amended, the bill would have been, in effect, an original bill for the proposed purpose of setting aside the decrees for fraud.

The plaintiff may, of right, amend his declaration or bill at any time before appearance of the defendant, or after such appearance, if substantial justice will be promoted thereby. Code 1890, c. 125, § 12. Plaintiff had filed her bill in the clerk's office at rules. Defendant M. F. Law appeared in court and interposed his demurrer thereto as a bill of review. If insufficient or improper as such bill of review, but sufficient, or capable of being made so by proper amendment, for the object sought, it was error in the court to refuse such amendment, and it was also error to dismiss the bill. In *Sturm v. Fleming*, 22 W. Va. 404, it is said: "The name and form are immaterial. Substance is all that is required. In Virginia the practice of courts of equity, which is the rule of practice in this state, allows the greatest liberality with respect to pleadings." In *Riggs v. Armstrong*, 23 W. Va. 760, it is held: "It is the disposition of courts of equity to regard substance, rather than mere form; hence in this case a bill was filed as a cross-bill which could not be sustained as such, but, having all the elements of an original bill, was held to be sufficient as an original bill, and treated as such." *Skaggs v. Mann*, 46 W. Va. 209, 219, 33 S. E. 110; *Cunningham v. Hedrick*, 23 W. Va. 579.

If, then, the remedy in such case is by an original bill, and the bill of review filed in

this cause could have been properly amended, and then treated as an original bill for the purposes sought, it is plain that the court should have permitted the amendments, and then treated the bill, so amended, as an original bill, without dismissing the plaintiff, to do again what she had done, and then and there proposed to do. The bill should have been amended and remanded to rules, to have been there properly matured for hearing.

Appellant, in her bill, and her counsel in his brief, fully acquit and exonerate W. W. Brannon, the attorney who assumed to act for her in the circuit court, from intentional wrong in the premises; but this disavowal on their part is in no way to be taken or treated as a waiver of any of the legal rights of appellant in the cause.

For the reasons stated, we are of opinion that there is error in the said decree of October 28, 1902. We therefore reverse and set the same aside, and remand the cause to the circuit court of Lewis county, to be therein further proceeded with according to the views herein expressed, and further in accordance with the rules and principles governing courts of equity.

(55 W. Va. 49)

TIBBS v. ZIRKLE et al.

(Supreme Court of Appeals of West Virginia.
Feb. 16, 1904.)

POWER OF ATTORNEY—CONSTRUCTION—SALE OF LAND—OPTION—RIGHTS OF PARTIES—REVOCATION.

1. The written power to sell land does not include the power to option, unless so expressed.

2. An option not authorized by a written power to sell is not binding on the landowners or a co-agent under such power to sell, without express ratification.

3. A co-agent under a power to sell is not bound by an unauthorized option not given or ratified by himself, and, if he purchase the land for himself, he cannot be held as a trustee for the claimant under such option.

4. An option given for a valuable money consideration cannot be revoked until the time limit therein has expired. If such option is without consideration, it may be withdrawn or revoked at any time before acceptance.

5. An option given without authority, while not binding on the landowners who did not authorize or ratify it, is binding and enforceable against the optionor whose land is included therein.

6. A person who has taken an option upon land, but has not paid the purchase money in full, is not a purchaser for value without notice.

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County; John Homer Holt, Judge.

Bill by R. B. Tibbs against A. D. Zirkle and others. Decree for defendants, and plaintiff appeals. Reversed in part.

Ice & Ice and W. S. Meredith, for appellant. W. T. George and E. D. Talbott, for appellees.

DENT, J. This is a suit for specific performance instituted in the circuit court of Barbour county by R. B. Tibbs, plaintiff, against A. D. Zirkle et al., in which the circuit court decreed specific performance against A. D. Zirkle individually, but refused it against N. G. Keim and the other defendants. The plaintiff appeals.

The suit is founded on the following optional contract:

"This agreement witnesseth: That A. D. Zirkle, attorney in fact, party of the first part, for and in consideration of the sum of one dollar, the receipt of which is hereby acknowledged, do hereby sell and convey to R. C. Dunnington & Co., party of the second part, heirs and assigns, the right to purchase all the coal except from one to three acres of each of the sixteen farms hereby represented in and under that certain tract of land in Valley District, Barbour County, W. Va., bounded by lands of N. T. Arnold, on East, North by P. Monahan and O'Brien tract, on West by Middle Fork River, on the South by Middle Fork River and N. T. Arnold, and containing eighteen hundred acres, more or less, together with the right to mine and remove every part of the same without being required to provide for the support of overlying strata or surface, and without being liable for any injury to the same or to anything therein or thereon by reason thereof and with all reasonable privileges for ventilating, pumping and draining the mines, together with the free and uninterrupted right of way into and through said lands and to build, keep and maintain roads and ways in and through said mines for ever, for the transportation of said coal, etc., and of coal and other things necessary for mining purposes from and to other lands.

"For which the parties of the second part, their heirs or assigns, shall pay eighteen dollars per acre for each and every acre of coal, no allowance being made for outcrop, as follows: Eighteen hundred dollars within sixty days after this date, the balance on or before the 3rd day of May, 1903, and it is agreed that said second party shall pay expenses of survey, abstracting of titles, &c., and further the party of the first part reserves the right to bore through said coal for oil and gas and to market same without being liable for damage.

"A good deed, clear of all encumbrances, with a general warranty, to be made to said second parties, heirs or assigns, when so notified by said second party.

"It is expressly understood and agreed that if the said coal is not accepted and paid for by the party of the second part, heirs or assigns, on or before the 3rd day of May, 1903, this agreement may be considered rescinded and neither party shall be bound thereby. And it is agreed that if the said 1,800 dollars is not paid on or before the 3rd day of March, 1903, this contract is null and void, further, if said payment is made and the

balance \$17.00 dollars per acre not paid on or before the 3rd day of May, 1903, this contract is null and void and said payment is a forfeiture.

"In witness whereof, the said parties have hereto set their hands and seals this 3rd day of January, A. D. 1903.

"Signed, sealed and delivered in the presence of A. D. Zirkle, Attorney in Fact. [L. S.]

"Attest: C. Morris."

This option was assigned to the plaintiff, who claims he fully conformed to all the stipulations thereof. The option is claimed to have been executed by virtue of the following power of attorney:

"Be it remembered that we the undersigned hereby appoint A. D. Zirkle to sell our coal except enough for domestic use and hereby give him power of attorney to make said sale not to sell for less than \$15.00 per acre and give him full control of said sale, and we agree to abide by the said sale that he may make, and we further agree to let him manage the sale and have the power to make said sale as long as he thinks there is a chance to sell and we further agree to pay the said A. D. Zirkle reasonable compensation for his time and his expenses for making sale as aforesaid if he make said sale, but if he fail to make the said sale no compensation is to be paid the said A. D. Zirkle for his time and expenses except agreed upon by the majority of the undersigned and we further agree to give him all the time necessary to make tests or opening and also not to interfere with any sale that may be pending if he thinks there is a chance to sell.

"Witness our hand this the 14th day of September, 1900. Jacob Zirkle, 400 A. Patrick McGinnis, 156 A. Bridget Caughlin, 102 A. H. W. Goss, 110 A. D. T. Goss, 45 A. Lewis Zirkle, 200 A. N. Rohrbaugh, 70 A. B. F. Wiseman, 180 A. G. C. Wiseman, 20 A. Valeria Wilson, 50 A. A. B. Wilson, 150 A. M. E. Gower, 60 A. A. D. Zirkle, 100 A. J. D. Zirkle, 110 A."

The defendant Keim between the 22d of January, 1903, and the 10th of February, 1903, took options on the coal of A. D. Zirkle, Lewis Zirkle, Nathan Rohrbaugh, Henry W. Goss, A. B. Wilson, B. F. Wiseman, Anna Goss, Jacob Zirkle, Margaret E. Gower, J. D. Zirkle, G. C. Wiseman, and Valeria Wilson, and paid a down payment on the purchase money to each, which was forfeitable. None of Keim's optioners had actual notice of the plaintiff's option prior to the date of Keim's options. While Zirkle, whose deposition alone is taken in behalf of defendant Keim, testifies that Keim did not have notice of such option, he admits that there was a contract between himself and Keim at the time the option was taken by which Keim was interested in such option, and, if the same matured into a sale, he (Keim) was entitled to share equally with Zirkle in the profits of the sale, and about the time and just previous to the taking of the options by Keim,

with Zirkle's assistance, Zirkle endeavored to get the optioners to abandon their options; thus plainly showing that Zirkle was working in Keim's interest, and, no doubt, with the full knowledge and approval of Keim.

So the important questions in this case are narrowed down to two: First. Did Zirkle's power of attorney authorize him to execute the plaintiff's options? Second. Did Keim occupy such a relation toward the plaintiff as prevented him from taking advantage of Zirkle's lack of authority to execute such option?

If it had been shown that Keim had done anything to ratify or approve of the Zirkle option, or that Zirkle was interested in Keim's options, a different case would have been presented. But there is no evidence, other than suspicious circumstances directly opposed by Zirkle's evidence, tending to prove Zirkle's interest in Keim's options, while the fact that Keim took these options shows that he did not approve or ratify Zirkle's option. If Zirkle had authority under his power of attorney to execute the option, Keim, under his contract with Zirkle, by which he was to have an equal interest in such power of attorney, would have been equally bound with Zirkle by such option, as they would have been mutually interested therein. But if Zirkle exceeded his authority in the execution of such option, then Keim would be no more bound thereby than the landowners, and this could only be by ratification thereof. The landowners stand indifferent in this suit, and their failure to answer the bill and deny its allegations might be deemed a willingness on their part to ratify the plaintiff's option, but this they could not do without Keim's consent after the execution of his options. We cannot hold otherwise than that Zirkle exceeded his authority under his power of attorney in executing plaintiff's option, for he was only authorized to make sale, while an option is not a sale, although it may eventuate in a sale. For the time being it prevents a sale, it matters not what the event thereof may be; and, if Zirkle had authority to give an option for three months, he had the right to extend such option for three years, and in this manner he might indefinitely tie up the property, and prevent, instead of securing, a sale thereof. This certainly was not had in view by the landowners when they authorized Zirkle to make sale for them. Those dealing with Zirkle must take notice of the extent of his power. 1 Am. & En. En. Law (2d Ed.) 1010; Field v. Small, 17 Colo. 386, 30 Pac. 1084; Dyer v. Duffy, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339. Zirkle's option being without authority, neither Keim nor the landowners were bound by it, and, without waiting to see whether it would result in a sale, they had the right to repudiate it, and enter into any other arrangement, either between themselves or others, for the option or sale of their coal. Keim held no confidential relation whatever towards the plaintiff,

in so far as the unauthorized option was concerned. It would have been otherwise, had Zirkle made a sale, instead of giving an option, as Keim would have been bound thereby by reason of his contract with Zirkle. Keim was in no sense the agent of the plaintiff, and was under no obligation of duty towards him. Keim was not bound to ratify Zirkle's option, nor await its consummation. The option gave plaintiff no vested interest in the land, but was a mere right to purchase within a limited time, binding only upon Zirkle. Keim was not in duty bound to make it good. 1 Perry on Trust, § 206, p. 301; Farley v. Kiltson, 27 Minn. 102, at page 105, 6 N. W. 450, 7 N. W. 287.

The plaintiff not being entitled to be substituted to Zirkle's rights under his power of attorney, since his option was in violation thereof, he is not entitled to be substituted to any of the rights that Zirkle might have by virtue of his contract with Keim. The option is not binding on Keim, and could not be made so by substitution, so as to make Keim plaintiff's agent or trustee in taking his options. The power of attorney was binding on Keim, and he had no right to take options for his own benefit without Zirkle's assent; but, as plaintiff is not entitled to enforce such power of attorney against the landowners, he cannot enforce it against Keim.

Keim's agency grew out of, and is controlled by, the power of attorney. Plaintiff's rights grow out of, and are controlled by, his option, and he acquired no vested rights under the power of attorney that can be affected by Keim's purchasing in disregard thereof. Zirkle was under obligation to prevent and, no doubt, could have prevented, the revocation of his power of attorney for the time limited in his option; but he had no legal right to compel such extension, and his acquiescence in the revocation thereof imposes no binding legal duty on either Keim or the landowners to the plaintiff. Zirkle's breach of duty to the plaintiff, though fraudulent, imposes no legal duty on those who are not participants in such fraud. Plaintiff's rights are wholly limited to his option, which imposes neither express nor implied legal obligations upon Keim. Hence Keim has committed no breach of legal duty he owes to the plaintiff, except in taking an option on A. D. Zirkle's 100 acres of coal. The circuit court so decreed, but, instead of canceling Keim's option as a cloud on plaintiff's title, or reserving the right to do so, it finally and completely dismissed the bill as to Keim, thus refusing complete relief between the parties. Hotchkiss v. Fitzgerald Plaster Co., 41 W. Va. 357, 23 S. E. 576. While the landowners and Keim were not bound by the option, Zirkle is, for he received a money consideration therefor, and he could not revoke it during the time limited. The law is otherwise if he had received no consideration. 21 Am. & En. En. Law (2d Ed.) 929; Weaver

v. Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; Eclipse Oil Co. v. South Penn Oil Co., 47 W. Va. 84, 34 S. E. 923.

The plaintiff complied with the terms of the option, and tendered Zirkle the sum of \$1,800, the full cash value of his 100 acres of coal. As to him, the court did not err in decreeing specific performance. The court did, however, err in dismissing the bill as to defendant Keim, as he held a recorded option on A. D. Zirkle's coal; and, as he has not paid the purchase money, he could in no event be treated as an innocent holder for value without notice. *Webb v. Bailey*, 41 W. Va. 463, 23 S. E. 644. His option should therefore be canceled as a cloud on plaintiff's title, if the plaintiff elects to take the Zirkle coal.

The decree will therefore be reversed in so far as it dismisses the bill as to defendant Keim, and in all other respects affirmed, and the cause is remanded to the circuit court for further proceedings according to the rules and principles governing courts of equity. The reversal is at the costs of the defendants A. D. Zirkle and N. G. Keim.

(55 W. Va. 69)

POLING v. WILLIAMS et al.

(Supreme Court of Appeals of West Virginia.
Feb. 16, 1904.)

FRAUDULENT CONVEYANCE—SETTING ASIDE—
SUIT BY GRANTOR—SUBSEQUENT SALE—PAROL
TRUST—BONA FIDE PURCHASER—APPEAL—
REVIEW.

1. Where a conveyance has been made with intent to hinder, delay, and defraud creditors of the grantor, all the estate of the grantor subject to the rights of creditors passes by the deed to the grantee, and equity will not, at the suit of the grantor or any person claiming under him as purchaser from him after such conveyance, set the deed aside.

2. No interest or estate in land so conveyed remains in the fraudulent grantor for his benefit, which can form the basis of such a contract of sale by him, as will create an equity respecting the land.

3. A purchaser from the grantee in such deed is not prejudiced by prior notice of a pretended contract of sale of the land so conveyed, made between such fraudulent grantor and a third person.

4. A voluntary or fraudulent conveyance is binding upon the parties thereto.

5. Equity will not aid any person in an effort to profit by his own fraudulent act.

6. One who conveys land to another voluntarily, and without consideration, cannot set up a parol trust in the land in his favor, unless the circumstances be such as to bring the case within the rule stated in point 3 of the syllabus in *Troll v. Carter*, 15 W. Va. 567.

7. One who claims such a trust vests no equity affecting the land by his contract for the sale of it to another.

8. Where two persons are attempting to purchase the same property, neither is bound by any notice of the acts of the other until an enforceable contract is made with one of them.

9. When a bill in equity sets up a claim that is unenforceable, and the evidence offered in support of it does not prove a good cause of action, and the relief asked has been decreed by the court below, the appellate court will, on ap-

peal, reverse the decree and dismiss the bill, although no demurrer was interposed in the lower court.

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County; John Homer Holt, Judge.

Bill by U. S. Poling against R. P. Williams and others. Decree for plaintiff, and defendants appeal. Reversed, and bill dismissed.

Harding & Harding and Linn, Byrne & Cato, for appellants. L. Hansford, for appellee.

POFFENBARGER, P. U. S. Poling sues to enforce the specific performance of a contract of sale of a tract of land containing 40 acres, situated in Randolph county, made between him and R. P. Williams on the 18th day of February, 1901, whereby Williams agreed to sell the plaintiff said land; and also to set aside a deed made by said R. P. Williams April 4, 1900, conveying the same land to his brother, E. L. Williams, "for the purpose of evading the payment of some small debts due from" the defendant R. P. Williams "to various persons," according to the allegations of the bill; and also to set aside another deed made by said E. L. Williams April 12, 1901, conveying the same land to H. E. Stout, wife of W. F. Stout; and also to enjoin and restrain the defendants from cutting and removing the timber from the land and otherwise interfering with complainant's possession of the land. After a full hearing on the bill, exhibits, answers, general replications, and depositions, the court, by its final decree, perpetuated the injunction awarded at the commencement of the suit, canceled the deed from E. L. Williams to Mrs. Stout, ordered R. P. Williams and E. L. Williams to execute a deed conveying the land to Poling upon his payment of the balance of the purchase money, and appointed a special commissioner to make said conveyance on their failure to do so within 30 days from the date of payment of said balance. From this decree H. E. Stout, W. F. Stout, and E. L. Williams have appealed.

By his contract of purchase, U. S. Poling could acquire only such right, title, and interest in the land as R. P. Williams then had. That Williams then had no interest in it is manifest. He had conveyed the legal title to his brother. He could claim nothing under or against that deed for two reasons: First. It was made with intent to defraud his creditors, and equity will not relieve a party from the consequences of his fraudulent act, nor aid him in an effort to profit by it. *McClintock v. Loiseau*, 31 W. Va. 865, 8 S. E. 612, 2 L. R. A. 816; *Billingsley v. Meneer*, 44 W. Va. 651, 30 S. E. 31; *Edgell v. Smith*, 50 W. Va. 349, 40 S. E. 402. "This rule applies not only to the original parties to the fraudulent transaction, but also to their heirs, and to all parties claim-

¶ 1. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 532, 592.

ing under, or by title derived from, them, where no equitable rights intervene to protect such parties." *McClintock v. Loisseau*, cited. Second. If the deed was not made to defraud the creditors of the grantor, he cannot set up an interest in the land by way of parol trust, and convey, or contract to convey, that to a third party. The statute of frauds and the rule against the admission of parol evidence to contradict, vary, or add to written contracts, make it impossible to create such an equitable title. *Troll v. Carter*, 15 W. Va. 567. It is not claimed here in any form that E. L. Williams procured the deed by any fraud perpetrated upon R. P. Williams, the grantor; nor that the latter owed the former a debt for which the land was conveyed as security; nor that the land was conveyed to the former by a third person in consideration of money paid or furnished by the latter. The case is not within any of the exceptions to the rule noted in point 2 of the syllabus of *Troll v. Carter*. The grantor here claims the grantee was to hold the land upon a secret parol trust for him, the grantor, in direct contradiction of the terms of the deed, and has sold that alleged equitable title to Poling. It is for that Poling sues, and it is a nonentity. The case, in this aspect of it, falls exactly within the principle announced in point 3 of the syllabus of *Troll v. Carter*.

But it is urged that Mrs. Stout had notice of Poling's contract with R. P. Williams. That is wholly immaterial. He clearly had nothing under that contract of which anybody could take notice. It was like waste paper. It conferred no right, title, or interest of any kind in the land. Parties are presumed to know the law, and in view of this principle Mrs. Stout knew Poling had acquired nothing by his contract, for R. P. Williams had nothing to sell him.

As stated in the bill, therefore, the case is wholly without any equity. It does not aver any purchase from, or contract of purchase with, E. L. Williams, nor that R. P. Williams was the agent of E. L. Williams, and made the alleged contract with Poling as such agent and on behalf of said E. L. Williams. Although not demurred to, the bill cannot support a decree, as it sets out an alleged bad claim, unenforceable in any court, and not a good cause of action insufficiently stated. It should have been dismissed at the hearing, unless the case made by the evidence showed that the bill could be made good by amendment and sustained by proof. Nor is it proved that R. P. Williams, as agent of E. L. Williams, had made a contract of sale to Poling. The evidence of both Poling and R. P. Williams conforms to the allegations of the bill. Poling says he bought the land of R. P. Williams and his wife, and the written contract reads as follows:

"Parsons, W. Va., Feb. 18th, 1901.

"I, this day, sell to U. S. Poling 40 acres of land I now own on Salt Lick in Randolph

County, W. Va., for the sum of \$95.00. I hereby receive as a part of said consideration \$13.33 which sum is to be deducted from the total consideration of \$95.00 and I further agree to make or cause to be made to the said Poling a deed properly acknowledged and stamped ready for recordation.

"R. P. Williams.

"Amanda J. Williams."

He immediately showed it to W. F. Stout, and does not say he told him he had had any communication whatever with E. L. Williams, or that R. P. Williams was acting for E. L. Williams. Under this contract he says he immediately went upon the land, and did some clearing, and put out fruit trees. R. P. Williams testifies that he was the owner of the land, sold it to Poling, and sent his brother a deed to execute, which the latter returned unexecuted, but told him to sell the land, and later wrote witness another letter saying he had better not make a deed, but hold it awhile. One of the letters is in the record, and says, under date of March 20, 1901: "Lony I cannot get away from the children to acknowledge the deed. I don't think it necessary anyhow. I will just say in this letter I give you all claims I have on the land, if you sell it do so you and I can settle afterwards. I send you the deed. I have no claim on it now." It does not appear that either Poling or Stout ever saw this letter, if it can be treated as a power of attorney or evidence of agency. Poling did nothing on the faith of this letter, for it is dated a month after the alleged contract was made under which he says he immediately took possession, and he does not say he ever saw it, or had any communication with E. L. Williams. It gives no authority to represent E. L. Williams as agent. He disclaims any interest in the land and uses no word or phrase which binds him to do anything. It is not a communication to Poling, nor an adoption of or agreement to carry out the contract made by R. P. Williams. Mrs. Stout was not bound or estopped by notice of anything short of a contract between E. L. Williams and Poling. She was bound by notice of any interest he had acquired in the land, but nothing short of an enforceable contract with E. L. Williams, made in person or by agent, amounted to such interest. Notice of mere negotiations pending is not sufficient if it can be said that any were pending. The principle invoked is that, if a subsequent purchaser has notice of a contract relating to the property, he is liable to the same equity, and stands in the same place, and is bound to do the same acts which the person who contracted, and whom he represents, would be bound to do. 1 Story's Eq. Jur. § 296; Fry, Spec. Per. § 135, p. 113; Bryant v. Booze, 55 Ga. 438; Taylor v. Sibbert, 2 Ves. Jr. 437; Potter v. Sanders, 6 Hare, 1; Wade on Notice, § 55. E. L. Williams was inactive, passive, suffering his brother to do as he

pleased with the land, and did not act binding upon himself until he executed the deed to Mrs. Stout, and then all the purchase money was received by R. P. Williams. There never was any promise or agreement on the part of either Poling or Mrs. Stout to pay any money to E. L. Williams, nor any agreement by him to convey to either of them. Hence Poling had no interest of which Mrs. Stout could take notice, nor any contract with E. L. Williams enforceable in this suit, so far as appears from either his bill or his evidence. Therefore he was not entitled to any decree on his bad bill, and it appears that an amendment would be useless.

For these reasons the decree complained of is reversed, the injunction dissolved, and the bill dismissed.

(55 W. Va. 63)

**TYREE v. VIRGINIA FIRE & MARINE
INS. CO.**

(Supreme Court of Appeals of West Virginia.
Feb. 16, 1904.)

INSURANCE—INSURABLE INTEREST—APPLICATION—FALSE STATEMENTS—CONDITIONS OF POLICY.

1. A husband living with his wife in a house which is on her separate estate has no insurable interest therein.

2. A false statement by an applicant for insurance to the agent that such applicant is sole and absolute owner of the house, the agent not knowing to the contrary, avoids the policy.

3. An insurance policy provides that, "if the title or interest of assured is less than the entire, absolute, unconditional, unincumbered, fee-simple ownership," the insurance company shall not be liable under the policy. Such provision is reasonable, and, if the insured has not such title or interest, no recovery can be had on the policy.

(Syllabus by the Court.)

Error from Circuit Court, Greenbrier County; J. M. McWhorter, Judge.

Action by W. F. Tyree against the Virginia Fire & Marine Insurance Company. Judgment for plaintiff. Defendant brings error. Reversed.

Williams & Dice, for plaintiff in error. Gilmer & Gilmer and Preston & Wallace, for defendant in error.

BRANNON, J. The Virginia Fire Insurance Company issued a policy to W. F. Tyree insuring a house and some furniture. The policy is in Tyree's name. The policy contains a clause that the company should not be liable under it "if the title or interest of assured is less than the entire, absolute, unconditional, unincumbered fee-simple ownership" in Tyree. The land was the separate estate of his wife. He built the house upon it at his own expense, and lived in it with his wife. When Tyree applied to the agent for insurance, Tyree says he said to the agent, "I want my house insured," but

the agent did not interrogate him as to his title. There is controversy only as to the loss from destruction of the dwelling house. The company tendered return of the premium. Tyree brought suit on the policy, recovered verdict and judgment for \$1,875 of the \$2,000 insurance on the house, and the company brought the case to this court.

A vital question is, had Tyree an insurable interest in the dwelling house, it being his wife's separate estate? I am perplexed upon the question. "It has become a fixed rule of insurance law that the assured must have an interest of some kind in the subject-matter of insurance, whether property or life. Two reasons may be assigned for this rule. In the first place, it is inexpedient that a contract so necessary for the protection of legitimate business should be prostituted to illegal uses as a mode of speculation; and, in the second place, it is opposed to public policy, because demoralizing to the insured, that he should be permitted to enter into any contract under which he would have an interest in the destruction of the subject-matter, rather than in its preservation." 16 Am. & Eng. Ency. Law, 846. "When there is no interest at all to be protected, a policy will be invalid, as counter to the spirit and purpose of the contract, as well as against public policy." "When the insured has nothing to lose, but everything to gain, by the event insured against, it would be dangerous and demoralizing to subject the insured to so great a temptation to destroy the property or the life upon which the insurance is effected." May on Ins. §§ 74, 75. "The question whether the husband has insurable interest in the wife's property must depend in great measure upon the statutes of the several states by which the rights of a husband in the wife's property are governed. If the loss of the property will deprive him of its possession, enjoyment, or profits, or any certain benefits growing out of it, or of a security or lien therein, it would seem that he has an insurable interest in such property. But, on the other side, if the wife's management of her property is not limited; if she may control absolutely its income; if she may lease it without his consent, and her lessee may expel him from possession; if during her lifetime he has no interest, no inchoate rights therein, nor even a right of occupancy, and after her decease his only rights would be acquired by descent, and not inchoate, which would be perfected thereby—he would, on general principles, seem to have no such pecuniary interest in the preservation of her property as would constitute an insurable interest." Joyce on Ins. § 1049. Under this statement it is hard to say that he has an insurable interest in this state. The wife has by statute power to lease, take all rents and profits to her sole use, and the husband has no control over her separate estate, does not take by descent, and has no right of

¶ 1. See Insurance, vol. 23, Cent. Dig. § 153.

possession by law during marriage, and has no curtesy initiate. The able jurist Judge Cooley said that, if the husband could insure in his own name his wife's property, "it is manifest that any person may obtain insurance upon property without any right in it whatever. He has but to disclose the facts, and the policy, though only a wager policy, will be as legal as any other. But such a doctrine is at war with the fundamental principles of insurance, which require that a person shall have an insurable interest before he can insure. A policy issued when there is no such interest is void, and it is immaterial that it is taken in good faith, and with full knowledge. The policy of the law does not admit of such insurance, however willing the parties may be to enter into it. The doctrine of waiver has obviously nothing to do with such a case. The agent cannot do for the company by waiver what it is powerless by express contract to do for itself. He cannot, by waiver, invest the insured with an interest he does not own. There was occasion to consider this question in *Peoria v. Hall*, 12 Mich. 202, and it was held that an insurance of partnership property by one partner in his own name could not be made to embrace the interest of the other partner, though it was written by the agent with full knowledge of the fact. The reason is the one above assigned. It is not competent to write an insurance where an insurable interest is wanting. The difficulty is inherent in the case, and is beyond the reach of waiver. It is proper to say that under our statute the husband has no control whatever over his wife's property; so that the question arises here precisely as it would had the silver been owned by a stranger." So was the decision *Agricultural Ins. Co. v. Montague*, 88 Mich. 548, 31 Am. Rep. 326. This holding is sustained by *Trott v. Woolwich Co.*, 83 Me. 362, 22 Atl. 245, holding that a policy issued on a dwelling in the name of the husband when title was in his wife, the company not being informed that he was not the owner, is void. The reasons are fully stated in *Clark v. Dwelling House Ins. Co.*, 81 Me. 373, 17 Atl. 303. "The Married Women's Acts take away from the husband all right to the possession or control of the wife's separate estate. He has no present right of enjoyment, no interest in the rents. A policy of insurance secured thereon by the husband, who has no insurable interest therein, is unenforceable." *Traders' Ins. Co. v. Newman*, 120 Ind. 554, 22 N. E. 428; *Traders' Ins. Co. v. Barraciff*, 45 N. J. Law, 543, 46 Am. Rep. 792, is to the reverse. *American Central Co. v. McLanathan*, 11 Kan. 533, cited to the contrary, is not so, as the policy was got by the husband as his wife's agent for the benefit of both, though in his name, and the insurer was aware of the facts. *Merrett v. Farmers' Ins. Co.*, 42 Iowa, 11, is cited on this side, but the court said the husband was by the

Iowa Code entitled to hold possession against his wife's will. In this state he is on her property not by binding law, but by leave and sufferance—has no legal tenure. *Horsch v. Dwelling Ins. Co. (Wis.)* 45 N. W. 945, 8 L. R. A. 806, is a case where the husband had the entire beneficial use and possession, had paid for the land, managed it exclusively, took exclusive control of rents and profits, and had an agreement with his wife that she would convey the land to him on request. He thus owned the land. So where he has lien on her land. *Rohrbach v. Germania Co.*, 20 Am. Rep. 451. The case of *Mutual Ins. Co. v. Deale*, 79 Am. Dec. 673, is no support for the husband's insurable interest, because in it he had a marital estate. It is so stated. *Clarke v. Firemen's Ins. Co.*, 18 La. 431, does not support the claim, because the opinion says that by the law of Louisiana the husband has control and management of his wife's personalty. *Cohn v. Va. Ins. Co.*, 3 Hughes, 272, Fed. Cas. No. 2,970, cited in *Joyce* on that side, is a case where the husband's action was defeated on the pleadings, the court saying he could only insure his "right to use" the wife's personalty, thus implying that he could not insure the property. Of course, he can insure where he has curtesy; but he has no estate, only an expectancy of curtesy, like a child. *McNesley v. Oil Co.*, 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562. I see no case except the New Jersey case holding that the husband has an insurable interest, except under special circumstances giving him a right in the property. An insurance company wants to insure the person who has vested property right, which will move him to protect it; not one who has no motive to protect it. In the latter case the insurance tempts him to burn the property. A husband may want to get money from his wife's property for his own use. If he could insure her house, this would be an easy way to accomplish the very thing which the law seeks to frustrate by demanding a property right in the insured. In this case it is charged that Tyree set fire to the house, and evidence given tending to show it. It is true that *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368, holds that, to give an insurable interest, one need not have any actual right of property, but it is sufficient if he or those he represents will suffer injury by the destruction of the property. Still it is meant that he must himself have an interest recognized by law, or those he legally represents must have, as the creditors of an estate are entitled to charge its assets. But in this case the husband did not have any estate, or represent any one. Why did he not insure in his wife's name? He wanted the money himself. By destruction of the house he lost a home is all we can say to support the policy.

Another question: Tyree represented to the agent that he owned the house. As he himself says, he said to the agent, "I want

my house insured," and in the policy he represented that he had "entire, absolute, unconditional, unincumbered fee-simple ownership." An insurer has the right to know the truth about ownership. It would be willing to insure the fee owner, because he would have a motive not to burn the property, but not willing to insure one not owning, for he might have a motive to burn it and get the money. "If the insured states the nature or extent of his interest, he must state it truly. If the nature of the insured's interest is such that it would influence the underwriter to charge a higher premium, or not insure at all, it must be disclosed, for it is material to the risk." "In cases where the misrepresentation is positive, and of a fact actually material, it is not necessary to prove that the representation was fraudulently made. The materiality of the misrepresentation and its falsity does away with the necessity of showing actual fraud." Joyce on Ins. §§ 1858, 1897, 1894. "A false representation as to the interest of the assured in the property is regarded as material, and such as, if substantially false, avoids the policy." Wood on Ins. § 179. Chief Justice Marshall said: "Insurances against fire are made in confidence that the assured will use all precautions to avoid the calamity insured against which would be suggested by his interest. The extent of his interest must always influence the underwriter in taking or rejecting the risk and estimating the premium. So far as it may influence him in this respect, it ought to be communicated to him." Columbian Ins. Co. v. Lawrence, 2 Pet. 48, 7 L. Ed. 335. If the policy requires a statement of interest, it is thus made material, and must be true. 1 May on Ins. §§ 285, 287. "When the condition requires the applicant to have the entire, unconditional, and sole ownership, a policy issued to one who described the property as his frame dwelling house, when his title was only a quitclaim deed from a second mortgage, avoids the policy under the sole ownership clause." Id. § 287b. "A representation may be made by express stipulation material in the sense that inquiry into its materiality is thereby precluded, and the insured will be bound in such case even though the fact be actually immaterial. The truth of the statements being generally made in such cases the basis of the contract, it is sufficient to show they are actually untrue." Joyce on Ins. § 1912. In the same section we find it said, "If a fire insurance policy is conditioned to be void 'in case of any misrepresentation whatever,' any misrepresentation, whether material or not, will avoid it." If a person does not like the conditions, he need not accept the policy. Tyree in words represented that he was sole owner. He assured the company that he had absolute fee simple, and he agreed that, if he had not, the policy should be void. The agent had no knowledge to the contrary. Surely, the com-

pany had the right to insert this condition as a reasonable one for its protection. "A condition that, if the insured is not the sole, entire, and unconditional owner, the policy shall be void, is reasonable and valid, and violation of it will prevent recovery." May on Ins. § 287a. "As the insurer is entitled to rely on the statements of the applicant, the insurer will not be charged with knowledge of the land records, where title might have been investigated." 1 Biddle on Ins. § 671.

Plaintiff's instructions 1, 3, and 4 and special replication to plea 2 are bad for reasons above given. The defendant's five instructions should have been given for the same reasons.

Judgment reversed, and new trial awarded.

(55 W. Va. 19)

PRINCE v. HOLSTON NAT. BLDG. & LOAN ASS'N et al.

(Supreme Court of Appeals of West Virginia. Feb. 16, 1904.)

BUILDING ASSOCIATION—LOAN—CONDITIONS—USURY.

1. Plaintiff, P., and wife, executed to defendant a bond as follows: "\$1,500. Bristol, Tennessee, Dec. 1, 1891. On or before nine years from date we promise to pay the Holston National Building and Loan Association, at its Home office, Bristol, Tennessee, Fifteen hundred dollars, and a premium of \$7.50 per month, together with interest on the sum of Fifteen hundred dollars at the rate of six per cent. per annum, payable monthly"—with an underwritten condition that said interest on the \$1,500, and the monthly premium of \$7.50, and the monthly payments on the shares of stock, and any fines assessed under the rules of said association, and taxes, insurance, etc., as set out in the bond and mortgage securing said loan, should be paid "until said stock becomes fully paid in and of the value of \$100 per share, then it is understood that upon the surrender of said stock to said association this note shall be deemed fully paid and canceled."

Held, that under said contract the obligor was bound to pay the premium of \$7.50 per month until the maturity of the stock upon which the loan was made. Held, further, that the time of the maturity of the stock being indefinite and uncertain rendered the amount of the premium to be paid uncertain, and thereby the monthly payments of premium were required to be paid for an indefinite period, and so rendered illegal, and making the contract usurious.

2. P. having subscribed for 20 shares of the stock of defendant association for the sole purpose of borrowing the par value thereof, \$2,000, and not to hold any part of said stock as investment stock, and the association having refused to loan P. on more than 15 of said shares \$1,500, it was not error to apply all payments of dues made by said P. on the 20 shares of stock on account of the debt of \$1,500 and its legal interest.

(Syllabus by the Court.)

Appeal from Circuit Court, Mercer County; J. M. Sanders, Judge.

Bill by Ash M. Prince against the Holston National Building & Loan Association and another. Decree for plaintiff. Defendant association appeals. Affirmed.

W. Walter McClaugherty, for appellant.
H. A. Ritz and A. W. Reynolds, for appellee.

McWHORTER, J. Ash M. Prince subscribed for 20 shares of stock, of the par value of \$100 per share, in the Holston National Building & Loan Association, of Bristol, Tenn., and a certificate of said 20 shares of stock was issued to him on the 13th day of July, 1891. On the 4th day of August, 1891, the said Prince applied to the association for an advance or loan to him of the full amount of the par value of his stock, \$2,000, and, in his application, offered to pay a premium of 50 cents per month on each \$100 borrowed, and to secure the premium and the loan, with interest at 6 per cent. per annum, by a deed of trust to be executed upon certain real estate in the city of Bluefield, county of Mercer, state of West Virginia. The application having been approved by the association to the extent of a loan of \$1,500 on 15 of the shares, the said Ash M. Prince and Emma J. Prince, his wife, executed the following note or bond:

"\$1,500.00. Bristol, Tennessee, Dec. 1st, 1891. On or before nine years from date, we promise to pay the Holston National Building and Loan Association, at its Home Office, Bristol, Tennessee, Fifteen Hundred dollars, and a premium of \$7.50 per month, together with interest on the sum of Fifteen Hundred * * * Dollars, at the rate of six per cent. per annum, payable monthly.

"This note is for money borrowed on Fifteen shares of the ninth series stock of said Association, and is secured by a mortgage of even date herewith, upon a lot of land in the county of Mercer * * * and State of West Virginia. Now if we pay promptly the monthly interest on said sum of \$1,500.00 and the monthly premium of \$7.50 bid by us for said loan and the monthly payments on said shares of stock and any fines assessed under the rules of said Association, and the taxes accruing on the lot of land described in the mortgage securing this obligation, and the premiums necessary to keep the house on said lot insured in such sum as said Association may require (not exceeding \$1,500.00) until the said stock becomes fully paid in and of the value of \$100 per share, then it is understood that upon the surrender of said stock to said Association this note shall be deemed fully paid and canceled. But if we fail to pay promptly when due and payable, the said taxes and insurance, premiums, or default in the payment of said monthly interest, monthly premiums, fines and monthly payments of said stock for a period of six months after the same are, or any installment thereof is due, then, at the option of the said Association the whole indebtedness evidenced by this obligation (including any taxes and insurance premiums due or paid by said association) shall at once become and be due and collectible, and a foreclosure

of said mortgage in the manner therein provided may be had.

"It is further understood that this Note is made with reference to, and under the laws of said State of Tennessee; and if paid before seven years from its date, such rebate from the premium included herein will be allowed, as the Board of Directors of said Association shall deem equitable.

"Witness our hands and seals the day and year first above written. Ash M. Prince.
[Seal.] Emma J. Prince. [Seal.]"

And at the same time they executed a deed of trust to W. W. McClaugherty, trustee, with covenants of general warranty of title, on certain real estate therein described, to secure the said note or obligation, and the payments therein provided for, according to its provisions, and provided that, if the obligors should comply with their undertaking in said obligation till the same should be paid or canceled as therein provided, then the conveyance should become and be void, but that if default should be made at all, or in any of the particulars mentioned in said note or obligation which should make the same due, then the trustee was authorized, when thereto required, in writing, by any party interested, and after having given notice required by section 6 of chapter 72 of the Code of West Virginia of 1884, to proceed to sell the property conveyed to the highest bidder at public auction. Default in some of the payments having been made as provided for in the deed of trust, and the trustee, McClaugherty, being requested so to do by the association, he advertised the property for sale on the 23d of October, 1897. On the 6th of October, 1897, Ash M. Prince presented his bill in equity against the Holston National Building & Loan Association and W. W. McClaugherty, trustee, alleging that the contract was usurious and unlawful, and that the payments that he had made to said association had more than paid his debt and interest to the said association, and alleging that, under the facts and circumstances set out in his bill, he was entitled to have the sale of the property forever enjoined, and to have the usury expunged from said contract, and to have a decree compelling said defendant loan association to release the lien of said trust deed, and to have a decree against the defendant loan association for whatever sum might be ascertained to be due to the plaintiff by the defendant loan association, for which, and for general relief, plaintiff prayed; and on the said 6th of October, 1897, the said judge granted the plaintiff an injunction as prayed for until the further order of the circuit court of Mercer county, or of the judge in vacation, which injunction was to take effect upon bond being given as required by the order. The defendant association filed its demurrer and separate answer to the bill, denying the material allegations thereof, and claimed there

was yet due the association from the plaintiff on account of said loan on the 1st day of September, 1897, the sum of \$962.79, and filed a statement of account with its said answer. Depositions were taken and filed in the cause, and on the 13th day of May the same was argued and submitted to the court, and time taken until the next term, with leave to counsel to file briefs before the judge in vacation. On the 21st of February, 1900, the cause was heard upon the bill and demurrer and answer of the defendant association, the orders made, and the depositions of witnesses, and upon the motion of the defendant association to dissolve the injunction, and upon the written briefs of counsel. And the court was of opinion that there was usury in the contract set up in the bill and proceedings, and that the defendant association was entitled to recover the sum of \$1,500, with interest at the rate of 6 per cent. per annum from the 1st day of December, 1891, subject to be credited by all sums paid by plaintiff (premiums, interest, and dues on stock) as of date of their payment, and referred the cause to a commissioner to ascertain and apply such credits as the plaintiff might be entitled to to the debt of the association, and to ascertain the status of the account between the parties, and report his calculations and any evidence taken by him to the court, and to report such other matter as might be deemed pertinent by himself, or which might be required by the parties in interest; and the injunction was continued until the coming in of the report of the commissioner. The commissioner filed his report, based upon said decree of February 21, 1900, showing a balance due from Prince to the association of \$57.43, as of May 14, 1900. The defendant association filed exceptions to said report, and on the 17th of May, 1900, the cause was again heard upon all the former proceedings, and upon said report and the exceptions thereto; and the court overruled the exceptions to the report, and confirmed it in all respects, and entered a decree in favor of the defendant association for \$57.43, as the correct amount remaining unpaid on its lien set up in the cause, and gave the plaintiff his costs, of \$60.03, recovered in the cause, to offset and discharge the said balance due on the lien, and discharged and released the lien, and perpetuated the injunction. From which decree, the defendant association appealed.

The first error assigned is the overruling of the demurrer to plaintiff's bill; the second and third, in refusing to dissolve the injunction on motion made in vacation on the incoming of the answer of the defendant. There is nothing offered on the first assignment of error in the briefs of the defendant to sustain the demurrer, and the bill, on its face, appears to be good. It is insisted in support of the second and third assignments that the plaintiff, having conveyed the real estate in question prior to the institution of

the suit, had no interest therein, and could not maintain his suit; that the plea of usury was personal to himself, and the same could not be maintained for the benefit of his grantees.

The defendant filed as an exhibit with its answer a deed of conveyance made by the plaintiff and his wife to Jacob Bloch and Abraham Bloch, dated on the 2d day of October, 1897, and acknowledged on the 5th, and recorded in the clerk's office of Mercer county on the 14th day of the same month, conveying to said Blochs, in consideration of \$5,708.32, with general warranty, except as to \$5,500 which was secured by deed of trust on the property conveyed, certain property in the city of Bluefield, including the property conveyed and described in the deed of trust made by said Prince and his wife to secure the loan to the defendant association. Appellant insists that, the property having been conveyed before the institution of this suit, which was begun on the 8th day of October, 1897, plaintiff had no further interest in the real estate, having conveyed the same as stated, and the injunction should be dissolved and his suit dismissed. It is true, the defense of usury is personal to the debtor, and that one who purchases land that is under deed of trust for a usurious debt cannot set up the usury against that debt. *Smith v. McMillan*, 46 W. Va. 577, 33 S. E. 283 (Syl., points 1, 2). And point 3 holds that, "where a stranger assumes to pay a usurious debt of another, the intervention of this stranger purges the usury, and he cannot set it up against his obligation to pay." See, also, 2 Pom. Eq. Jur. § 937. It appears from the evidence in case at bar, however, that the Blochs, vendees of said Prince, did not assume the payment of the said lien, and the same was not included in the \$5,500, to secure the payment of which Prince took a deed of trust. It further appears from the evidence that the deed to the Blochs was not delivered until the 12th day of October, four days after the filing of plaintiff's bill. Defendant's counsel, in support of their position on this question, cite the Virginia case of *Saunders v. Baltimore Building & Loan Association*, 37 S. E. 775. That was a case in which it was alleged in the bill that, on a date prior to the institution of the suit, plaintiff had conveyed the property advertised to be sold under the deed of trust to the loan association, in consideration of a large sum of money mentioned, and the further consideration that the grantees should assume the incumbrance on the real estate thereby conveyed, which included the debt to the loan association; and, the bill having failed to allege that his grantees were insolvent, or that the mortgaged premises would not sell for enough to discharge the lien, or that defendant would have a right of action against him in case the premises did not bring enough to satisfy the first mortgage, it was held that the demurrer to the bill should

have been sustained; and, further, it was held that "the demurrer was improperly overruled, since the relief sought would inure to the benefit of complainant's grantees only, who were not entitled thereto, being bound to discharge the first mortgage by assuming the payment thereof." In *Smith v. McMillan*, supra (Syl., point 5), it is held: "If a sale of land is about to be made for a debt including usury, an injunction lies against it." So it appears from the record in case at bar the plaintiff had the right to interpose the defense of usury, and the court did not err in refusing to dismiss the bill on that ground.

It is well insisted by counsel for appellee that the principles announced in the cases of *Gray v. Baltimore Building & Loan Association*, 48 W. Va. 164, 37 S. E. 533, 54 L. R. A. 217, *Archer v. Baltimore Building & Loan Association*, 45 W. Va. 37, 30 S. E. 241, and *Floyd v. National Loan & Investment Company*, 49 W. Va. 327, 38 S. E. 653, 54 L. R. A. 536, 87 Am. St. Rep. 805, are conclusive of the case at bar; it being held in said causes that a building and loan association may fix a minimum premium, payable in advance or in periodical installments, but such premium must be a lump sum, certain and definite, and not a percentage payable indefinitely at fixed periods. All those cases were based upon contracts fixing a premium to be paid in periodical installments, which payments were to be continued just as the interest and dues on the stock subscribed were to be paid until the stock subscribed for, and upon which the loan was made, should be matured. The date of the maturity of stock, being contingent upon the amount of business done by, and the judicious and economical management of, the association, was necessarily indefinite and uncertain. The payments of premiums in those cases were not for a fixed period of time, but were to continue until the maturity of the stock, which was liable to run indefinitely, and depended upon the economical management and the business prosperity of the association. A close inspection of the contract in the case at bar makes it clear to my mind that it is liable to the same objection. Notwithstanding the bond is payable "on or before nine years from date," it specifically provides that "the monthly interest on said sum of \$1,500, and the monthly premium of \$7.50 bid by us on said loan," and the dues on the stock, fines, taxes, insurance premiums, etc., shall continue to be paid "until the said stock becomes fully paid in and of the value of \$100 per share," which can mean nothing but the time of the maturity of the stock upon which the loan was made, which renders the time which the periodical payments of premiums shall run indefinite and uncertain; thus bringing this case clearly within the rulings of this court in the cases cited and relied upon by appellee.

The contract in the case at bar has been

construed by the Supreme Court of Appeals of Virginia in the case of *Counselman v. Holston National Building & Loan Association* (Va.) 33 S. E. 603. The form of the contract in that case is precisely that used in the case at bar. It is there held (Syl., point 2): "Where the premium bid by a borrowing member of a building and loan association is payable only on maturity of the loan, and that period is fixed by the bond and the deed securing it, the amount of the premium is sufficiently certain." Judge Riley, in delivering the opinion of the court, says: "The ground of the objection is that the premium is not definite and certain, because its payment in installments is provided for in the bond, and in the deed of trust securing the same, until the stock of the appellant matures, which time is necessarily indefinite, and renders the amount of the premium uncertain. This is an erroneous construction of the contract. The premium is only payable until the maturity of the loan. That period is fixed by the bond and the deed of trust securing it. The payment of the premium cannot be exacted beyond that time. The date of the maturity of the loan is fixed and definite, and renders the amount of the premium definite and certain." And he cites *Thompson on Building & Loan Associations*, § 190, which says, "A premium bid for the right of precedence in taking a loan cannot be collected after the maturity of the loan;" citing *Savings, etc., Association v. Stevens*, 3 Wkly. Law Bul. 113. I have been unable to find the case of *Association v. Stevens*, cited by Mr. Thompson, but it seems that case is the only authority upon which his section 190, touching this point, is based. I find, also, section 232, Th. & Bl. on Building & Loan Associations, is to the same effect, and based solely upon the same case, in 3 Wkly. Law Bul. 113. A distinct provision could have been, but was not, inserted in the bond, that monthly payments of premium should cease at the end of nine years, and probably it was so in the case cited by Mr. Thompson (*Savings, etc., Association v. Stevens*, 3 Wkly. Law Bul. 113); but, on the contrary, the bond now under consideration provides that the premium and other things mentioned shall continue to be paid until the maturity of the stock. I cannot understand how the Court of Appeals of Virginia could come to the conclusion that payments of the premium could not be required after the loan became due, when the contract itself is so explicit in its language that monthly payments of premium shall be paid "until the said stock becomes fully paid in and of the value of one hundred dollars per share." Section 2 of article 8 of the by-laws of defendant the Holston National Building & Loan Association provides, "The payments of each share shall be sixty cents per month for each and every month until maturity, commencing the last day of the month following the date of

the certificate." It is impossible to tell when these payments and the fees, fines, and the earnings of the association will mature the stock to the par value of \$100 per share; that being contingent upon the management and conduct and prosperity of the business. Indeed, it may turn out that the stock may never be matured, as is the case with many of the national building and loan associations, largely because of the expense of maintaining a corps of officers on large salaries, in consequence of which the association has to borrow money at a high rate of interest to meet the demands of applicants to borrow. This necessarily renders the time the payment of installments of premium has to be kept up very indefinite and uncertain. Our statute (section 26, c. 54, Code 1899) provides that a loan association "may charge and receive the premium bid by a stockholder for the priority of right to such loans in periodical installments; but the by-laws of every association shall set forth whether the premium bid for the prior right to the loan shall be deducted therefrom in advance or be paid in periodical installments." In the Cases of Archer, Gray, and Floyd, before referred to, where it is held that the minimum premium "must be a lump sum, certain and definite, and not a percentage payable indefinitely at fixed periods," it is so held because in the contracts then under consideration there was no definite time fixed at which the monthly payments of premium should cease, and beyond which further payments should not be collected; hence the whole amount of the premium was not, and could not be, fixed, definite, and certain. But where it is provided that the monthly premiums of a specified amount for each monthly or periodical payment shall continue not exceeding a given number of months, it is rendered certain and definite, because it cannot go beyond the number of months designated; and if it should cease, by reason of maturity of the stock and the consequent payment of the loan, in a shorter time, surely the borrower could not complain.

It is contended by appellant the contract involved in this cause is a Tennessee contract, and that the "matters connected with the performance of the contract (i. e., its interpretation and the like), and operations of the parties thereto, are regulated by the law prevailing at the place of performance, whether the place of performance is different from, or the same as, the place of execution." This proposition is well settled as applying to the case at bar in the case of Floyd v. National Loan & Investment Co., *supra* (Syl., point 3): "A foreign corporation, coming into this state to transact business, must conform to the law of this state, if there be any, regulating similar corporations organized under the laws of this state; and its contracts, although in terms solvable in the foreign state in which such corporation has its domicile, must be such a contract as a simi-

lar domestic corporation is authorized to make, or the courts of this state cannot enforce, or permit the enforcement of, its performance." The defendant company organized in Mercer county, of this state, a local board, and induced the plaintiff, Prince, to take stock and borrow money from it as a building and loan association, securing the loan upon real estate in Mercer county, and attempts to enforce the said contract in the courts of this state, when such contract, if made with a similar corporation organized under the laws of this state, could not be enforced, because usurious. This being the case, the defendant will not be permitted to enforce the same.

The appellant says the court erred in overruling its exceptions to the commissioner's report in crediting upon the loan all the money paid by plaintiff as dues upon the 20 shares of stock subscribed by him, when it should have been applied to the maturity of the stock. It is true, plaintiff only borrowed on 15 shares, but it was all one transaction. The record shows that he subscribed only for the purpose of borrowing, and was to have \$2,000 on loan, and hence subscribed for the 20 shares. But after he had subscribed for the 20 shares the defendant refused to loan to him more than the par value of 15 shares. The plaintiff did not subscribe for the purpose of holding the 5 shares as investment stock, and, the loan being, because of its usurious nature, a straight loan of \$1,500 at 6 per cent. per annum, all payments made by plaintiff on account of dues, premiums, fines, etc., were properly applied to the payment of the debt and interest.

There is no error in the decree, and the same is affirmed.

(55 W. Va. 30)

RATLIFF v. SOMMERS et al.

(Supreme Court of Appeals of West Virginia.
Feb. 16, 1904.)

EQUITY—PLEADING—AMENDMENT—SPECIFIC PERFORMANCE—PAROL PURCHASE.

1. It is impracticable to lay down a rule in reference to amendments of equity pleadings which shall govern in all cases. Their allowance must at every stage of the cause rest in the discretion of the court, and that discretion must depend largely on the special circumstances of each case. The ends of justice should never be sacrificed to mere form, or by too rigid an adherence to technical rules of practice.

2. Courts are much stricter in permitting amendments to answers than to bills.

3. Where a purchaser under a parol contract has been placed in possession, and held under the contract, and paid all or part of the purchase money, and made valuable, permanent improvements upon the land, and such possession has been actual and exclusive, and not as a tenant of the vendor, he may maintain his bill in a court of equity for specific performance.

(Syllabus by the Court.)

Appeal from Circuit Court, Lewis County:
W. G. Bennett, Judge.

¶ 3. See *Frauds*, Statute of, vol. 22, Cent. Dig. § 326; *Specific Performance*, vol. 44, Cent. Dig. §§ 126, 127.

Bill by William Ratliff against Martha M. Sommers and others. Decree for plaintiff, and defendants appeal. Affirmed.

Linn & Bland, for appellants. Edward A. Brannon and Louis Bennett, for appellee.

McWHORTER, J. William Ratliff filed his bill in the circuit court of Lewis county against Martha M. Sommers et al., heirs at law and administrator de bonis non with the will annexed of G. D. Camden, deceased, for the purpose of enforcing specific performance of a contract made with the said G. D. Camden in his lifetime for a tract of 88½ acres of land on Oil creek, setting forth the metes and bounds thereof in his bill—alleging that negotiations were commenced as early as 1874 for the purchase of said land—and filed with his bill, as exhibits, certain letters and fragments of letters from G. D. Camden indicating such negotiations, and also two letters as follows:

"Wm. Ratliff, Esq.: Your letter was duly received some weeks before we left home and I expected to have written you before we left but was too busy to look over your account since coming here I have looked it over and find it all right. I wish you would buy the land and you can have it for \$4 an acre. I will let your account of \$150 go as a payment on the land. If you wish it and you can have all the time you wish to finish paying for the land. Please see that no one cuts any of the timber on adjoining lands. Yours truly, G. D. Camden, per Mrs. G. D. Camden, Florida, March 28th, 1884."

"Eureka Springs, March 20th, 1888. Wm. Ratliff, Esq. I received your letter and I am glad to hear you are well. I am much improved since I came here. I thank you very much for the money you sent \$160. This about or quite pays off your land and you better take the other little piece that joins you and you will have a nice farm on Oil Creek. My lands give me so much trouble to keep people from stealing the timber that I am going to sell them all. Please regard this letter as a receipt. I will be home soon and will make a deed. Yours truly, G. D. Camden, per Mrs. Camden."

He alleged that said letters so received constituted a valid and binding contract against said Camden and his estate for the specific conveyance by deed to plaintiff of said tract of land; that plaintiff had control and management of quite a quantity of said Camden's lands in Lewis county, and was employed by Camden to watch and look after the same, and keep trespassers from cutting timber and doing damage to the same, and for which work Camden promised, verbally and in writing, to pay him therefor, and the same was to go as a credit on said land purchase, which work, with the cash shown by said receipts to have been paid on said land, had fully and more than paid for said tract at the price of \$4 per acre; that, at the date

of the letters written from Florida, Camden possessed a large number of tracts in Lewis county, and had extensive business interests generally, and about the date of the said letters his health became impaired, but he retained his mental vigor up to the time of his death, and during the period of 1884, and up to 1889, his wife, Mrs. Camden, was authorized by him to do and perform such work and acts as were represented by said letters, contracts, and receipts, which he would dictate to her, and she would write at his instance and request, and she would sign many of his important legal papers, such as contracts for sale of land, receipts for purchase money, and other papers, as appear by the contracts, letters, and receipts made a part of the bill; that Charles W. Lynch was appointed and qualified as administrator de bonis non with the will annexed of G. D. Camden—and praying that the said heirs at law be required to execute and deliver a good and sufficient deed conveying to plaintiff the said tract of land, and for general relief.

The defendant Charles W. Lynch, administrator, filed his demurrer and answer to the bill, and for ground of demurrer said that Myra H. Camden, who was named in the process, but not made a party by the bill, but expressly stated therein not to be a necessary or material party, was a necessary party to the bill, and pleaded the statute of limitations, and answered, denying that G. D. Camden had ever sold the land to plaintiff as claimed in his bill, and averring that John J. Davis and T. B. Camden, trustees named in a settlement made between the heirs and Myra H. Camden concerning the contest of the will, by deed dated the 21st of March, 1895, conveyed to the said heirs at law, "all and singular, all the unsold and remaining lands that were conveyed to parties of the first part [trustees] by the deed aforesaid for the purposes in said deed mentioned, in the State of West Virginia, and elsewhere in any other state or country, and all the lands conveyed by said G. D. Camden to said Myra H. Camden and not sold and not conveyed by the said G. D. Camden, or sold and conveyed to her by parties of the first part."

The defendants Martha M. Sommers et al., heirs at law, also filed their demurrer and answer, insisting that Myra H. Camden was a necessary party to the suit, and denying the sale to the plaintiff as alleged in the bill.

Depositions were taken and filed in the cause, and on the 18th day of March, 1899, the plaintiff tendered his amended bill, which was filed, and remanded to rules, for the purpose of issuing process thereon and maturing the cause for hearing. The amended bill alleged that Myra H. Camden, who had intermarried with G. W. Atkinson, was a necessary party to the suit; and alleging in said bill that said G. W. Atkinson, by reason of his marital relations, had also become a necessary party, and asking that the original

bill be read as a part of the amended bill, and alleging that the said G. D. Camden, being the owner thereof, at one time sold to one James Gay, by specific metes and bounds, which are set out in the bill, as well as the amended bill, the said 88% acres of land on Oil creek, which sale was afterwards canceled and annulled, and the same again became the property of Camden, who for many years owned this and other lands in that section, and employed Ratliff to look after the same for him, and to attend not only to his general interests there, but especially to his interests in a warmly litigated suit about land pending in the circuit court of Lewis county between the said Camden and one John Keith et al., and promised to pay Ratliff a proper consideration for his services; that, in pursuance of said employment, he had, at great inconvenience to himself, and at the loss of the friendship of many of his neighbors, done work and performed services up to the spring of 1884 to the amount of \$150 and more, which said Camden then agreed to pay to him, and still continued in the service and employment of Camden, and his service thereabouts amounted to a large sum, which Camden agreed to pay; that about 1886 or 1887 he and said Camden had an oral agreement by which Camden sold him the land at \$4 per acre, he to have credit for the amount due him for services, and the residue, when ascertained, to be paid by Ratliff, who took possession of said land under said purchase with full knowledge and by the express consent of Camden, and had continued in adverse possession under said sale ever since; that Camden then and repeatedly thereafter promised Ratliff to draw up and execute a writing setting out the sale and the terms thereof, but, being old and feeble in health, he put off and delayed the execution of the same until the 24th of June, 1888, when, plaintiff having fully paid up the entire purchase money on said land, said Camden authorized and directed W. B. McGary to execute and deliver for him to plaintiff a writing setting forth said sale and the payment of the purchase money, which he did, being general agent for Camden to sell his Oil creek lands, as well as other lands, and, in pursuance of his general as well as of his special authority, executed on behalf of G. D. Camden a writing selling said tract of land to said Ratliff at said \$4 per acre, and stating that the entire purchase money had been duly settled with said Camden, signing the same with the name of G. D. Camden, by W. B. McGary, his attorney, and delivered the same to plaintiff; alleging that said Camden died on the 21st of April, 1891, without having made him a deed for said land, though he had repeatedly promised to do so; that he left surviving him the heirs at law named, and his wife, Myra H. Camden; that he left a will in which he devised all of his real estate to his said wife (now Myra H. Atkinson); that said will was duly admitted

to probate; that proceedings to set aside the will were instituted by the heirs at law of Camden, which were finally compromised, and Myra H. Camden conveyed to John J. Davis and T. B. Camden many of said G. D. Camden's lands, but expressly reserved in herself the title to all lands sold by G. D. Camden in his lifetime, and remaining unconveyed at the time of his death; and that said trustee, after having sold many tracts of said land under the trust, conveyed the residue of the tracts to the said heirs at law. Therefore plaintiff says that the title to said tract of 88% acres of land was still in said Myra H. Camden, unless the court should hold that there was never a sale in the lifetime of said Camden, in which case it would be in the said heirs at law; that neither the said Myra H. Atkinson, nor the said heirs at law, had ever conveyed the land to plaintiff, and refused to do so, but that said land was sold to plaintiff and fully paid for, and prayed that it be decreed to him.

On the 23d of June, 1899, the defendants the heirs at law and R. M. Ramsburg, administrator of G. D. Camden, deceased, who had been appointed in the place of Charles W. Lynch, moved the court to reject the said amended bill for the reasons set out in a paper filed with the said motion, and also excepted to so much of the deposition of Louis Bennett, filed March 11, 1899, and the depositions of R. B. Brinkley and W. C. Ratliff, filed March 1, 1899, as related to the alleged contract or writing made by W. B. McGary, referred to in the amended bill. The court overruled the motion to strike out the amended bill, but sustained the exceptions to the depositions of Louis Bennett, R. B. Brinkley, and W. C. Ratliff, and suppressed so much of said depositions as related to the alleged contract; and said defendants then and by leave of the court filed their several answers to the said amended bill, and leave was granted to plaintiff to retake the deposition of Louis Bennett, R. B. Brinkley, and W. C. Ratliff as to the matters suppressed, so far as relevant, upon proper notice. The paper filed with the motion to strike out the amended bill and suppress the depositions asks that the amended bill be rejected because the new matter alleged therein, if true, must have been known by plaintiff and by the attorney who wrote the original bill at the time, as well as when the amended bill was written, and that, according to his own showing, plaintiff had been guilty of such neglect that he was not entitled to maintain his amended bill; citing *Foutty v. Poar*, 35 W. Va. 70, 12 S. E. 1096 (Syl., point 2), and other authorities. It also moved the court to strike out all that part of the amended bill which alleged a contract, written and signed and delivered by McGary, as agent for Camden, and that McGary was the agent of said Camden, and also all that part alleging an oral purchase of the land made by the plaintiff in 1886 or 1887, because, by said

amended bill, if issue was joined on the amended bill and answer, and evidence had been taken on both sides departs from the foundation of the suit, by seeking to set up and rely upon a written contract made by W. B. McGary as agent, and the evidence shows that said McGary wrote the original bill. The depositions of Louis Bennett and W. C. Ratliff were retaken.

The cause was heard on the 1st day of April, 1901, when the court decreed that William Ratliff purchased said tract of land from Camden, as alleged in his bills, at the price of \$4 per acre; that the purchase price had been fully paid and satisfied, and that plaintiff was entitled to a specific execution of said sale and conveyance of said land to him; that the legal title thereto was in said Myra H. Atkinson—and decreed that she and her husband, G. W. Atkinson, convey the same to plaintiff by proper deed, and, in default of their executing such deed, appointed W. B. McGary and Louis Bennett special commissioners to make the deed on their behalf, and decreed costs against appellants. The defendants Dora E. Ramsburg, Genevieve B. Parr, Martha M. Sommers, and Wilson L. Camden appealed from said decree, assigning as errors that the contract was not proved as alleged; that the evidence in support of plaintiff's pretensions was insufficient, and much of it fabricated; and in hearing the cause on the amended bill and entertaining that bill; and because the court should have refused relief to plaintiff because the evidence shows he came into court with unclean hands.

It clearly appears from the record that Myra H. Atkinson was a necessary party to the suit, as the legal title to the land in question remained in her, if the negotiations between Ratliff and Camden in his lifetime amounted to a sale of the land; and, if the court should so hold, it would then become necessary for her to make the conveyance to the plaintiff, so that, as far as parties to the suit were concerned, an amended bill was necessary to bring her and her husband in as parties. In *Rexroad v. McQuain*, 24 W. Va. 32 (Syl., point 1), it is held: "It is a cardinal rule in equity that all persons materially interested, either legally or beneficially, in the subject-matter of the suit, must be made parties to the suit." *Gall v. Gall*, 50 W. Va. 523, 40 S. E. 380; 1 *Hogg's Eq. Proc.* §§ 36, 323, 324. When the proofs in a cause show that the plaintiff has a cause of action which entitled him to relief, that it is of similar nature to that alleged in his bill, and such as might be made available by proper amendments of his bill, the court will not dismiss the original bill without giving plaintiff an opportunity to amend within a reasonable time. *Doonan v. Glynn*, 26 W. Va. 225. "A plaintiff in a suit in chancery can only obtain relief upon the case made in his bill, and not on a substantially different case made by the proof. But where the case made by the

proof shows a right to relief, and is not so different from the case made in the bill that, under the rules of chancery pleading, it could not be amended, the plaintiff will be allowed to amend his bill to conform to the true state of the case." *Lamb v. Cecil*, 25 W. Va. 288 (Syl., point 3); *Id.*, 28 W. Va. 653; and, to the same effect, 1 *Enc. Pl. & Pr.* 485, and cases there cited. The amended bill in the case at bar in no wise contradicts the allegations of the original bill, or is inconsistent therewith. It alleges a parol sale of the land in 1886 or 1887, as shown by the original bill, showing negotiations and acknowledgments of plaintiff's payments and rights; and, as further evidence of said sale and its payment, the amended bill also refers to the writing made by McGary at the instance of Camden and at the request of plaintiff. Section 12, c. 125, Code 1899, makes ample provision for amendment to a declaration or bill before, or even after, appearance of the defendant, "if substantial justice will be promoted thereby"—of course, exacting such terms on the part of the plaintiff as justice in the premises may demand. See *Bird v. Stout*, 40 W. Va. 43, 20 S. E. 852 (Syl., point 4). "Subject to the rights of the opposing party, amendments to the pleadings can usually be made at any time before the jury have retired, or the hearing in equity is at an end." *A. & E. Enc.* (1st Ed.) 553, and cases there cited; 1 *Hogg's Eq. Pr.* § 322. In *Hardin v. Boyd*, 113 U. S. 756, 5 Sup. Ct. 771, 28 L. Ed. 1141, Justice Harlan, in delivering the opinion of the court, at page 761, 113 U. S., and page 773, 5 Sup. Ct., 28 L. Ed. 1141, says: "In reference to amendments of equity pleadings, the courts have found it impracticable to lay down a rule that would govern all cases. Their allowance must, at every stage of the cause, rest in the discretion of the court, and that discretion must depend largely on the special circumstances of each case. It may be said generally that, in passing upon applications to amend, the ends of justice should never be sacrificed to mere form, or by too rigid an adherence to technical rules of practice." *Wiggins Ferry Co. v. Railway Co.*, 142 U. S. 396, 413, 12 Sup. Ct. 188, 35 L. Ed. 1055; *Crockett v. Lee*, 7 Wheat. 522, 5 L. Ed. 513; *Watts v. Waddle*, 6 Pet. 389, 8 L. Ed. 437; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273; *Walden v. Bodley*, 14 Pet. 156, 10 L. Ed. 398; *Neale v. Neale*, 9 Wall. 1, 19 L. Ed. 590. The case of *Foutty v. Poar*, 35 W. Va. 70, 12 S. E. 1096, cited by the appellants to show that the court should not have permitted the filing of the amended bill, is not in point. "Courts are much stricter in permitting amendments to answers than to bills." 1 *Hogg's Eq. Proc.* § 343, and authorities cited under "188." In case of *Foutty v. Poar* it is said: "To file an amended answer, it should appear that the reasons for it are cogent and satisfactory; that the mistakes to be corrected or facts to be added are

made highly probable, if not certain; that they are material; that the party has not been guilty of gross negligence; and that the mistakes have been ascertained and the new facts have come to the knowledge of the party since the original answer." Citing *Matthews v. Dunbar*, 3 W. Va. 138; *Wyatt v. Thompson*, 10 W. Va. 645; *McKay v. McKay's Adm'rs*, 33 W. Va. 736, 11 S. E. 213. In the case at bar *W. B. McGary* prepared the bill, and in his deposition he gives sufficient reasons for not filing it with the original bill. There is no negligence on the part of plaintiff himself in the preparation of his bill. In *Davison v. Davison*, 13 N. J. Eq. 246: "The bill in this case permitted to be amended after final hearing so as to make the contract alleged agree with that proved." *Abbott v. L'Hommedieu*, 10 W. Va. 677 (Syl., point 2), it is held: "The exercise of the equity branch of jurisprudence respecting the rescission and specific performance of contracts is not a matter of right in either party; but it is a matter of discretion in the court, not, indeed, an arbitrary or capricious discretion, dependent upon the mere pleasure of the judge, but of that sound and reasonable discretion which governs itself, as far as it may, by general rules and principles, but at the same time which withholds or grants relief according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties." And in *Lowry v. Buffington*, 6 W. Va. 249 (Syl., points 1 and 2): "(1) When there has been a part performance of a contract for the sale of land, by the purchaser being put into possession of the property, and payment of the purchase money, or a part thereof, and an offer to pay the residue according to contract, and valuable improvements have been made on the land by the purchaser on faith of the contract, the statute of frauds cannot be successfully pleaded in bar to the performance in a court of equity. (2) Applications to the court to compel specific performance are addressed to its discretion, but it is not an arbitrary or capricious discretion, but a sound judicial discretion, regulated by the established principles of the court." "It is apparent that the general rule requires the contract sought to be specifically enforced to be in writing, and signed by the party to be charged, or his agent. But courts of equity treat parol contracts for the sale or exchange of real estate, when there has been part performance, as valid and as effectual as things evidenced by the most solemn instruments in writing." *Hogg's Eq. Proc.* § 398, and cases there cited. And in the same section it is said: "In order to prevent the possibility of fraud, however, in ingrafting this exception upon the statute of frauds, it is settled that the parol agreement relied upon must be certain and definite in its terms; the acts proved in part performance must therefore result from, or be in pursuance of, the agreement; and the

agreement must have been so far executed that a refusal of full execution would operate as a fraud upon the party, and place him in a situation which would not allow of adequate relief by way of compensation in damages."

Where the purchaser has been placed in possession, and held under the contract, and paid all or part of the purchase money, and made valuable and permanent improvements upon the land, and such possession having been actual, adverse, and exclusive, and not as a tenant of the vendor—when this can be shown to the satisfaction of a court of equity—he can maintain his bill for specific performance. *Miller v. Lorentz*, 39 W. Va. 160, 19 S. E. 391; *Gallagher v. Gallagher*, 31 W. Va. 9, 5 S. E. 297; *Goodwin v. Bartlett*, 43 W. Va. 332, 27 S. E. 325; *Middleton v. Selby*, 19 W. Va. 167 (Syl., point 4).

The original bill does not set up the writing made by *W. B. McGary*, agent of *Camden*, dated the 24th day of June, 1888. While the paper written by *McGary* is sometimes referred to as a sale of the land, yet it was not, strictly speaking, a sale. It was a mere memorandum to show that the sale had formerly taken place, and that the purchase money for the land had been paid by *Ratliff*, and that he was entitled to a deed. The evidence of *Brinkley* and *McGary* touching the interview between *Camden* and *Ratliff* at the *Bailey House*, leading up to the making of the paper by *McGary*, was competent to be given under the original bill, as it referred to negotiations which had taken place between *Camden* and *Ratliff* at times prior to that, and to statements then made by *Camden* as to *Ratliff's* right to the land and to a deed therefor.

As to the introduction of the paper writing prepared by *McGary*, it is insisted by appellants that the foundation is not sufficiently laid to prove its contents as a lost paper. Witness *Louis Bennett* states that *W. C. Ratliff* brought the paper to him, and showed it to him; that he made a memorandum of it, and he thinks he gave it back to *Ratliff*, intending to make it a part of his deposition, as proof of the sale; that he had looked carefully through his papers first, wherever he thought it might be found, and had insisted upon *W. C. Ratliff* making a like search; that they had not succeeded in finding it, and that witness did not know where it was; that the paper was dated June 24, 1888, and was in the handwriting of *W. B. McGary*; that it bore evidence of some age, and described the paper upon which it was written, and stated that his memorandum taken from the paper at the time that he saw it was as follows: "*G. D. Camden* to *Wm. Ratliff* by *W. B. McGary* his agt. & atty, dated June 24th, 88—sells land where *Ratliff* lived on *Oil Crk* at \$4 an acre settled with *Judge Camden*." *W. C. Ratliff* swears that he took the paper from *Robert Brinkley*, he thinks about a year and a half before he

testified, on the 15th of August, 1899, and took it to Weston, and gave it to Mr. Louis Bennett to look at; that he did not recollect whether Bennett returned the paper to him or not; that he had made diligent search for it, had looked through all the papers about the house, and was unable to find it, and that he knew no other place where he could reasonably expect to find it; and that he never gave it to anybody else after he showed it to Mr. Bennett. This traces the paper to the possession of Bennett and W. C. Ratliff, and that it was never given to any other person, and they were both sufficiently definite as to their search for it and their inability to find it. Mr. McGary states that Judge Camden had considerable transactions with plaintiff; that he was at Weston on one occasion, and plaintiff and Robert Brinkley were there at the same time; that Ratliff was at Judge Camden for a deed for the land on Oil creek that witness understood Judge Camden had sold him. "Judge Camden told Ratliff and told me to go on and have the matter fixed up, or he would have me to fix it up, and whatever I did would be all right; that he intended Ratliff to have this piece of land, or words to this effect. I told the judge Ratliff's claim about the matter—that Ratliff had done some work on a run which went through the place, which, if it had not been done, would have washed all the bottom land on this piece away. When I left the judge at this time, I was to fix the necessary writing to suit Ratliff, or satisfy him that he would get the land." That after writing the contract between himself, as agent of Camden, and Ratliff, he delivered the same to Brinkley or Ratliff; that, if he delivered it to Brinkley, it was because Ratliff was under the influence of liquor, and did not want to run the risk of his losing it, and the delivery was to Brinkley for Ratliff; "that the contents of the writing was what I gathered and understood from both parties at the time, and prepared it in conformity therewith." There is no question about the sufficiency of the evidence that plaintiff went on to that tract of land and took possession of it as a purchaser about 1887, and has been in such possession of it ever since. Witness Samuel Gay says plaintiff moved on to the place, he thinks, in 1887. That he heard Camden "tell Mr. Ratliff to go on to that place; that the land was his. * * * Mr. Camden says, 'You made me, or saved me, \$800.' He says, 'William, there is a piece over here across the hill adjoining that,' and he would let him have it right." That the piece Ratliff was to go onto was the Jimmy Gay tract. When asked why it was called the Jimmy Gay tract, he answered: "Well, Jim Gay bought the land in the first place, and it was run out to him, and he failed to pay for it, and left it." He also testified that the improvements made upon the place by plaintiff were worth, in his judgment from \$500 to \$600. Joseph O. Keith also testified that he

lived adjoining the land; that plaintiff moved onto the place in 1887; that he made fencing on it, and put some buildings on it—a granary, stable, dwelling house, and other small buildings. J. S. Riffle, a witness 52 years of age, living on Oil creek, and who knew the land claimed by the plaintiff, by the boundaries described, said it had been called the Jimmy Gay tract until since Ratliff bought it, since which time it was called the Ratliff land; that he was with Ratliff and Judge Camden at Clarksburg, and was asked to state the conversation, if any, that he heard between Ratliff and Judge Camden concerning the purchase of this Gay or Ratliff piece of land on Oil creek; and stated as follows: "Well, what I heard stated was this: Mr. Ratliff asked Mr. Camden, 'Have you got my deed made yet?' Mr. Camden says, 'I have not. I have not been well. I have had a heap of work to do. Mr. Ratliff, just as soon as I get able I am coming to Oil Creek, and then I will make you your deed. Mr. Ratliff, you go back home, tend to my land matters, and other matters which I have been directing and writing for you to do for me concerning this Keith matter. Now, Mr. Riffle, I want you to aid Mr. Ratliff all you possibly can concerning this Keith matter. Mr. Riffle, I would like to show to you the charges that Mr. Keith has made against me in the last ten or twelve years. I am sorry to tell you Mr. Keith is trying to rob me of a considerable sum of money. I want you, Mr. John Wellen, to aid, and all other honest men there in that neighborhood, concerning this Keith matter. I will amply pay all you gentlemen for all the trouble that you put yourselves to in trying to hold my own in this Keith matter. Now, please, you gentlemen, do all for me you possibly can.' Now Mr. Ratliff says again, 'I would love to have my deed made.' 'Mr. Ratliff, I told you just a little bit ago that when I come to Oil Creek that I would make that deed. Mr. Ratliff, I want to tell you that my word is as good as my bond. I let you have that land more reasonable that I would any other man, on account of being willing and ready to assist me in everything that I have called upon you to do.'" Asked whether in the conversation about the deed he heard anything about whether the land had been paid for, answered, "No, sir; I didn't hear money mentioned by either party." That his understanding about it was that all that was between the two men was the deed; and stated that the conversation was then about 10 or 12 years ago; that about 1875 or 1876 Ratliff collected rent for Judge Camden, and continued from that time on to look after Judge Camden's interest on Oil creek, and he would not have performed the services Ratliff did for less than \$25 a year, and maybe a little more. R. B. Brinkley testifies to an interview between Mr. Camden and Mr. Ratliff as follows: "Well, to the best of my judgment, it was on the 24th day

of June, 1888, at Weston, at the Bailey House. Mr. Ratliff asked Mr. Camden to give him a deed or writing to show that he had a right to this piece of land—that he didn't want to lose what he paid for it. And he told him that he was old, broke down, and couldn't do any business any further that time, and to go on; that the land was his; to make such improvements as he wanted to; that his word was as good as his bond. Ratliff insisted that he should make him some writing, and he said that he could not; that McGary was his attorney, and he would fix the matter up." And said that McGary drew a writing, and gave it to him for Ratliff, and he kept it for him, and about a year before the taking of his deposition, which was in February, 1899, he gave the writing to W. C. Ratliff, son of plaintiff; that he thinks the writing was dated the 24th of June, 1888. Witness further states that plaintiff was acting as agent and doing business for Judge Camden, he thought, about 20 years, and that Ratliff had placed improvements—he had built a stable, house, granary, and barn, and he thought they would be worth from \$700 to \$800. J. D. Wellen testified to a conversation he heard between plaintiff and Judge Camden at the Bailey House, in Weston. "Mr. Ratliff wanted possession of this land; that he wanted to make some improvements. Mr. Camden said to go ahead—that the land was his—to the best of my knowledge." And he also states Ratliff had built a house and a granary and a barn, and that the improvements ought to be worth from \$500 to \$700; that he did not think he could do it for less.

It would seem that this evidence of the fact that Camden had placed plaintiff in possession of the land, which he has ever since held, under the contract of sale, and promised to make a deed to the plaintiff, would be quite sufficient to entitle the plaintiff to relief, but, taken in connection with the evidence of services rendered to Judge Camden by the plaintiff after March, 1884, the date of the allowance for services of \$150, seems to me to fully meet the requirements of the law as laid down in *Gallagher v. Gallagher*, 31 W. Va. 9, 5 S. E. 297; *Boggs v. Bodkin*, 32 W. Va. 566, 9 S. E. 891, 5 L. R. A. 245; *Harris v. Elliott*, 45 W. Va. 245, 32 S. E. 176; *Hogg's Eq. Proc.* 398, and cases cited. In addition to the oral testimony just mentioned, the two exhibits filed with the original bill, being letters dated March 23, 1884, and March 20, 1888, together with the evidence establishing the genuineness of these letters and receipts, makes a decided preponderance of evidence sustaining the decree.

The principal defense attempted in this case is to establish a conspiracy, in which Mrs. Camden, now Atkinson, was the chief actor, to injure and destroy the estate, as far as it might be, of Judge Camden; and appellants have injected into the case, in the

way of testimony, quite a large part of the trial of Owens and Mrs. Camden upon indictments against them in Gilmer county. But all this goes for naught here, if these two letters are proved genuine, and they fail to connect the plaintiff with such conspiracy, if such there was; and, if the letters were written at the dates they bear, they utterly fail to connect him with it. Such conspiracy, if it existed, could not have been even thought of at the dates the letters bear. Without mentioning the testimony of Elizabeth C. Ratliff, the wife of plaintiff, in regard to the payment of the \$160 mentioned in the letter of the 20th of March, 1888, the fact of the money being sent and letters received, as well as the receipt of the letter of March 24, 1884, is proved by W. G. Ratliff. The letter of March 20, 1888, is also proved by Martha A. Ratliff, and Joseph O. Keith testifies that he saw these two letters with Ratliff's papers in 1888; and no attempt is made to impeach any of these witnesses. These facts being true, whatever there may have been in the way of a conspiracy such as is attempted to be shown cannot affect the case, because the letters were in the possession of Ratliff before the death of Judge Camden.

As to the question of the statute of limitations, the plaintiff was in possession from 1887, and, being in possession, the doctrine of laches does not apply. *Abbott v. L'Houmedieu*, 10 W. Va. 678; *Zane's Devises v. Zane*, 6 Munf. 406; *Ballard v. Ballard*, 26 W. Va. 470 (Syl., point 3).

Appellants, in their brief, raise the question as to the propriety, at least, of attorneys for appellee testifying in the cause, and cite authorities disapproving the practice. We agree with appellants that, as a rule, it is not proper, but, like all other rules, there are exceptions, as stated in *Potter v. Inhabitants of Ware*, 1 Cush. 519, cited by appellants, where it is held: "In most cases counsel cannot testify for their client without subjecting themselves to just reprehension. But there may be cases in which they can do it not only without dishonor, but in which it is their duty to do it. Such cases, however, are rare, and whenever they occur they necessarily cause great pain to counsel of the right spirit." We think it clearly appears that this case is a just exception to the rule, especially in the case of the attorney and witness Louis Bennett, to whom the witness W. C. Ratliff had delivered the writing which was lost, and it could not be accounted for without the testimony of Bennett, who was the only person who had possession of the paper, besides W. C. Ratliff, after Brinkley delivered it to said Ratliff; and it was absolutely necessary for him to show what he did with it, or to account for it by showing that, if left with him, it was lost or mislaid, and could not be found. The possession of it laid between him and W. C.

Ratliff, and neither one of them alone could account for it. The evidence of both was necessary.

Appellants, in their brief, assert that the judge who heard the case and rendered the decree was disqualified, and base their charge of disqualification upon the affidavit of R. M. Ramsburg, administrator of G. D. Camden, deceased, to the effect that in a suit pending in Harrison county in the name of Despard et al., plaintiffs, v. G. D. Camden and J. M. Bennett, defendants, wherein the heirs and devisees of J. M. Bennett, the said judge (being one of the heirs), and the heirs and devisees of Despard and the heirs of G. D. Camden were parties, it was sought to recover against the estate of said J. M. Bennett, deceased, a large sum of money on account of moneys collected by the said Bennett on account of sales of lands which belonged to the said J. M. Bennett, G. D. Camden, and B. Despard, in which suit the heirs and devisees of Bennett claimed a large sum as credit or offset against the demand so made for services claimed by them to have been rendered by the said J. M. Bennett in looking after the interests of the joint owners in the lands and the proceeds, and to prove an express promise on the part of G. D. Camden to pay said Bennett for the alleged services. Mrs. Camden was introduced as a witness on behalf of said Bennett's heirs and devisees, she then being the widow of said Camden, and the same person who wrote the papers filed in this cause which were charged to be fraudulent; said affidavit setting forth the fact of the indictments of Mrs. Camden and J. P. Owens in Gilmer county for fraudulently uttering said papers; Mrs. Camden being indicted as accessory before the fact; and that Louis Bennett, with others, had become her surety in recognizance for her appearance to answer the indictment; that affiant was reliably informed that Louis Bennett, a brother of said Judge Bennett, and a witness for plaintiff, Ratliff, had openly declared that the Camden heirs were fighting him, and that he was fighting them, and further declaring that to be a reason that he would not give consent for the Camdens to cross his land with timber, or sell to them, over which lands was the only way the said Camdens could get certain of their timber to market, but would hold it so as to prevent said timber from being marketed (this on account of said litigation in Harrison county), and that the interests of said W. G. Bennett, judge, and Louis Bennett, in said litigation, were identical; and further alleging that in an equity suit in Webster county of R. C. Ferrell against the administrator and heirs at law of said Camden, based upon alleged receipts for \$4,000, purporting to be dated a short time before the death of G. D. Camden, and to be for lands in Webster county, which were signed G. D. Camden, per Mrs. Camden, and which suit was decided by said Bennett, judge, in favor of said Ferrell; that,

some time after said decision in favor of said Ferrell, persons acting under said Ferrell began to strip the land in controversy of valuable timber, and that said administrator and heirs presented to said Bennett, in vacation, a bill of review, alleging newly discovered evidence, and that timber was being removed, and asked for an injunction, which bill of review so praying for the injunction was held by said judge about two months, and leave to file the same then refused; and that the administrator and heirs, to protect their rights, were driven to an appeal to the Supreme Court from the order of refusal, which appeal was then pending in the Supreme Court. It appears from the brief of counsel for appellants that the theory of the disqualification is the fact of the judge having an interest in the litigation mentioned in Harrison county, wherein his brother Louis Bennett and Mrs. Camden, witnesses for appellants in this case, are also witnesses in the litigation there mentioned in Harrison county, and that it was improper for the judge in this case to pass upon the weight of their testimony, as he would be interested in sustaining the testimony of the witnesses; that he is interested in maintaining their credit. It is not contended that he has any pecuniary or other interest in the case at bar. In *Forest Coal Company v. Doolittle* (W. Va.) 46 S. E. 239 (Syl., point 3), it is held, "In order to disqualify, the interest of the judge must be in the subject-matter of the cause, and not merely in a legal question involved in it." It may not be out of place to say here that the first appeal mentioned in the affidavit of Ramsburg as pending in the Supreme Court of Appeals was dismissed by the court (*Ferrell v. Camden*, 49 W. Va. 225, 38 S. E. 531), and the second appeal from the order of refusing the filing of the bill of review was affirmed by that court (50 W. Va. 119, 40 S. E. 868).

There being no reversible error in the decree, the same is affirmed.

(119 Ga. 467)

MCKINNEY v. CARMACK.

(Supreme Court of Georgia. Feb. 12, 1904.)

WITNESS — IMPEACHMENT — HOMICIDE — THREATS — EVIDENCE — INSTRUCTIONS.

1. For the purpose of impeaching a witness, his testimony on the commitment trial of one accused of a felony may be proved as well by a person who heard it, as by the notes or memoranda of the evidence taken by the court. *Brown v. State*, 76 Ga. 623. The same rule will apply in the case of a coroner's report of the substance of the testimony delivered before him at an inquest.

2. As a general rule, evidence of threats previously made by one who is killed by another, but uncommunicated to the latter, are not admissible on the trial of a case involving the question whether or not the slayer was justified in taking the life of the deceased; but when the evidence tends to show that the person killed began the mortal conflict, and that the slayer killed his adversary in self-defense, proof of threats of this character may be re-

ceived to show the state of mind or feeling on the part of the deceased, and thus illustrate his conduct and throw light upon his intention and purpose at the time of the fatal rencontre. May v. State, 17 S. E. 108, 90 Ga. 797, and cases therein cited and reviewed.

3. The court below committed no material error in charging, or in failing or in refusing to charge, as to the law touching the issues on which the jury were called on to pass; and there was evidence which warranted their verdict.

(Syllabus by the Court.)

Error from City Court of Vienna; D. L. Henderson, Judge.

Action by Louisa McKinney against W. H. J. Carmack for damages for the homicide of her husband. Judgment for defendant, and plaintiff brings error. Affirmed.

R. L. Berner and Crum & Jones, for plaintiff in error. Hall & George and Busbee & Busbee, for defendant in error.

TURNER, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(68 S. C. 46)

DARLINGTON OIL CO. v. PEE DEE OIL & ICE CO.

(Supreme Court of South Carolina. Jan. 8, 1904.)

APPEAL—GRANT OF NEW TRIAL.

1. The grant of a new trial on the ground that the verdict is against the weight of the evidence will not be disturbed where no abuse of discretion is shown.

Appeal from Common Pleas Circuit Court of Darlington County; Aldrich, Judge.

Action by the Darlington Oil Company against the Pee Dee Oil & Ice Company. From order granting new trial, after verdict, defendant appeals. Affirmed.

The following are the exceptions:

"(1) There was error on the part of his honor, the presiding judge, in sustaining, as he did, the plaintiff's fifth ground of motion for a new trial, which was, as given in his honor's order, 'Because your honor omitted in submitting to the jury the question as to compensatory damages,' and ordering a new trial thereon: First, because, even had his honor used the words 'punitive' or 'exemplary' where he intended to use, and should have used, the word 'compensatory,' it could not have misled the jury when taken in connection with the rest of his charge, inasmuch as his honor in the body of the charge, as stated by him in his said order, explained fully to the jury what were compensatory and what exemplary damages, and when each of such classes of damages should be given by the jury. Second, because in his charge to the jury there was no such 'slip of the tongue' as his honor supposed he had made, and his honor did not use the word 'exemplary' where the word 'compensatory' should have been used, either in directing the jury as to the form of the verdict, or else-

where in his charge, as will appear from an examination of his charge in full delivered to the jury.

"(2) His honor, having held that the verdict of the jury was not against, but was in keeping with, the weight and force of the evidence, both as to plaintiff's claim for compensatory or actual, and also for exemplary or punitive, damages, erred in granting a new trial upon the ground that plaintiff was entitled to nominal damages: First, because, even if plaintiff was entitled under the view of his honor to a verdict for nominal damages, such verdict would be merely to establish plaintiff's right to the use of the property, to wit, the track scales in question, and failure to render such verdict would not entitle the plaintiff to a new trial on all the issues involved both as to actual and exemplary damages, upon both of which the verdict was correct, and was concurred in by the court; the way being still open to plaintiff for a full hearing upon the question of its right to use said scales. Second, because the issue as to plaintiff's easement, or its right to the use of the property, which might have been established by a verdict for nominal damages, still remained an issue for the court to determine after the rendition of the verdict; the right of the plaintiff to have such issue tried and determined by the court having been fully recognized, and an order granted by his honor directing that an issue involving the right to such use of the property be tried by a jury. Third, because the question of nominal damages was not submitted to the jury, nor was there any request to charge the jury thereon, plaintiff having relied entirely upon its claim for compensatory and exemplary damages as to which the verdict was sustained by the court, and upon having the issue as to the use of the property tried by the court, which right of plaintiff was fully preserved.

"(3) His honor erred, it is respectfully submitted, in sustaining another of plaintiff's grounds, to wit, the fourth ground, and thereupon ordering a new trial, because in the opinion and judgment of his honor, as stated in his said order, the testimony overwhelmingly sustained the plaintiff's allegations that the track scales were attached to the realty, and were fixtures: First, because the failure of the jury to find according to the weight of the testimony on that question could only bear upon the right to a verdict for nominal damages, or the mere establishment of plaintiff's right to use the property, upon which an issue is now pending, and would not entitle the plaintiff to a new trial upon the whole case, as his honor sustained the verdict of the jury in favor of the defendant upon the claim of plaintiff both as to compensatory, or actual, and exemplary damages, and did not charge, and was not requested to charge, the jury as to the right to recover nominal damages. Second, because his honor should have concluded that the jury solved the said question of easement according to

the weight of the evidence, and in keeping with his charge, and yet found a verdict for defendant, as there was no proof of damages, and thus sustained the verdict, inasmuch as his honor held that only nominal damages could have been found under the testimony; thereby holding, in effect, that the verdict of the jury was correct upon all the issues submitted to it, or as to which he was requested to charge. Third, because, not only did his honor sustain the verdict of the jury as to plaintiff's claims for compensatory and exemplary damages, and did not charge the jury, nor was he requested to charge, as to the right to a verdict for nominal damages, but also because the plaintiff's right to the use of the property in question could be determined by the court after the rendition of the verdict, and a hearing by the court thereupon was asked for by plaintiff after the order granting a new trial, which said request was complied with, and an issue thereon was ordered and is now pending.

"(4) His honor erred in sustaining so much of the plaintiff's fourth ground of the motion for a new trial, to wit, that the 'verdict of the jury was against the weight of the evidence as to the force necessary to constitute a cause of action,' and also so much of the sixth ground, as he sets out in his said order, to wit, 'because the verdict was contrary to your honor's charge on the question of * * * force necessary to constitute a cause of action and as to damages'; it being respectfully submitted that in considering said grounds his honor's conclusions should have led to a refusal thereon of the motion for a new trial, because, according to the conclusion of his honor as to the failure of plaintiff to prove either compensatory or actual, and exemplary or punitive, damages, the jury could only have found a verdict for nominal damages at all events, which would merely have established the right to the use of the property, which issue is now pending, and which the plaintiff may yet have determined as dictated by the court; and also because neither did his honor charge upon the right to nominal damages, nor was he requested by the plaintiff so to charge.

"(5) Because, as it is respectfully submitted, the said question relating to an easement, or the right to the use of the property in question by the plaintiff, is involved in the equitable issue yet to be heard upon the pleadings and as directed by the court, and was not necessarily involved in the legal issue of damages passed upon by the jury, and there was no right in the plaintiff to have such issue submitted to the jury, and thereon a right to a new trial could not arise.

"(6) Because the conclusion of the jury upon the question of damages submitted to them, upon which alone they could find a verdict, was correct, and was entirely in accord with the view or conclusions of his honor upon the question both of compensatory or actual, as well as exemplary, dam-

ages, as expressed in his order granting plaintiff's motion, and the motion for a new trial should have been refused."

Woods & Macfarlan, for appellant. W. F. Dargan and E. Keith Dargan, for appellee.

GARY, A. A. J. This action was commenced September 26, 1900, by the service of a summons and complaint upon the defendant, a notice of no personal claim on the Virginia-Carolina Chemical Company, and the legal issue of damages was tried before his honor, Judge James Aldrich, and a jury, at the spring term of the court in Darlington, in March, 1902, between plaintiff and the defendant, the Pee Dee Oil & Ice Company. The jury rendered a verdict for the defendant in the words, "We find for the defendant." Upon the rendition of this verdict, the plaintiff gave notice of a motion for a new trial. The presiding judge (Aldrich) granted the motion in an order bearing date March 27, 1902, and which is set out in full in the "case." In this order it appears that he sustained the motion for a new trial on the fourth, fifth, and sixth grounds set out in the "notice of motion." From this order the Pee Dee Oil & Ice Company appeals to this court.

The fourth ground is as follows: "Because the verdict of the jury was against the weight of the evidence as to the plaintiff's easement, as to the notice of the reservation in the deed, as to the force necessary to constitute a cause of action, as to the compensatory damages, and as to the exemplary damages." The fifth ground is: "Because your honor omitted in submitting to the jury the question of compensatory damages." And the sixth is: "Because the verdict was contrary to your honor's charge on the question of easement, the construction of the deed, notice of the deed, force necessary to constitute a cause of action, and as to the damages."

In passing upon the fourth ground the presiding judge uses this language: "The fourth ground is as follows: 'Because the verdict of the jury was against the weight of the evidence as to plaintiff's easement.' This ground is sustained. In my opinion and judgment, the testimony overwhelmingly sustains the plaintiff's allegations, viz., that the track scales were attached to the realty, fixtures, and intended to be such and to remain such. It is not certain that the jury did decide that said scales were not fixtures, but the jury may have so decided, and therefore this is a ground for granting a new trial. * * * The fourth ground also charges that the 'verdict of the jury was against the weight of the evidence * * * as to the force necessary to constitute a cause of action'; and the sixth ground is: 'Because the verdict was contrary to your honor's charge on the question, * * * and on the question of force necessary to constitute a cause of action, and as to the damages.' The request of defendant to charge referred in various ways

to this question. I passed upon these requests, but these requests did not cover the issue. * * * I read this admission to the jury and in several places stated it in my charge. This admission or statement in answer, considered in connection with the testimony and the charge, sustains so much of these two grounds as I have set out: *The verdict was, in my judgment, against the great weight of the testimony, and was contrary to the charge of the court.*" (Italics mine.)

The exceptions to the order granting a new trial should be set out in the report of the case, which in different language imputes error to the circuit judge in granting a new trial in this cause. Section 2734 of the Code of Laws provides that "the circuit courts shall have the power to grant new trials in cases where there has been a trial by jury for reasons for which new trials have been granted in the courts of law in this state." Section 286 of the Code of Procedure, in subdivision 4, contains a provision that the judge who tries a cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside the verdict and grant a new trial, upon exceptions or upon insufficient evidence, or for excessive damages; but such motions, if put upon the minutes, can only be put at the same time at which the trial is had. In *Dent v. Bryce*, 16 S. C. 14, Mr. Chief Justice Simpson uses this language: "It needs no authority, then, to say that the jury is bound to take the law from the court. This opinion applies in every class of cases, except one not necessary now to be considered. And when the law is announced by the court, it is the law of the case until overruled by a higher authority. It follows, then, that a verdict in direct conflict with the law of the court is a verdict against the law, and will in all cases be vacated in the first instance, either sua sponte by the judge, or on motion of the aggrieved party. Any other doctrine would lead to the utmost confusion. If the jury could question the charge of the judge, the result would be that in every case the whole case, both law and facts, would go to the jury under the hope that, whatever might be the charge of the judge at the time, he could be satisfied afterwards that he was in error. This could not be tolerated. It would degrade the judiciary and unhinge the whole system. The argument of the respondent, by which he attempts to draw a distinction between a verdict contrary to the charge of the judge and one contrary to law, though ingenious, fails to meet the case. In fact, that doctrine would open the door to the very evil which a separation of the powers and duties of the court and jury was intended to prevent. So far as the jury is concerned, there is no such thing as the charge of the judge being contrary to law, because, whatever may be his charge, it is the law to them."

From the foregoing it appears that a sound discretion is very properly vested in the trial

judge in passing upon a motion for a new trial, and, unless it is shown that he has abused such discretion, his judgment will not be impugned by this court. The burden, therefore, is upon the appellant to show that there has been some abuse of such discretion, or, as in *Epperson v. Stansill*, 64 S. C. 485, 42 S. E. 426, the new trial was granted for misdirection of the jury, when, in fact, it appeared that the jury were properly instructed. The record in this case fails to show any such abuse. While it is true, as contended by appellant, that the fifth ground was sustained under a misapprehension of fact as to what instruction had been given the jury in the charge of the presiding judge, yet we are of opinion that the result should not be changed, for the reason that it would only be supplementary to the main ground, viz., that the verdict was, in the opinion of the trial judge, against the great weight of testimony, and was contrary to the charge of the court.

It is therefore ordered that the appeal be dismissed.

(124 N. C. 632)

STATE v. DAVIS.

(Supreme Court of North Carolina. March 8, 1904.)

HOMICIDE — DYING DECLARATIONS — INSTRUCTIONS — QUESTIONS FOR JURY — ARGUMENT OF COUNSEL — APPEAL AND ERROR.

1. A charge in a prosecution for homicide that the dying declarations of the deceased should be carefully weighed and considered for the reason that there was no cross-examination before the jury of the declarant, is proper.

2. The refusal of a general charge for defendant in a prosecution for homicide is proper where the dying declarations of the deceased were coherent, and made to several persons, and, if believed, were explicit as to the guilt of the defendant.

3. The weight of dying declarations as evidence is a question for the jury.

4. The credibility of testimony of a medical witness in relation to the condition of deceased at the time of making dying declarations is a question for the jury.

5. Where defendant in a prosecution for homicide let pass an argument of counsel for the state without objection being made at the time, and again kept silent when repeated by the court as one of the contentions of the state, it is too late to ask a new trial predicated on an objection thereto by an exception to the recital of the contention made for the first time in the statement of the case on appeal.

Appeal from Superior Court, Lenoir County; Brown, Judge.

Frank Davis was convicted of murder in the first degree, and appeals. Affirmed.

T. C. Wooten and Shepherd & Shepherd, for appellant. The Attorney General, for the State.

CLARK, C. J. The prisoner was convicted of murder in the first degree. The first, second, fourth, and eighth prayers for instructions asked by the prisoner were given. The third prayer—"that the dying declara-

tions of the deceased should be received with caution and care, for the reason there being no cross-examination before the jury of the declarant"—was given, merely substituting "should be carefully weighed and considered" in lieu of the words "should be received with caution and care." We find no error in the modification. It is not essential that the exact words of the prayer should be given, even when correct, if substantially given. *State v. Hicks*, 130 N. C. 710, 41 S. E. 803. Here the substituted phrase was more proper than that asked, and is in accordance with the rule stated. 1 Bishop, New Cr. Pr. (4th Ed.) p. 743, § 1216. The fifth and sixth prayers were properly refused, because containing recitals not found in the evidence. *Harris v. R. R. Co.*, 132 N. C. 160, 43 S. E. 589. The only other prayer, the seventh, was "that, in no event can the jury find the prisoner guilty of the crime set out in the indictment under all the evidence in this case." This was properly refused. The dying declarations were coherent, and made to several persons, and, if believed, were explicit as to the guilt of the prisoner. There was also other evidence, though it may be that, in the absence of the dying declarations and the identification of the prisoner by the deceased as the man who shot him, the jury might not have convicted. The prisoner's counsel insisted that the testimony of one of the physicians as to the condition of the dying man, and its probable effect upon his memory, would justify the court in setting aside the dying declarations. The other physician testified that when the declarations were made to him the deceased was in his right mind. The credit to be given to the physician's testimony and opinion, as well as the weight to be given to the dying declarations, was a matter solely for the triers of the fact—the jury. This court can review only the rulings of the court below upon the law.

The prisoner further excepts that in summing up the contention for the state his honor said: "The state contends that Frank Davis might have had his shoes hidden in the woods, and that he might have put on his shoes, stood behind the stump, and shot Pate, then removed the shoes, and returned home barefooted, and that this might have been a mere subterfuge." The court was stating and arraying the contentions of both sides. It is not denied that this argument had been used by the solicitor, and had not been objected to. The prisoner could not let it pass unobjected to when made in the argument, and again keep silent when repeated by the court as one of the contentions of the state, and then ask a new trial by an exception to the recital of the contention, made for the first time in the statement of the case on appeal. *State v. Tyson*, 133 N. C. 692, 45 S. E. 838. The object of all criminal trials is a just and strict enforcement of the law by the conviction of the guilty, with such care for

the rights of the accused that the innocent may be protected. But this does not permit the accused and his counsel to be silent in face of what they may deem prejudicial, and when it might be corrected by the judge (if erroneous) by objection taken in apt time. Besides, in this case, while there was no evidence to the exact purport of the contention of the state, it was not an unfair or unreasonable argument upon the testimony. The solicitor stated it merely as an inference—"might have"—from the testimony, and the jury could not have misunderstood it.

The only other exception is to the recommendation of the court to the jury—doubtless given at a late hour, and after a long and fatiguing session—not to consider the case till next morning, and is without merit. It is not shown that it prejudiced the prisoner in any way, nor can we see that it was likely to do so.

No error.

(134 N. C. 41)

**BOARD OF TRUSTEES OF CHARLOTTE
TP. v. PIEDMONT REALTY CO.**

(Supreme Court of North Carolina. Dec. 15, 1903.)

**MUNICIPAL CORPORATIONS — BRIDGES — AID
FROM PRIVATE PARTY—CONTRACTS
—ULTRA VIRES—ESTOPPEL.**

1. Where public necessity required the building by a town of a bridge of sufficient strength to permit street cars to cross it, and a corporation owning suburban property, which would be rendered accessible if the bridge was built and the car line extended, agreed with the town that, if it would erect a strong and substantial bridge, it would defray a portion of the expense, the contract was not unenforceable, as against public policy.

2. Where a corporation owning suburban property contracted with a town to pay a portion of the cost of erecting a bridge which would accommodate street car traffic to the suburb where its property was located, it was, after the construction of the bridge by the city, estopped from pleading that the making of the contract was ultra vires.

Appeal from Superior Court, Mecklenburg County; Neal, Judge.

Action by the board of trustees of Charlotte township against the Piedmont Realty Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Jones & Tillett, for appellant. Burwell & Cansler, for appellee.

CONNOR, J. The plaintiff alleged its corporate existence, and the power to establish and maintain the public highways and bridges in Charlotte township, Mecklenburg county, and to do all things necessary and incidental to the exercise of such power. That the defendant was a corporation, with power and authority to buy, sell, hold, and deal in suburban and other real estate in the county aforesaid. "(3) That prior to the 19th day of July, 1901, the defendant was, and is

still, the owner of a large tract of land just east of the city of Charlotte, which is divided up into building lots, and thrown upon the market to all persons wishing to invest therein for the purpose of erecting thereon suburban residences, the value of which, as such, would be materially enhanced by the extension through it of the city street car line. (4) That it was necessary to erect over Sugar creek, just beyond the eastern limit of Seventh street, on one of the public highways in Charlotte township, a bridge of sufficient strength and capacity to permit the street cars to cross the same, in order that said street car line might be extended through the suburban property of the defendant, hereinbefore described; and for that purpose the defendant, by its duly authorized agents, urged the plaintiff to erect and construct across said creek at said point a strong and substantial bridge, in order that its suburban property might be materially benefited and enhanced in value thereby, and offered to pay as a consideration therefor one-fourth of the costs of erecting said bridge, if the plaintiff would undertake the same, and defray the balance of the costs thereof. (5) That, during the negotiations between the plaintiff and the defendant concerning the erection of said bridge, the defendant contracted to sell to divers parties a number of building lots from the property aforesaid, by representing to said persons that said bridge would be erected, and the street car line extended through said property, and urged upon plaintiff the fact that it had made such contracts and representations as an additional reason why said bridge should be erected by the plaintiff as soon as possible. (6) That thereupon the plaintiff agreed to erect and construct said bridge, in consideration of which the defendant agreed to pay to plaintiff one-fourth of the costs thereof, when the same should be completed, whereupon the plaintiff undertook to erect, and did erect, across said Sugar creek, upon said highway, in accordance with said agreement, a large and substantial bridge, of sufficient capacity to permit said street car line to cross the same and to accommodate all public travel, at a total cost to it of \$6,178.68, on account of which the defendant's property was materially enhanced in value, in the manner and for the reasons hereinbefore stated. (7) That the cost of said bridge was greatly increased, at the defendant's request, and in order to make it of sufficient strength and durability to permit the electric street railway and its cars to cross it in the extension of said railway line to and through the suburban property of defendant as aforesaid. (8) That, after the completion of the erection of said bridge by the plaintiff, it duly demanded of the defendant, on the 19th day of July, 1902, the payment to it of the sum of \$1,544.67, being one-fourth of the costs of said bridge, which the defendant had theretofore agreed to pay, but which it refused, and still refuses,

to pay. (9) That, on account of the matters and things hereinbefore stated, the defendant is now justly indebted to the plaintiff in the sum of \$1,544.67, with 6 per cent. interest thereon from the 19th day of July, 1902, until paid. Wherefore the plaintiff demands judgment against the defendant for the sum of \$1,544.67 and the costs of this action, to be taxed by the clerk."

Demurrer: "The defendant, demurring to the complaint herein filed, for grounds of demurrer says: First. That the complaint does not state facts sufficient to constitute a cause of action, in this: (1) That it appears from the complaint that the contract alleged to have been made by the defendant company was one in its nature ultra vires, and beyond the power of the corporation to make, in that it was a contract to expend money in aid of the construction of a public bridge on a public highway that was not on any part of the land belonging to the defendant company; and, further, that it was a contract made with public officers acting in derogation of their duty, and was against the policy of the law. (2) That it appears from the complaint that the contract alleged to have been made by the defendant company is one which was beyond its power to make, and, moreover, was against the policy of the law, in this: that, it being the duty of said officers to erect on the highway of the said township all bridges for public use, it became their duty to erect this bridge at public expense if the same was necessary for the public use, and the contract, being one to erect a bridge not necessary for the public use generally, but for the benefit of a private landowner, was unauthorized by law, and against its policy."

The demurrer is based upon two propositions: First, that the contract made by the plaintiff, whereby it agreed to construct a stronger and more expensive bridge, to be paid for out of the public funds, was ultra vires; and, second, that said contract was against public policy. It was admitted by defendant's counsel on the argument of this case that the demurrer should be overruled, unless the court should not hold that by proper interpretation of the complaint in this action it was alleged therein that the contract sued upon contemplated an expenditure of public funds for private uses. It was admitted that the court had no right to control the plaintiff in the expenditure of the public funds, so long as these funds were being expended for public purposes; but it was urged that the contract set out in the complaint clearly showed that it contemplated an expenditure of public funds in excess of what the plaintiff deemed necessary for public needs, and that, this appearing from the face of the complaint, the court should sustain the demurrer, because, in the first place, it was a contract to expend the funds of a municipal corporation for private uses, and, in the second place, such contract was void as being against public policy. Treating the com-

plaint as alleging a contract to expend public funds for private uses, it was contended that the state Constitution forbade such a contract, unless it was submitted to a vote of the people, and that in such sense the contract was ultra vires of the plaintiff corporation, and, again, that a contract contemplating the expenditure of the funds of a municipal corporation for private enterprises was against public policy, and therefore void. These principles are fundamental. A very different question, however, is presented by the complaint and demurrer in this case. It is admitted by the demurrer that public necessity required the building of the bridge over the creek crossed by a public highway of said township. The defendant urged, not the building of the bridge, but that it should be strong and substantial, in order that the property of the defendant might be benefited. It was for this that the defendant promised to pay one-fourth of the whole cost. It is also admitted that the cost of said bridge was greatly increased, at the defendant's request, in order to make it of sufficient size and durability to permit the street railway and its cars to cross it in extension of said railway to and through suburban property of the defendant. It being admitted that the bridge was necessary, the strength, durability, width, etc., were questions entirely within the province of the board of trustees to decide. This court could not have undertaken to pass upon or control the exercise of their judgment in that respect. In *Broadnax v. Groom*, 64 N. C. 244, Pearson, C. J., says: "Who is to decide what are the necessary expenses of a county? The county commissioners, to whom are confided the trust of regulating all county matters. 'Repairing and building bridges' is a part of the necessary expenses of a county—as much so as keeping the roads in order or making new roads. So the case before us is within the power of the county commissioners. How can this court undertake to control its exercise? Can we say such a bridge does not need repairs, or that, in building a new bridge near the site of an old bridge, it should be erected as heretofore, upon posts, so as to be cheap, but warranted to last for some years, or that it is better policy to locate it a mile or so above, where the banks are good abutments, and to have stone pillars, at a heavier outlay at the start, but such as will insure permanence and be cheaper in the long run? * * * This court has no power, and is not capable if it had the power, of controlling the exercise of power conferred by the Constitution upon the legislative department of the government, or upon the county authorities." It certainly was not violating any constitutional or statutory restriction upon the power of the board to build the bridge of such strength and durability as the commissioners, in their judgment, thought proper. That being conceded, we are at a loss to perceive how it can be

contrary to public policy to enter into a contract with the defendant by which it agreed to share a part of the burden and cost of building the bridge. It does not appear that the cost of the bridge was enhanced to the extent of one-fourth at the request or for the benefit of the defendant. Judge Dillon, in his work on *Municipal Corporations*, says: "A promise by individuals to pay a portion of the expense of public improvements does not fall within this principle, and such promise is not void as being against public policy; and, if the promisors have a peculiar and local interest in the matter, their promise is not void for want of consideration, and may be enforced against them."

The question seems to have been presented in *Townsend v. Hoyle*, 20 Conn. 1, cited in the plaintiff's brief. The court, in discussing the question, says: "The defendants are not only benefited in common with other citizens, but obviously they had a peculiar and local interest, and well might obligate themselves to indemnify the city for assuming the burdens and responsibilities of a new public highway. * * * We must not be considered as assenting to the proposition that a promise by individuals to pay a part of the expense of public improvements ordered by public authority is, of course, illegal and void. We think the amount of a public burden or the cost to the public of an improvement may properly enough enter into the question of expediency or necessity. A canal, a railroad, a bridge, a new street, a public square, or a sewer is called for. If made in one way or in one place, it will be much better for the public, though more expensive; but individuals especially benefited stand ready, by giving their land, their money, or their labor, to meet the extra expense. Will these promises be void, as being without consideration or against public policy? We think not." This language fully meets our approval, and would seem to be decisive of this case. Of course, if there was any improper or corrupt motive controlling the commissioners in a public work of this character, or if it were manifest that its real purpose was to promote the private interest of the defendant, and not the public necessity, a very different question would be presented. But the complaint negatives any such suggestion, and the demurrer admits the facts to be as stated in the complaint. If the county commissioners, finding it necessary to open a public road from one point to another, should, at the request and in consideration of the payment by a landowner of the additional cost, change its course, keeping in view always the convenience of the public, we cannot see how such contract would be open to the criticism of being against public policy. We think such a contract would come within the principle laid down in the cases cited.

This court, in *Stratford v. Greensboro*, 124 N. C. 131, 32 S. E. 396, says: "There can be no objection to the contributing of an indi-

vidual to the expense of laying out or altering a street; nor will such an act prove that the property was taken for the accommodation of private individuals, and not for public use. If, in point of fact, the public necessity and convenience require the improvement of a street, or the opening of one, it can make no difference who pays the damages of condemnation. It might be that a party contributing a part or the whole of the assessed damages in the condemnation of land for a public street, when the public necessity requires such street, might have lands adjacent which might be improved by the opening of the street, and surely, if nothing else appeared, it would not be either immoral or illegal for him to pay the damages growing out of the condemnation proceedings." The opinion cites *Parks v. Boston*, 8 Pick. 218, 19 Am. Dec. 322, in which it is said: "If the public necessity and convenience required the alteration, it is immaterial at whose expense it was made. A donation or contribution from individuals to relieve the burden upon the city has no tendency to prove that the enlargement of the street was not a public benefit. A street or highway is not the less public because it accommodates some individuals more than others."

There is no suggestion that the public credit has been pledged to build this bridge. So far as appears from the record, the bridge has been paid for. Surely, as was well suggested by the plaintiff's brief, if the defendant will perform its part of the contract, and replace the money thus expended at its request and upon its promise, there will be no injury to the public; assuming that the cost of the bridge was enhanced for the defendant's benefit. It would lead to a singular result if the defendant could induce the plaintiff to expend public money for its benefit, and then, by refusing to repay the money, successfully justify its refusal upon the ground that the public treasury was depleted by the plaintiff. It would seem that such depletion is the result of the defendant's conduct, rather than the plaintiff's. If the contract set out in the complaint was *ultra vires*, it would seem that after it is executed, and the defendant has received the benefit thereof, it would be estopped from setting up this defense. The defendant's counsel admitted that if this was an ordinary case of *ultra vires*, where a private corporation had entered into a contract which was not within the express powers granted to it, then a receipt of benefits would estop the corporation; but it was contended that there could be no estoppel where the contract in question was made with a municipal corporation in direct violation of the constitutional restriction, or in violation of the law of public policy. The authorities cited fully sustain the position of the plaintiff that, if the corporation has performed the contract on its side, the other contracting party cannot plead that it was *ultra vires*. We can see no reason in law or

in good morals why the defendant should not perform the contract which it admits was made with the plaintiff, which has been performed by the plaintiff, the full benefit of which the defendant has received.

We think his honor correctly overruled the demurrer. The judgment must be affirmed.

WALKER, J., did not sit on the hearing of this case.

(134 N. C. 283)

HOOKER v. WORTHINGTON et al.
(Supreme Court of North Carolina. March 1, 1904.)

PLEADING—ANSWER—SUFFICIENCY—LIMITATIONS—BURDEN OF PROOF.

1. Where limitations are pleaded, the burden is on the other party to show that the cause of action accrued within the time limited.

2. In an action by the purchaser of a judgment to set aside conveyances made by the judgment debtor as fraudulent, and to subject the land conveyed to the payment of the judgment, which had been purchased within three years of the action, limitations having been pleaded, it was incumbent on plaintiff to show that his assignors had not discovered the fraud more than three years before the action was commenced.

3. In an action to set aside conveyances made by a husband to his wife and to subject the lands to plaintiff's judgment against the husband, where the wife's answer was sufficient in form and substance, it was a sufficient answer on the part of the husband that he adopted the answer of the other defendant as his own, under Code, § 248, providing that an answer must contain a general or specific denial of each material allegation controverted, or of information sufficient to form a belief.

Appeal from Superior Court, Pitt County; Moore, Judge.

Action by Oscar Hooker against Alfred Worthington and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

J. L. Fleming, for appellant. Jarvis & Blow, Skinner & Whedbee, and L. I. Moore, for appellees.

MONTGOMERY, J. The original complaint in this action does not clearly show upon what ground the plaintiff seeks relief. Upon a cursory reading of that pleading it would appear to be the purpose of the pleader to have the defendant S. A. Worthington, the wife of the other defendant, A. Worthington, declared a trustee, by way of resulting trust, of the property mentioned in the complaint, for the benefit of the plaintiff. Such a position could not be maintained, because enough appears in the complaint to show that there were no contractual relations between the plaintiff and either of the defendants, and that the very purpose of Mrs. Worthington was to hold the property adversely to all claimants. The amendment to the complaint, however, together with sec-

tion 33 of the complaint, makes it certain that the plaintiff's purpose in the action is to charge fraud upon Mrs. Worthington and her husband, the fraud being alleged to be that Worthington procured the sale of the property for the purposes of having it bought in by his wife, thereby hindering, delaying, and defrauding his creditors. It seems, taking the whole evidence into consideration, that the husband, being very much indebted, executed several mortgages or deeds of trust to secure certain of his creditors, and that the property conveyed by him was afterwards sold and purchased by his wife. Between the times of the execution of the mortgage deeds and the sale of the property under the same, and after the last-mentioned date, various unsecured creditors of Worthington procured judgments against him, some of them in courts of justices of the peace, and some in the superior court of Pitt county. The plaintiff bought up a large number of these judgments, his purchases embracing some of the justice of the peace court and some of the superior court, and brought this action to have Mrs. Worthington declared a trustee for the benefit of the plaintiff, and for such other relief as the plaintiff might be entitled to. The defendants, in their answer, set up a defense on the merits of the case, and also pleaded the statute of limitations, that is, subdivision 9 of section 155 of the Code, treating the complaint as an action to have the deeds made by the mortgagees to Mrs. Worthington set aside for fraud, and the property applied, under the order of the court, to the payment of the plaintiff's debts. We are of the opinion that that was the true nature of the cause of action as set out in the complaint, notwithstanding the prayer of the plaintiff for a technically different judgment. And, the defendants having pleaded the statute of limitations, it became necessary for the plaintiff to show that a discovery of the fraud alleged in the complaint had not been made by the plaintiff or his assignors more than three years before the commencement of the action. That requirement on the part of the plaintiff is analogous to the several rulings which have been made by this court, viz., that, where the statute of limitations has been pleaded, the burden is on the other party to show that the cause of action accrued within the time limited. *House v. Arnold*, 122 N. C. 220, 29 S. E. 334; *Houston v. Thornton*, 122 N. C. 365, 29 S. E. 827, 65 Am. St. Rep. 699.

The plaintiff offered no evidence upon the issue tending to show when the discoveries of fraud were made by the plaintiff's assignors. It is true that he, as a witness for himself, stated that all he had ever learned on the subject of the frauds charged in the

complaint he learned about 30 days before he bought the judgments, the date of which was within 3 years of the commencement of the action. But nearly 10 years had elapsed since the matters complained of occurred, and the plaintiff's assignors transferred their rights to the plaintiff in the judgments more than 3 years after the dates of the badges of fraud set out in the complaint, and he can occupy no better position than his assignors would have if they had brought the action. It was incumbent on him to show that his assignors had not discovered the fraud earlier than three years before the action was commenced. The burden was on the plaintiff, as we have said, to repel the plea of the statute of limitations, and, as the plaintiff failed to offer any evidence on that issue, the judge could either direct a verdict against him, or dismiss the action under chapter 109, p. 155, of the Acts of 1897. *House v. Arnold*, supra, and cases there cited.

This view of the case on the defendants' plea of the statute of limitations renders it unnecessary to discuss the questions of law argued here by the counsel on the merits of the case.

In her answer the defendant S. A. Worthington pleaded the statute of limitations as a defense against the justice's judgment against her husband, and the plaintiff admitted that the plea was sufficient in form and substance. The defendant's husband, for answer, said simply "that he adopts each and every section of the answer of S. F. Worthington, herein filed, as his own," and signed it. His honor was asked by the plaintiff's counsel to sign a judgment for the plaintiff's debt against the defendant's husband, including the justice's judgments which he had bought, on the ground that the defendant's answer was not a sufficient denial of each section of the complaint, and he declined to sign such judgment. We think there was no error in the refusal to sign the judgment as requested. We think the defendant's answer was a sufficient compliance with section 243 of the Code. The answer of his codefendant was sufficient in form and substance, admittedly so, and A. Worthington's answer adopted each and every section of his wife's answer.

It follows as a matter of course, from what we have said, that the plaintiff was not entitled to have his judgment against A. Worthington declared a lien upon the defendant's homestead, as it was sold under the deeds of trust and purchased by Mrs. Worthington; and his honor was right in refusing to adjudge it a lien on any of the lands described in the complaint. His honor, on motion of the defendants, dismissed, as of nonsuit, the plaintiff's action, and in doing so there was no error.

(134 N. C. 276)

WETHERINGTON et al. v. WILLIAMS et al.

(Supreme Court of North Carolina. March 1, 1904.)

DEEDS—DELIVERY—PROOF—CHANGE IN GRANTEES—EVIDENCE—ADMISSIBILITY—SUFFICIENCY—TENANTS IN COMMON—RIGHT TO POSSESSION.

1. The question of title to real estate and the right to possession cannot be adjudicated in an action between alleged tenants in common where it appears that the premises are in possession of a third person not a party to the action.

2. In an action between alleged tenants in common to establish plaintiffs' title to the land in controversy, to which defendants claimed title by deed from a common deceased ancestor, the decedent's widow is not disqualified as a witness for defendants under Code, § 590, where she is not a party to the action and is disinterested in the event.

3. Where a deed is written in favor of certain grantees, but retained in the possession of the grantor without delivery to any of the grantees, the grantor has power to change the deed as he may see fit.

4. So long as the probate and registration of a deed stand unimpeached, they furnish sufficient prima facie evidence of its execution and delivery.

5. Where a deed is written in favor of certain grantees, but retained in the possession of the grantor without delivery to any of the grantees until after the death of one of them, when it was handed to one of the other grantees, who was told by the grantor to erase the deceased grantee's name, and then to have it recorded, which was done, there is a sufficient delivery to the remaining grantees.

Appeal from Superior Court, Craven County; Moore, Judge.

Action by M. C. Wetherington and others against Mary Williams and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

W. D. McIver, for appellants. D. L. Ward, for appellees.

WALKER, J. This is an action by the plaintiffs to recover their interest as tenants in common with the feme defendants in a tract of land which was formerly owned by Lewis Wetherington. The latter was married twice. The plaintiffs M. C. and G. L. Wetherington are children of the first marriage, and the plaintiff Stephen Oliver, who has died since the action was commenced, without issue, was a grandchild. The feme defendants Cornie Wetherington and Mary Williams are children of the second marriage, and the plaintiff Hyman Stubbs is a grandchild, he being the child of Leah Wetherington, who intermarried with Levi Stubbs. The plaintiffs allege that M. C. and G. L. Wetherington and Hyman Stubbs and the feme defendants are tenants in common of the tract of land described in the complaint in equal shares, and that the defendants are in possession of the land, claiming title to the whole thereof. These allegations are denied by the defendants in their answer.

There was no evidence introduced by the plaintiffs to show that the defendants were in possession of the land at the time the action was brought. On the contrary, their own witness Gaston Wetherington testified that Mary Wetherington, the widow of Lewis Wetherington, was in possession. Before a tenant in common can bring an action against his co-tenant to recover his share in the land, he must allege and prove that he has been ousted by the latter. If the co-tenant is shown to be in possession of the land, and in his answer denies the plaintiff's title, he thereby admits an ouster; at least for the purpose of the action. *Halford v. Tetherow*, 47 N. C. 398; *Day v. Howard*, 73 N. C. 1; *Withrow v. Biggerstaff*, 82 N. C. 82. The plaintiffs brought this suit, not only for the purpose of establishing their title to the shares in the land which they allege are owned by them, but also for the purpose of being let into possession with the defendants. This relief cannot, of course, be granted, unless the defendants are in the possession, and certainly not when a third person, who is not a party to the action, is shown to be in possession of the land. But perhaps the case as it was tried below comes within the provisions of chapter 6, p. 37, of the Acts of 1893, which is entitled "An act to determine conflicting claims to real property," and we may therefore consider the case so far as it is necessary to decide whether the plaintiffs have any interest in the land, or whether by any erroneous ruling of the court they have been prevented from showing that they have an interest. The court submitted to the jury the following issue: "Are the plaintiffs and defendants tenants in common of the lands described in the complaint, as alleged in said complaint?" The plaintiffs alleged that Lewis Wetherington died seised and possessed of the land in dispute, and that it descended to his children, who are his heirs, as tenants in common. The defendants introduced in evidence a deed from Lewis Wetherington and wife, Mary Wetherington, to the defendants Cornie Wetherington and Mary Williams. The execution of this deed was acknowledged by the wife, Mary Wetherington, on January 29, 1898, which was after the death of her husband, and was proven as to Lewis Wetherington by G. S. Wilcox, the subscribing witness, on October 11, 1902, and was registered on that day. The said G. S. Wilcox, who was a witness of the plaintiffs, testified that he wrote the deed, and his recollection was that the names of the three daughters of Lewis Wetherington by his second marriage, namely, Mary, Leah, and Cornie, were in it; that the deed was signed by Lewis Wetherington, and then witnessed by him, and returned to Lewis Wetherington, or to his wife, or to some member of his family, but that he did not remember who took it from his hands, or who kept it. He did not see the deed again until after the death of Lewis Wetherington, when

it was handed to him by some member of the family to be registered. The name of Leah had been erased. He proved the execution of the deed as subscribing witness before the clerk of the court, and it was registered. The name of Leah Wetherington, afterwards Leah Stubbs, was not in the deed when he proved it. The certificate of probate annexed to the deed shows that the execution of the deed was proven before the clerk by the oath and examination of G. S. Wilcox, the subscribing witness thereto. The defendants introduced as a witness Mary Wetherington, the widow of Lewis Wetherington, who testified that her husband, who had the deed in his possession, handed it to his daughter, Mary Wetherington, now Mary Williams, one of the defendants, and "told her to take Leah's name off, and she did so. He said Stubbs was a dissipated man, and he did not wish him to handle anything he had. Leah was dead at that time. After he had Leah's name erased, he gave the deed to Mary, and told her to have it registered." The plaintiff objected to this evidence upon the ground that Mary Wetherington was not a competent witness, under section 590 of the Code, to testify concerning the matters stated by her. The witness is not a party to the action, and we do not see how she is interested in its event. If the deed is effectual as to her, she has conveyed away all of her interest; that is, her dower or right of dower. If it is not valid as to her, she is entitled to dower in the land, but this will be in no way affected by the result of this suit. If the defendants recover, they will become the sole owners in fee of the land, and the witness will acquire no interest whatever in it that she does not already possess, nor will any interest that she now has be in the slightest degree impaired. The witness whose competency is in question must be either a party to the action or interested in the event of the action, and must testify in behalf of himself or herself or in behalf of the person succeeding to his or her title or interest. *Bunn v. Todd*, 107 N. C. 266, 11 S. E. 1043. We do not think the witness is disqualified by the statute. While it is not necessary to decide the question, if we concede that the witness is interested in the result, we doubt very much whether her testimony relates to a personal transaction or communication between herself and her husband. She testified only to what she saw and heard, and, so far as appears in the case, she took no part whatever in the transaction or communication between her husband and his daughter, Mary Wetherington. *Norris v. Stewart*, 105 N. C. 455, 10 S. E. 912, 18 Am. St. Rep. 917; *McCall v. Wilson*, 101 N. C. 598, 8 S. E. 225; *Dobbins v. Osborne*, 87 N. C. 259.

We come now to the question as to the state of the proof in the case, the court having charged the jury that, if they believed the evidence, they should answer the issue, "No." *Gaither v. Ferebee*, 60 N. C. 310; *Mc-*

Quay v. R. R. Co., 109 N. C. 588, 13 S. E. 944; *Nelson v. Ins. Co.*, 120 N. C. 302, 27 S. E. 38. The defendants introduced in evidence the original deed, which appeared by the certificates annexed thereto to have been duly proved and registered. The fact of registration is not conclusive as to either the execution or the probate of the deed. The factum of the instrument may be disputed after its registration, and the party who assails the deed may show, if he can, that it was not in fact delivered. But so long as the probate and registration stand unimpeached and unimpaired, they furnish sufficient *prima facie* evidence of the execution of the deed, which, of course, always includes delivery. He who would avoid this presumption arising from registration must do so by proof sufficient to rebut it or to repel its legal force and effect. *Redman v. Graham*, 80 N. C. 231; *Love's Ex'rs v. Harbin*, 87 N. C. 249; *Helms v. Austin*, 116 N. C. 751, 21 S. E. 556. In the case last cited this court referred with approval to the case of *Mitchell's Lessee v. Ryan*, 3 Ohio St. 377, and said "that a recorded deed is *prima facie* evidence of delivery, and it is to be presumed that the maker meant to part with the title, and clear proof ought to be required to warrant the court in holding otherwise." The question in controversy in our case is whether the deed had been delivered to Leah Stubbs before her name was erased therefrom, and, if not, then whether it was delivered to her two sisters after her death. If the deed had not been delivered to Leah, or to any one for her use or benefit, which is the same thing, the grantor had the right to erase her name, for it was not his deed until it was delivered, and he still retained full power and control over it with the right to change it as he might see fit. The witness Wilcox did not testify that it was delivered to Leah, nor did he testify to any facts from which delivery could be inferred. His testimony did not tend to show delivery. *Baldwin v. Maulsby*, 27 N. C. 505; *Bailey v. Bailey*, 52 N. C. 44. He merely said that when the deed left his hands it had the name of Leah in it, and that he did not know to whom he gave it—whether to Lewis Wetherington, who signed the deed, or to some member of his family. This tends to prove only that the paper he witnessed was not the one he produced before the clerk, and which was afterwards registered. It must follow, therefore, as there was no other proof bearing on this point, that the deed had not been delivered to Leah when her name was erased; and the only question remaining in the case is, did the testimony of Mrs. Wetherington, if believed, or if the jury found the facts in accordance therewith, establish the delivery of the deed to Cornie Wetherington and Mary Williams, the defendants? It appears from this testimony that Lewis Wetherington, who had possession of the deed, and who, so far as appears, kept it continuously from the time it was written, told

Mary Wetherington, his daughter, to erase Leah's name, for the reason then given by him, and to have the deed registered, which was done. This was surely a sufficient delivery, whether the deed was afterwards registered or not. *Phillips v. Houston*, 50 N. C. 302; *Helms v. Austin*, supra. If we eliminate from the case the force and effect of the probate and registration as creating a presumption of delivery, the evidence of the defendants, which was uncontradicted, was sufficient to prove an actual delivery of the deed by the maker to Cornie and Mary, his two daughters. The jury believed this evidence, because, under the instructions of the court, they answered the issue in favor of the defendants. This conclusion makes it unnecessary to pass upon the other exceptions of the plaintiffs.

No error.

(134 N. C. 622)

STATE v. CAPPS.

(Supreme Court of North Carolina. March 1, 1904.)

MURDER—INTENTION OF ACCUSED—MALICE—PRESUMPTION—EVIDENCE—SENTENCE.

1. Where the killing with a deadly weapon is proved, and nothing else appears, the law implies malice, and it is murder in the second degree, as defined by Acts 1893, p. 76, c. 85.

2. On a trial for murder, where the accused had deliberately shot into a house through an open door and killed an inmate, evidence held insufficient to rebut the presumption of malice arising from the reckless act, or to reduce the grade of the crime to manslaughter, though there was no actual intention to injure any one.

3. Where one accused of murder had deliberately shot into a house and killed an inmate, evidence that the accused was on friendly terms with the family living there was inadmissible.

4. On a conviction for murder in the second degree, a sentence to 20 years' imprisonment was not excessive.

Appeal from Superior Court, Beaufort County; Council, Judge.

George Capps was convicted of murder in the second degree, and appeals. Affirmed.

The defendant was indicted in the court below for the murder of Augustus Tuten, and, having been convicted of murder in the second degree, appealed to this court. The evidence tended to show that the deceased, who was a boy seven years old, lived with his grandmother Mary McCulloch, whose house was about 30 or 40 yards from the home of the defendant. The house had only one room, and at the time of the homicide there were in this room Mary McCulloch, her three daughters, Georgia, Florence, and Annie, and the little boy, who was killed by the defendant some time in the afternoon, between 4 o'clock and sunset; one of the witnesses stating that he heard the gun fired about 5 o'clock, and another that she heard it about 4 o'clock. The defendant

came directly from his house to the McCulloch house, and had with him a single-barreled gun, into which he placed a shell as he was approaching the house of Mary McCulloch. The principal facts are stated by one of the witnesses for the state (Georgia McCulloch), who testified as follows: "When the defendant got to the house, he called me and said, 'Georgia, come here a minute.' I said, 'I have not got time.' He said again, 'Come here a minute,' and I said, 'I have not got time.' Defendant was at the gate when he began calling me. When I said, 'I have not got time,' he said, 'You are scared of me, ain't you?' I said: 'No, sir; I ain't scared of you. I am cool.' He said: 'You act like you are scared of me.' I was sitting at the sewing machine during this conversation. I left the machine about the time it was over, and went up to the fire to warm my hands. While I was warming my hands, my sister Florence said, 'Mr. Capps, when I go to your house, I recognize your house; and, when you come to mamma's, I want you to do the same.' He then said, 'Florence, 'tain't worth while for you to begin to cut up, God damn it! I am going to shoot.' At the time the defendant and Florence were talking, defendant was standing on the door step. He then raised his gun, and presented it, and fired it right through the door into the house. When the defendant shot, I saw the boy fall in the middle of the floor, between the two doors. I saw the boy after he fell. He was shot in the side. As the boy fell, he put his hand to his head and side, and said, 'Uncle George has shot me.' I was about three steps (nine feet) from the boy when he was shot. The boy, myself, my mother, and my sisters, Florence and Annie, were in the house when the shooting occurred. After the shooting, the defendant walked around the house and went away." This witness further stated that the defendant did not like any of the McCulloch family much, that he sometimes quarreled with the little boy, that the gun was pointed in the direction where the deceased stood at the time he was shot, and that the defendant said nothing to or about the boy before he fired the gun. The evidence of the witness Georgia McCulloch was in all essential particulars corroborated by the testimony of Mary McCulloch and her daughter Florence. The witness Florence Tuten also testified: That the defendant "shot right through the house," and when he shot he was 12 or 15 feet from where the boy fell. After the defendant fired the gun, he immediately left the house, and went towards the main road, and passed by his own house without stopping. That "he put up the gun to his face and seemed to take aim," but she was unable to say whether or not he put the breech to his shoulder. She further stated that before the shooting occurred the defendant's wife came over to their house, and she heard her say, "George, your gun is

going to get you into trouble." Laura Collins, a witness for the state, testified: "I remember when Gus Tuten got killed. I saw the defendant twice that day. The last time I saw him was in the evening, at Mary McCulloch's house. I heard a noise or fuss over there. I stopped, and heard the defendant say, 'I am going to shoot,' and saw him raise his gun, and take sight along the barrel, and fire into the house. After shooting, he turned and walked away from the house. I hid in the bushes, and he passed me with his gun in his hand. It was a single-barrel breech-loading shotgun. I heard the defendant doing loud talking before the shot was fired. When he passed me, after the shooting, the defendant had passed his own house, going on. The shooting occurred about four o'clock on Saturday evening. I saw the defendant with the greens in his arms that evening as he went towards Mary McCulloch's house. On his way over there, he did not stop at his house or at the gate. His wife was behind him as he went over. The gun was against his face when he shot." Annie McCulloch, a witness for the state, testified: "I was present at the time the boy was shot. I heard the defendant say, 'I am going to shoot, damn it!' and he raised his gun up and shot right in the house, and struck Gus and killed him. I dodged out of the way when I saw he was going to shoot. The defendant left after the shooting. The back and front doors were both open at the time he shot. The defendant gave Georgia some greens that evening when he came over to our house, and she took them. I do not know where the boy was standing when the defendant came to the door." Alexander Watson, a witness for the state, testified: "I live about a quarter of a mile from the defendant and Mary McCulloch. I recall the time Gus Tuten was said to have been shot. I heard the gun fire about 5:15 that evening. I saw the defendant as he was going home that evening about 5. He had his gun then. His wife and Mary McCulloch were with him. They had some greens. I did not speak to the defendant, nor he to me. About 8 or 9 o'clock that night I saw the defendant again. He came to my house, and wanted me to go to his wife and get his clothes for him. I said, 'You had better leave here.' A few minutes later he came back to the house, and asked me to let him go upstairs, and I agreed that he could do so." There was testimony tending to show that the defendant was not drinking or under the influence of liquor when he committed the homicide. The jury rendered a verdict of guilty of murder in the second degree, and judgment was entered thereon, to which the defendant excepted and appealed.

Small & McLean and E. F. Simmons, for appellant. The Attorney General, for the State.

WALKER, J. (after stating the case). The defendant's counsel, at the close of the testimony, requested the court to give certain instructions to the jury, which it refused to do; but we do not deem it necessary to consider or discuss them, as all of the questions intended to be presented by the other exceptions of the defendant are raised by the defendant's exception to one of the instructions given by the court in its charge to the jury. The court charged the jury correctly in regard to murder in the first degree, and also as to the circumstances under which the defendant would be entitled to an acquittal, but told the jury that in no view of the evidence could they convict him of manslaughter; and in this connection the jury were instructed as follows: "If you find from the evidence, beyond a reasonable doubt, that the defendant shot the deceased with a gun, inflicting a wound from which death resulted, but you are not satisfied beyond a reasonable doubt that the shooting and killing were the result of willful premeditation and deliberation, then your verdict should be that of murder in the second degree. If it resulted from willful premeditation and deliberation, then your verdict should be guilty of murder in the first degree. In no view of the evidence, if you believe it, can you return a verdict of manslaughter."

The question, then, is, was there any evidence, if the testimony is considered in the most favorable light for the defendant, upon which the jury could have returned a verdict that the defendant was guilty only of manslaughter? The defendant could not have his case presented here in a more favorable aspect for him than it is by this charge of the court, because if there is any view of the evidence which the jury might have taken, and which would have reduced the grade of his offense from murder to manslaughter, he is entitled to have us consider the case in that view. We have not discovered any evidence which entitled the defendant to an acquittal, if the jury found as a fact, which fact seems to have been admitted at the trial, that he killed the deceased with a deadly weapon; and we do not understand it to be seriously contended before us that there was any such evidence. The defendant's counsel, as it appears in the record, virtually admitted the killing with a deadly weapon, and also requested the court to charge the jury "that upon all the evidence in the case, if believed by them, the jury can find the defendant guilty of murder in the second degree or of manslaughter." The real question, therefore, is whether there was any evidence to reduce the grade of the offense from murder in the second degree to manslaughter.

There is no principle in the criminal law better settled than that, where the killing with a deadly weapon is admitted, or proved, in the sense that it is established as a fact

In the case, the law implies or presumes malice; and at common law the killing, if nothing else appears, is murder. *State v. Willis*, 63 N. C. 26; *State v. Johnson*, 48 N. C. 266; *State v. Brittain*, 89 N. C. 481. When this implication is raised by an admission or by proof of the fact of killing, the burden is upon the defendant of showing all the circumstances of mitigation, excuse, or justification to the satisfaction of the jury (*State v. Johnson* and *State v. Willis*, supra; *State v. Vann*, 82 N. C. 631; *State v. Barrett*, 132 N. C. 1005, 43 S. E. 832), and that burden continues to rest upon him throughout the trial (*State v. Brittain*, supra). As malice is an implication or presumption raised by law from the fact of the killing, it must needs be a matter of law as to what facts or circumstances which the evidence tends to establish will or will not rebut the presumption. *State v. Matthews*, 78 N. C. 523; *State v. Byrd*, 121 N. C. 684, 28 S. E. 353; *State v. Wilcox*, 118 N. C. 1131, 23 S. E. 928; *State v. Craton*, 28 N. C. 164; *State v. Johnson*, supra. Whether the evidence sufficiently establishes the facts or circumstances which will constitute a rebuttal of the implication of the law must as surely be a question of fact for the jury to pass upon; and when, therefore, there is any evidence tending to show these facts or circumstances, it is the duty of the court to submit them to the jury, with proper instructions as to what will be sufficient to rebut the presumption, so that the jury may finally decide whether or not the presumption has been met and overcome by the defendant. It follows that whether there is any evidence in this case to rebut the implied malice is a question of law. When there is a killing with a deadly weapon, the law, as we have said, implies the malice, and the offense, at common law, is murder, and under the Acts of 1893, p. 76, c. 85, it is murder in the second degree, if there is nothing in the case to reduce the homicide to a lower grade. *State v. Wilcox*, 118 N. C. 1131, 23 S. E. 928. This being so, all matters in mitigation or excuse must be shown in the same way as at common law, if the defendant would reduce the offense to manslaughter, or acquit himself altogether of the charge.

We have examined the testimony set forth in the record with great care, and have been unable to find anything which tends, in law, to extenuate the crime of which the defendant was convicted, and there is certainly nothing to excuse it. Instead of rebutting the implied malice, the evidence tends to strengthen and confirm the presumption raised against the defendant from the act of killing with a deadly weapon. The malice necessary to constitute murder may exist, though there was no intent to kill or even to injure the particular person or any one else. It is implied when an act dangerous to others is done so recklessly or wantonly as to evince depravity of mind and a disregard of human life, and, if the death of any per-

son is caused by such an act, it is murder. *Dunaway v. People*, 110 Ill. 338, 51 Am. Rep. 686; *Pool v. State*, 87 Ga. 530, 13 S. E. 556; *Golliher v. Commonwealth*, 87 Am. Dec. 493; *Washington v. State*, 60 Ala. 16, 31 Am. Rep. 28; *State v. Edwards*, 71 Mo. 312; 1 *McLain*, Cr. Law, § 325; 1 *Wharton*, C. L. § 819; 21 Am. & Eng. Enc. Law, 153.

We believe the authorities cited support the general rule laid down, and several of the cases, while not presenting precisely the same facts, cannot be distinguished in principle from the case under consideration. In *Clark's Criminal Law*, p. 180, the rule is thus substantially stated: Where a person does an act with knowledge that it will probably cause death or grievous bodily harm to some person, although he has no actual intention to injure any person, but may wish the contrary, and death ensues from his act, he is guilty of murder. Thus, if a man recklessly throws from a roof into a crowded street a heavy piece of timber, which kills a person in the street, or if he intentionally fires a pistol in a crowded street and kills another, in either case it is murder. In *Pool v. State*, supra, the court says: "The law infers guilty intention from reckless conduct, and, where the recklessness is of such a character as to justify this inference, it is the same as if the defendant had deliberately intended the act committed. When, therefore, one recklessly fires a pistol, with criminal indifference as to the consequences, and another is killed, it is not necessary, in order to constitute this killing murder, that the accused should, at the time of firing, have been engaged in the commission of some unlawful act, independent of and in addition to the reckless firing itself." In *Brown v. Commonwealth (Ky.)* 17 S. W. 220, it is said by the court: "If we are mistaken as to there being evidence of the appellant's malice towards the deceased in particular, it is clearly established that the appellant, without lawful excuse, intentionally fired the pistol in a room crowded with persons. If he did this, not with the design of killing any one, but for his diversion, merely, but killed one of the crowd, he is guilty of murder, for such conduct establishes 'general malignity and recklessness of the lives and personal safety of others, which proceed from a heart void of a just sense of social duty and fatally bent on mischief.'" In the case of *Alken v. State*, 10 Tex. App. 610, 618, it appeared that the defendant fired his pistol into the window of a passenger car, in which he knew there were passengers; and the court said, in discussing the case, that "where an act unlawful in itself is done with deliberation and intention of mischief or great bodily harm to particular individuals, or of mischief indiscriminately, fall where it may, and death ensues against or beside the original intention of the party, it will be murder. The intention to commit an offense is presumed whenever the means used is such as would ordinarily result in the

commission of a forbidden act, and this rests upon the principle that a man is always presumed to intend that which is the necessary or even probable consequence of his acts, unless the contrary appears." It is further said by the court that, "according to the evidence, the defendant fired his pistol into the window of a passenger car of a railroad train, in which, it is shown, he must have known and did know there were passengers. The deceased was struck by the ball, and died in a minute or two thereafter from the effects. More reckless disregard of human life was never shown, and can scarcely be imagined; and the act, under the circumstances developed, is, and could be, in law, nothing short of murder." If it be suggested that the killing might have been done accidentally and without negligence, in which case the defendant would be entitled to an acquittal, or that it was done recklessly, but without intention to kill, in which case the defendant would be guilty only of manslaughter, there is no evidence, as we think, to sustain either view. Such a suggestion is fully met and answered by the case of *State v. Vines*, 93 N. C. 496, 53 Am. Rep. 466, in which *Merrimon, J.*, speaking for the court, says: "The test of responsibility depends upon whether the conduct of the person accused was unlawful, or, not being so, was so grossly negligent, reckless, or violent as necessarily to imply moral impropriety or turpitude. In some cases it may be difficult to determine the grade of the offense, but the case before us leaves no ground for doubt or hesitation in determining that it is at least one of manslaughter. Indeed, in one aspect of the case, it was murder. There was some evidence going to show the willful purpose of the prisoner to shoot without regard to the consequences, and, if this purpose existed, it was murder. If he had been allowed to say that, in his opinion, the shooting was accidental, this could not have materially changed the case, because the prisoner had used the loaded pistol in an unlawful and reckless manner, and whether the firing was accidental or not made no difference. The law does not tolerate such use of deadly weapons, and, when fatal consequences result from it, the offender cannot be held guiltless. In such case he must answer for the consequences. It would be monstrous and shocking to reason to allow a man to so use a loaded pistol, and then take shelter behind the fact that the firing was accidental."

The defendant, on the cross-examination of some of the state's witnesses, proposed to show that he had been friendly with Mary McCulloch and her family at the time when the homicide was committed, and also proposed to show certain facts and circumstances from which his friendly feeling towards them could be inferred by the jury. The court excluded the evidence, and we think it did so properly. This evidence, if admitted, could

not have reduced the grade of the homicide. A defendant must show something more than a mere friendly disposition towards the person killed, if he would justify, excuse, or mitigate his offense. It was so decided, as it seems to us, in *State v. Johnson*, supra.

The evidence in this case tends to show that the defendant's anger was aroused by the refusal of Georgia McCulloch to come to the door of the house when he called her, and perhaps by what Florence Tuten said to him at the time. This reference to the testimony is made not so much to show that there was evidence in the case of actual malice as to show that the evidence not only does not rebut the implication of malice, but rather tends to confirm it.

The defendant excepted to the judgment upon the ground that the punishment imposed is excessive. The sentence of the court was entirely within the limit fixed by the law. It imposed only the extreme punishment for manslaughter. We do not think, in any view of the evidence, that it was excessive. *State v. Miller*, 94 N. C. 904.

Upon a review of the whole case, our conclusion is that the rulings and charge of the court were correct. No error.

(134 N. C. 656)

STATE v. TEACHEY.

(Supreme Court of North Carolina. March 8, 1904.)

HOMICIDE—EVIDENCE—STATEMENTS OF WITNESSES.

1. In a prosecution for homicide, where defendant's father testified that defendant was at home at 7 o'clock on the night of the shooting, and that he, the father, went to bed early and did not see defendant until the next morning, and deceased was shown to have been shot about 9 o'clock that night, testimony of a state's witness that, a few days after the shooting, the father said, on hearing that the shooting was done at 9 o'clock, that he might as well give the case up, as he could not account for defendant after 7 o'clock, was inadmissible, for it was neither contradictory of any statement of defendant's father, nor connected with any fact concerning the shooting.

Appeal from Superior Court, Duplin County; O. H. Allen, Judge.

Dan Teachey was convicted of homicide, and appeals. Reversed.

James O. Carr and John D. Kerr, for appellant. The Attorney General and Stevens, Beasley & Weeks, for the State.

MONTGOMERY, J. In addition to the statement of witnesses concerning the dying declarations of the deceased, there was strong evidence that the prisoner shot and killed the deceased. His honor, however, in the course of the trial, received a certain piece of evidence offered by the state which was so clearly incompetent, and which may have been harmful to the prisoner, that we

are on that account compelled to order a new trial.

Robert Teachey, the father of the prisoner, testified, for the defense, that his son, the prisoner, was at his home at 7 o'clock on the night of the shooting, and that he (the father) went to bed early and did not see the prisoner until next morning. The deceased was shot about 9 o'clock at night. W. D. Teachey, a witness for the state, was allowed to testify, over the prisoner's objection, that on Sunday after the shooting he, at the house of Robert Teachey, was asked by Robert if he (W. D.) had heard anybody say at what time the shooting took place, and that he answered, "About 9 o'clock," and that in reply Robert said, "I might as well give the case up, as I have no grounds to fight upon. I cannot account for Dan after 7 o'clock." Joe Bostick testified that he heard Robert Teachey say that he could not account for Dan after 7 o'clock. At the close of his testimony the jury were instructed "that the evidence as to what Bob Teachey [who is the same as R. Teachey] said was not to be considered, unless they found from the evidence of said Teachey that he fixed Dan Teachey at home that night after 7 o'clock, and he [Bob Teachey] was thereby contradicted." Assuming that this instruction to the jury had reference to the testimony of W. D. Teachey as well as to that of Bostick, it could not have the effect of curing the error in the admission of the testimony of W. D. Teachey. In no sense could the testimony of W. D. Teachey be considered as contradictory of any statement made by Robert Teachey as to the whereabouts of Dan on the night of the shooting. The despair of the father (Robert) in successfully defending his son against the charge of murder had no connection with any statement made by the father as to the time when he saw the son last on the night of the shooting. It was entirely independent of all reference as to the time of the shooting, and was but the individual opinion of a distressed parent about the difficulties surrounding his son's condition. It was not contradictory of any statement made by the witness, and was not connected with any fact concerning the alleged homicide.

New trial.

(134 N. C. 316)

RILEY et al. v. PELLETIER.

(Supreme Court of North Carolina. March 8, 1904.)

VENUE—PARTIES TO ACTION—MOTIONS FOR CHANGE—TIME OF MAKING—WAIVER OF RIGHT.

1. Under Code, § 195 (2), providing that the court, in its discretion, may change the venue when the convenience of witnesses and the ends of justice would be promoted by the change, such motion may be made at any time in the progress of the cause.

2. The filing of an affidavit and motion for change of venue, in vacation, before the clerk, is invalid; the motion must be made before the judge.

3. Under Code, § 195, providing for change of venue when the county designated is not the proper county, and requiring such motion to be made before the time of answering expires, the motion must be made at the return term if the complaint is then filed, and, if not, as soon as the complaint is filed, and before answering; and either the filing of an answer without suggestion or demand for removal, or the acceptance of a special order extending the time to answer, is a waiver of the right to remove.

Appeal from Superior Court, Lenoir County; Peebles, Judge.

Action by J. T. Riley and others against J. W. Pelletier. From an order granting a removal of the cause, plaintiffs appeal. Reversed.

N. J. Rouse, for appellants. Simmons & Ward, for appellee.

CLARK, C. J. Plaintiffs, other than Lovett Hines, are nonresidents of the state. The defendant resides in Carteret county. The summons was returnable to April term, 1902, of Lenoir superior court; complaint was filed at that term, and entry made, "time to answer." The next term began 11th November, at which term the answer was filed. In the meantime, on 17th October, 1902, the defendant filed an affidavit and motion to remove the cause to Carteret, but it does not appear that notice of this motion was served on any of the plaintiffs or their attorneys. At November term, 1902, and succeeding term, the motion and cause were continued. At March term, 1903, the motion to remove was granted.

"Lovett Hines, Agent," who resides in Lenoir county, was joined as party plaintiff. It is alleged in the complaint that he was the agent of his coplaintiffs, and as such rented out the lands, and was authorized to collect the stipulated rent thereon for the conversion of which this action was brought. The answer, while denying information upon the above allegation, admits that said Hines was agent for his coplaintiffs in taking possession of the crop, and sets up as a defense that he took more of the crop than was due. The Code (section 177) requires that the real party in interest should be plaintiff, "except as otherwise provided," and section 179 authorizes, among others, "a trustee of an express trust" to sue, and defines him to be "a person with whom, or in whose name a contract is made for the benefit of another." It is suggested that Hines, upon the averments in the complaint, was the "trustee of an express trust," the alter ego of the landowners to rent the land and collect the rents, and hence that he was *prima facie* a proper party, and, being a resident of Lenoir county, it was therefore error to remove the cause on the ground assigned in the motion, under

Code, § 192, for the residence of defendant in Carteret. We do not find it necessary to pass upon this point.

The court, in its discretion, may remove the trial "when the convenience of witnesses and the ends of justice would be promoted by the change" (Code, § 195 [2]), and such motion may be made at any time in the progress of the cause. The restriction that the motion to remove must be made "before the time of answering expires" applies only when "the county designated in the summons and complaint is not the proper county" (Code, § 195) and the defendant seeks to remove as a matter of right.

We may note, further, that filing the affidavit and motion to remove, in vacation, before the clerk, was invalid. Such motion must be made before the judge (Howard v. R. Co., 122 N. C. 944, 29 S. E. 778), and notice given (State v. Johnson, 109 N. C. 855, 13 S. E. 843; Stith v. Jones, 119 N. C. 430, 25 S. E. 1022). Even if valid, the filing of the answer, without suggestion or demand for removal, and before action had upon the motion, was a waiver of the motion. McMinn v. Hamilton, 77 N. C. 301; Co. Board v. State Board, 106 N. C. 81, 10 S. E. 1002; Cherry v. Lilly, 113 N. C. 27, 18 S. E. 76.

Besides, the Code requires that the motion to remove should be made "before the time for answering expires." While this language is slightly different from the federal statute regulating motions to remove to the federal court, which specifies that said motion must be made "at the time or any time before the defendant is required by the laws of the state or the rule of the state court, in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff," we think the tenor and object of the two statutes are the same, i. e., to require the defendant to object to the jurisdiction in limine by moving to remove as soon as he is afforded opportunity, from filing the complaint, to know definitely the scope of the action. The language of the statute in both cases has reference to the time at which the answer should be filed under the statute or the general rules of court, and not the special order granting extension of time to answer, which is of itself, if asked or accepted by the defendant, an acceptance of the jurisdiction, and therefore a waiver of the right to remove. Howard v. Railroad, supra. In County Board v. State Board, supra, the motion to remove was made before the expiration of the extension of time to answer, but after the answer was filed, and it was held too late. The only case which seems to militate against our ruling in this case is Shaver v. Huntley, 107 N. C. 623, 12 S. E. 816, but there time was given to file the complaint, and when it was filed in vacation, disclosing the nature of the action, the defendant, before answering, made a demand for removal, and gave notice of the motion to the opposite party. In that case

the court repeats that the motion must be made in limine. The question here decided was raised in Roberts v. Connor, 125 N. C. 45, 34 S. E. 107, but not passed upon, as the order of removal was reversed upon another ground. If the defendant seeks to remove, as a right, because the action is brought in the wrong county, the motion must be made at the return term, if the complaint be then filed, and, if it is not, then as soon as the complaint is filed, and before answering.

Error.

(134 N. C. 350)

OUTLAND v. SEABOARD AIR LINE RY. CO. et al.

(Supreme Court of North Carolina. March 8, 1904.)

CARRIERS—CONTRACT TO FURNISH CARS FOR FREIGHT—REASONABLE TIME—AUTHORITY OF AGENTS—INSTRUCTIONS—HARMLESS ERROR—DAMAGES.

1. Plaintiff wrote defendant that he was cutting and expected to cut 50 car loads of props at a certain point, which he could not load at any siding, and asked for a train to load them on the main line. Defendant wrote that it had considered his application to load a train on the main line and was prepared to permit it, and concluded, "Please let me know when you desire a train, and we will take up with the superintendent the question when it can be furnished." Held, that there was an unconditional and complete contract to furnish cars for transportation of the props; the day when the superintendent should send them being a mere matter of detail and in law to be done within a reasonable time after plaintiff should make known his readiness therefor.

2. One may contract with the general freight agent of a division of a railroad as having authority to furnish trains for moving freight under special contract.

3. Even if the superintendent of transportation of a railroad had power to decline to furnish cars where the general freight agent had made a special contract for the furnishing of a train to move freight, there is a complete contract where plaintiff sent to the superintendent a request for a train, and the superintendent sent it to the general freight agent, who wrote plaintiff referring to his letter to the superintendent, and saying that they had considered his application to be permitted to load a train and were prepared to permit it.

4. Under the contract, consisting of plaintiff's letter, stating that he expected to cut 50 car loads of props and asking defendant "to grant me train to load my props on the main line," and defendant's letter, agreeing to furnish "a train," there is no error in an instruction to allow plaintiff such damages as he sustained by defendant's failure to furnish "trains" of cars sufficient to transport 50 car loads of props; no train having been furnished.

5. An instruction that if the jury believed the evidence they should find that defendant agreed to furnish plaintiff with cars "as alleged in the complaint" (which was at such time as plaintiff might need them) is harmless, though the contract merely required them to be furnished within a reasonable time, they also being instructed that they were to allow such damages as plaintiff sustained by reason of cars not being furnished in a reasonable time, and there having, as matter of law, been an unreasonable delay in furnishing them.

6. As a matter of law, a railroad company which contracts to furnish cars for transport-

ing timber does not, by tendering them 75 or 80 days after the contract is made, perform its contract in a reasonable time.

7. A railroad company is not relieved of liability for breach of its contract to furnish cars to transport freight by the fact that it used reasonable effort to procure foreign cars.

8. A railroad company which contracts to furnish, for a certain amount to be paid as freight, cars to transport a certain amount of props cut and to be cut, having broken the contract, is liable for damages as respects the props cut at the time of the contract, as well as those thereafter cut, including those cut after it gave notice that it could not furnish cars.

Appeal from Superior Court, Northampton County; Moore, Judge.

Action by W. F. Outland against the Seaboard Air Line Railway Company and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Day & Bell, T. W. Mason, and Murray Allen, for appellants. Peebles & Harris, for appellee.

MONTGOMERY, J. This action was brought by the plaintiff to recover damages for an alleged breach of a contract which was made between the plaintiff and the defendant in November, 1901. The contract is in writing, and is embraced in a written correspondence between the plaintiff and the agents of the defendant. On the 22d of October, 1901, the plaintiff wrote to C. R. Capps, the general freight agent of the First Division of the defendant's road, at Portsmouth, Va., and also on the 31st October, 1901, to C. H. Hix, division superintendent, in the same words, as follows: "Dear Sir: I am cutting and expect to cut 50 car loads of mining props, 27 feet long, near Roxobel, N. C. There is absolutely no accommodation for loading the same at Roxobel siding as it is all taken up with cordwood, Brown and Bundy's place where they have to pile their lumber prior to shipping and C. T. Harrell's gin house and site. Also S. T. Hedgepeth tells me that he has 50 or 60 thousand feet, which he expects to begin to cut and load now soon at Roxobel if he has not already started, and further, were it possible for me to load at Roxobel, your company has not any place for me to drop the props on, prior to loading, and Liverman, the party who owns the land adjoining the depot will not allow any one to drop props on his premises without paying him one cent per log for use of same, which charges I am not willing to pay. Consequently under the many existing circumstances, I respectfully ask you to grant me train to load my props on the main line. I think that there is no doubt but what I could load a train in one day." The letter to Hix was sent by him to Capps, and on the 18th of November, 1901, Capps wrote to the plaintiff, at Woodland, in Bertie county, N. C., along the line of the First Division of the defendant company, a letter in the following words: "Dear Sir: Referring to your

letter of October 31 to Mr. Hix, we have considered your application to be permitted to load a train of mine props on the main line near Roxobel, N. C., and are prepared to permit this, subject to the rules governing the loading of cord wood on the main line, with which you are familiar. These rules of course provide that you will be allowed from sunrise to sunset for loading, and that the special train must make way at all times for other trains. The rates to be charged you will be the full local rates from Roxobel to destination. Please let us know when you desire a train, and we will take up with Superintendent Hix the question of when it can be furnished." There was evidence tending to show that before the 18th of November, 1901, the date of the contract, the plaintiff had already cut a large number of the mine props, and that after the 22d of November, 1901, when Capps notified the plaintiff that he feared he would be unable to furnish him the train if the props were to be shipped to some point in Pennsylvania or beyond the defendant's line, the plaintiff cut other props. There was further evidence that the plaintiff hauled a large number of the props to the defendant's railroad, and was ready and able to load as many as 350,000 feet. The defendant did not offer to furnish the cars or a train until about the last of February, 1902, when the plaintiff refused to use them.

The chief contention in the case of the defendant is that there was no contract between the plaintiff and the defendant to furnish cars for the transportation of the props, for that the letter from Capps to the plaintiff of the 18th of November, upon its face, was but a conditional contract, dependent upon the ratification or approval by Hix, the division superintendent, and that the condition is found in the last three lines of the letter, which is in these words: "Please let us know when you desire a train, and we will take up with Superintendent Hix the question when it can be furnished." It is clear to us that the letter of the 18th of November, in its entirety, read in connection with the plaintiff's letter of the 22d of October to Capps, furnishes an unconditional and a complete contract to furnish the plaintiff with the cars to transport the props. The day when Hix, the division superintendent, should send the cars to the place of shipment, was a mere matter of detail, and in law to be done within a reasonable time after the plaintiff should make known his readiness for the cars.

But the defendant insists, further, that, if the contract was a complete one, the general freight agent Capps had no power or authority to bind the defendant by his act. The defendant introduced two witnesses who testified that the power to make contracts for furnishing trains on the First Division actually reposed in Hix. Capps had no such power. We think that that testimony, in a

case like this, is in effect a conclusion of law on the part of the witnesses, and that it was not a correct conclusion. The defendant held Capps out as its general freight agent of its First Division, and that designation carries with it, in law, the power to do all acts connected with the handling of freight and fixing special rates, the furnishing of trains for the movement of freight under special contract, and all matters pertaining to the subject of freights, which the company itself could do. It could not be that Hix, the superintendent of transportation, could have the power to decline to furnish cars to a customer at certain times and places, in cases where the general freight agent had made special contract with customers to furnish them. But if that were not so, the contract is a complete one, because Hix sent the plaintiff's letter in reference to the transportation of these props to Capps, and Capps, after that time, in his letter to the plaintiff, stated that he had knowledge of the plaintiff's letter to Hix, "and that we have considered your application to be permitted to load the train of mine props on the main line near Roxobel, and are prepared to permit this, subject," etc. So the correspondence discloses the joint consideration of this contract by both Capps and Hix, even if Hix's approval is necessary. His honor was therefore right when he refused to charge the jury, at the request of the defendant, that there was no contract between the plaintiff and the defendant in respect to furnishing the cars; and also in his refusal to instruct the jury "that if they believed the evidence that Capps, the general freight agent, had no authority to make a contract."

The next in importance of the defendant's contentions is that the evidence on the fourth issue did not warrant his honor in instructing the jury that if they believed the evidence they should answer the issue in the affirmative. The language of the fourth issue was as follows: "Did the defendant, on or about the 18th of November, 1901, contract and agree with the plaintiff to furnish the plaintiff with trains of cars upon which to load mine props and to allow him to load the same at his log yard on the main line of the defendant's road, as alleged in the second cause of action stated in the complaint?" The allegation on that subject in the complaint was that the defendant was to furnish the plaintiff, at such time as he might need the same, trains of cars upon which to load the mine props. The contract, as we have seen, in its treaty, was based upon the letter of the plaintiff to Capps and Hix, which is set out above. In those letters the plaintiff said he was cutting, and expected to cut, 50 car loads of props, and asked the defendant "to grant me train to load my props on the main line." The letter of Capps of the 18th of November refers to the letter from the plaintiff to

him, and in that letter Capps writes of furnishing a train. [Italics ours.] That is the ground on which the defendant rests his contention that the evidence did not fit the issue. His honor, no doubt, considered that the defendant had notice that the plaintiff would require accommodations in the way of train service to transport the 50 car loads of props mentioned in the contract, and he instructed the jury upon the evidence (the contract) that they should allow the plaintiff such damages as he sustained by reason of the failure of the defendant to furnish the plaintiff *trains* of cars [Italics ours] at his log yard on the defendant's main line, sufficient to transport 50 car loads of mine props within a reasonable time. We think the construction his honor put upon the contract was a correct one, and, that being so, no fault can be found with the instruction which he gave.

But the defendant further says that it nowhere appears in the evidence that the cars were to be furnished at such time as he (the plaintiff) might need the same, as was declared in the complaint. That is true, but the charge was not harmful, because his honor said that the defendant was required to furnish the cars within a reasonable time. On the question of the reasonableness of time within which the defendant was to have furnished the cars, raised by the fifth issue, his honor told the jury that if they believed the evidence they should say that the defendant had failed to perform its part of the contract within a reasonable time. His honor then decided that that question was a question of law, and in that view we concur. "What is a reasonable time within which a contract must be performed is a matter of law for the court, when it depends upon the construction of a contract in writing, or upon undisputed extrinsic facts." 9 Cyc. 615, and cases there cited. Seventy-five or eighty days had passed between the date of the contract and the time when the defendant tendered the cars. That, in law, was an unreasonable delay, and is not palliated by the fact that the defendant used reasonable efforts to procure foreign cars upon which the props might be loaded. That was a matter which the defendant should have looked to before making the contract.

The defendant further contends that the plaintiff ought not to recover damages for any loss he may have sustained by reason of the defendant not having furnished cars to ship such props as were cut by the plaintiff before the contract was made. There is no force in that contention, for the defendant knew from the letters of the plaintiff that a large number of props had been cut before the day of the date of the contract, and that he wanted to ship them. The agreement to pay the freight for such shipment was a sufficient consideration to support the contract.

Then, again, the defendant insists that such props as were cut after the defendant had said that it might not be able to furnish the cars could not be made the subject of damages. The contract being a valid one, as we have said, the plaintiff had a right to proceed under it, and it was not in the power of the defendant to put an end to its obligation to perform its part of the contract, simply because it could not carry it out. If that were the law, no person who may have been aggrieved by a breach of contract could have redress against one who had violated his part of it because he could not specifically perform what he had agreed to do.

But the defendant says that the plaintiff should have stopped his operations when he found that the defendant could not furnish cars to transport the props to Northern points. Under the contract there was nothing said about the point of destination of the shipment of the props, and it was the defendant's duty to have furnished the cars and to have transported the props to any point on its own line.

The question of the measure of damages does not arise, for it was agreed on both sides that if the plaintiff was entitled to recover anything he was entitled to recover \$2 per thousand feet, or a total of \$350, and the sixth issue was answered accordingly.

Upon a full examination of the case, we are satisfied that there is no error.

(124 N. C. 311)

CRESLER et al. v. CITY OF ASHEVILLE.
(Supreme Court of North Carolina. March 8, 1904.)

MUNICIPALITIES—DEFECTIVE STREETS—ACCUMULATIONS OF ICE—CARE REQUIRED OF CITY—INSTRUCTIONS—NOTICE OF CLAIM FOR INJURIES—PROOF.

1. A municipality is not liable in damages for injuries sustained by a person by slipping on a natural formation of ice, unless it has formed in unusual quantity and remained unremoved for a longer period than necessary, or could not have been removed except at a greater expense than could reasonably be incurred.

2. In an action against a city for injuries sustained by plaintiff owing to her having slipped on ice on a sidewalk, defendant requested an instruction that, if the ice came from a hydrant situated on private property and which the city did not control, defendant would not be liable, and the instruction was given, but the court added that if the hydrant was not on private property, and the city had control of it, and was negligent in allowing the water to escape and form ice, whereby plaintiff was injured, the city would be negligent. *Held*, that the instruction as given was erroneous, as it was the province of the jury to find the facts about the accumulation of the ice; and because the formation of ice from the hydrant, during the course of a night or a few hours, was made negligence as a matter of law.

3. The error was not cured by other instruc-

tions in which the jury were fully and accurately instructed on the issues.

4. Evidence held insufficient to show notice of claim for injuries by defect in street given to city as required by charter.

Douglas, J., dissenting.

Appeal from Superior Court, Buncombe County; E. B. Jones, Judge.

Action by Jane H. Cresler and others against the city of Asheville. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

Davidson, Bourne & Parker, for appellant.
Locke Craig, for appellees.

MONTGOMERY, J. It is the positive duty of the governing authorities of cities and towns to keep the streets, including the sidewalks, in proper repair, that is, as was said in *Bunch v. Edenton*, 90 N. C. 431, and *Russell v. Monroe*, 116 N. C. 720, 21 S. E. 550, 47 Am. St. Rep. 823, "the streets must be kept in such condition as that the people passing and repassing over them might at all times do so with reasonable ease, speed, and safety; and proper repair implies that all bridges, dangerous pits, embankments, dangerous walls, and the like perilous places and things, very near and adjoining the streets, shall be guarded against by proper railings and barriers." It was also decided in those cases that all persons using the streets, including sidewalks, must do so in an "orderly manner," but that they have a right to assume that the town authorities have properly discharged their duties under their powers, and that the streets are in good repair, that the sidewalks are in safe condition, and that nuisances near to and adjoining them have been properly guarded.

In the case before us the plaintiff's claim for damages against the defendant city is based on the alleged negligence that the city allowed water to escape from a hydrant, to flow over the sidewalk, and to freeze thereon during a spell of cold weather, whereby the plaintiff, in going to her work early in the morning, before it was light, was caused to slip and fall into a washout or gully by the side of the sidewalk, and thereby became seriously injured. The alleged negligence, then, was not that the sidewalk was per se dangerous, that is, built or erected or kept in bad condition, but that the icy condition of the sidewalk was the only negligence, or, rather, that it was the negligent failure of the defendant to remove the ice that lies at the foundation of the action. The defendant requested his honor to instruct the jury that "the slippery condition of a sidewalk, resulting from ordinary accumulation of ice in winter, is not an actionable defect if such accumulations are smooth; and, if you find in this case that the alleged injury of the plaintiff was due to such cause, you will answer the first issue 'No,' and not consider the other issues." His honor gave the in-

¶ 1. See *Municipal Corporations*, vol. 36, Cent. Dig. §§ 1627-1629.

struction, with the modification added, after the word "winter," "not from neglect of city." We think the modification was certainly misleading to the jury, and was therefore erroneous. The instruction, as originally prayed for, simply meant that the law would not hold liable in damages a town or city for an injury caused through the slipping of a person on its sidewalk, on account of ice formed there at a season of the year when such formation of ice might be reasonably anticipated, and not through an unusual accumulation and after being allowed to remain there for an unreasonable length of time. Putting that interpretation upon the prayer for instruction, we think it ought to have been substantially given.

It will never do to lay down the rule that in the cities and towns of North Carolina, covering, as they do in many instances, large areas not built upon, but provided with sidewalks, the municipalities should be liable in damages in cases of injury to persons caused by slipping, upon the natural formation of ice and sleet and fall of snow during our winter season. It would be an impossibility to keep these streets free from such obstructions. The true rule seems to us to be that, unless ice or snow or sleet has been allowed to fall in such quantities as are unusual, and to remain unremoved for a longer period than was necessary, or could not have been removed except at a greater expense than could reasonably be incurred, the municipality would not be liable.

Again, his honor was requested to instruct the jury: "(6) If you find as a fact in this case that the ice which formed on the sidewalk and caused the plaintiff's injury came from a hydrant situated on private property, and which the city of Asheville did not control, then the defendant would not be liable, and you will answer the first issue 'No.'" He gave the instruction, but added: "But if you find the hydrant was located on private property, and the city had control of the same, and the city was negligent in allowing water to escape and accumulate and form ice on the street, by reason of this the plaintiff fell and was injured, then the city would be negligent, and you should answer the first issue 'Yes.'" That instruction was erroneous, and for the same reason that it was the province of the jury to find the facts about the accumulation of the ice, and that of his honor to instruct them as a matter of law upon those facts, whether the defendant was negligent or not; and for the further reason that under that instruction the formation of ice from the hydrant during the course of a night or a few hours was made, as a matter of law, negligence on the part of the city. It is but just to add that in his charge in chief his honor instructed the jury pretty fully, and, in the main, accurately, on these questions. But where instructions are contradictory, and on serious phases of the case, a new trial must be granted, for the reasons we have

often pointed out—that we cannot tell which instruction the jury followed.

The defendant further requested the court to instruct the jury that the plaintiff could not recover in this action because there was no evidence that she had given the board of aldermen the notice required in sections 96 and 97 of chapter 352, p. 628, Priv. Laws 1895 (the amended and consolidated charter of the city of Asheville):

"Sec. 96. No action shall be instituted or maintained against said city upon any claim or demand whatsoever of any kind or character, until the claimant shall have first presented his or her claim or demand in writing to said board of aldermen and said board shall have declined to pay or settle the same as presented, or for ten days after such presentation neglected to enter or cause to be entered upon its minutes its determination in regard thereto; but nothing herein contained shall be construed to prevent any statute of limitation from commencing to run at the time such claim accrued or demand arose, or in any manner interfered with its running.

"Sec. 97. No action for damages against said city of any character whatever, to either person or property, shall be instituted against said city, unless within ninety days after the happening or infliction of the injury complained of, the complainant, his executors or administrators, shall have given notice to the board of aldermen of said city of such injury in writing, stating in such notice the date and place of the happening or infliction of such injury, the manner of such infliction, the character of the injury and the amount of damages claimed therefor; but this shall not prevent any time of limitation prescribed by law from commencing to run at the date of the happening or infliction of such injury, or in any manner interfere with its running."

In the complaint as originally filed there was no allegation of notice to the defendant of the plaintiff's injury as required by the statute, but an amendment was made to the complaint, in which notice was alleged, and the defendant made no answer to the amendment. The plaintiff contends that, notwithstanding the requirements of sections 96 and 97 of the act of 1895, proof of notice to the city by the plaintiff of her injury was not necessary, because of the Code rule that matters of fact alleged in the complaint, not denied in the answer, are to be taken as true. The defendant, however, contends that those sections of the act of 1895 are in effect a bar to the plaintiff's right of action, unless she both alleges and proves, by evidence, that she gave to the defendant such notice as is required by law, and that the act is not a statute of limitations, but a bar to the plaintiff's action, unless it is shown on the trial that the notice was given. His honor did not deem the failure on the part of the defendant to answer the amendment of the plaintiff as of sufficient consequence to al-

low the plaintiff to recover without proof of the notice required, and the plaintiff introduced three witnesses to show that the notice was given. That evidence was not even a scintilla going to show that the notice had been given by the plaintiff to the defendant as required by the statute.

Error.

DOUGLAS, J., dissents.

(134 N. C. 390)

JONES v. WARREN et al.

(Supreme Court of North Carolina. March 8, 1904.)

MORTGAGE NOTES—REFORMATION—MUTUAL MISTAKE—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY—VARIANCE OR CONDITION OF WRITTEN INSTRUMENT.

1. In an action to correct a mutual mistake as to the amount of mortgage notes given for the purchase of land, evidence of declarations by plaintiff, before the papers were drawn, as to the price agreed on, was competent to corroborate his testimony as to the same.

2. An exception to a refusal to nonsuit plaintiff at the close of his evidence is waived by the introduction of evidence by defendant.

3. Where the testimony, if believed, is sufficient to be submitted to the jury, the court should not state that the evidence is not strong, clear, and convincing.

4. Evidence in an action to reform mortgage notes on the ground that by mutual mistake, or the misapprehension or imposition of the draftsman (the defendant), the contract was not correctly reduced to writing, considered, and *held* sufficient to present a case for the jury.

5. In an action to reform mortgage notes defendant cannot complain that his error in drawing up the same for an amount more than was agreed on, as shown by the evidence, was not charged as a fraud on his part, and that the action was restricted by the complaint and issue, submitted without objection, to an inquiry whether there was a mutual mistake.

6. Where plaintiff sought to reform notes on the ground that they were incorrectly put into writing by the mutual mistake of defendant, who drew them, and of plaintiff, who, being unable to read and write, was unable to correct the error, they not being read over to him, it cannot be objected to as an attempt to vary or contradict a written instrument by a contemporaneous parol agreement.

7. Though one party's mistake will not entitle him to correct a written instrument when there is a mutual mistake or mistake on one side, and either fraud, undue influence, or like cause on the other, giving rise to plaintiff's mistake, the court will grant relief.

Appeal from Superior Court, Chowan County; Council, Judge.

Action by Martin Jones against James O. and T. D. Warren. From a judgment in favor of plaintiff, defendant James O. Warren appeals. No error.

Pruden & Pruden and Shepherd & Shepherd, for appellant. W. M. Bond, for appellee.

OLARK, C. J. This is an action to ascertain the balance due upon a mortgage executed by the plaintiff to the defendant to secure

the balance of the purchase money upon the land which had been conveyed to the plaintiff by the defendant, and an injunction pending the action. The complaint alleged that the purchase price was \$8 per acre; that the deed recites a consideration of \$1, but that the mortgage notes were written upon the basis of \$10 per acre, allowing credit for amounts paid before the execution of the mortgage; that the plaintiff is an ignorant man, unable to read or write, and that the defendant wrote all the papers. The jury found that the plaintiff was entitled to the credits claimed, and that the agreed price was \$8 per acre; and there was judgment in favor of the defendant for the balance due upon such findings, and a decree of foreclosure if such balance was not paid by a day named. The defendant appealed.

The plaintiff was allowed to state that, after he had contracted with the defendant, and before the papers were drawn up, he (the plaintiff) stated to one Byrum that the agreement to buy was for the price of \$8 per acre; and, further, Byrum testified that the plaintiff did make such statement to him at that time. The first and second exceptions were to the above evidence, but it was competent to corroborate the plaintiff who had testified that \$8 per acre was the agreed price. *Burnett v. R. Co.*, 120 N. C. 517, 26 S. E. 819, and cases there cited; *Ratliff v. Ratliff*, 131 N. C. 431, 42 S. E. 887.

The third exception—for refusing to nonsuit the plaintiff at the close of his evidence—was waived by the defendant introducing evidence. *Ratliff v. Ratliff*, 131 N. C. 428, 42 S. E. 887; *McCall v. Railroad*, 129 N. C. 298, 40 S. E. 67; *Means v. Railroad*, 126 N. C. 424, 35 S. E. 813.

The fifth exception is that the court refused to tell the jury that the evidence was not strong, clear, and convincing. In *Cobb v. Edwards*, 117 N. C., at page 253, 23 S. E. 244, the court said: "The judge has no more right, when the testimony, if believed, is sufficient to be submitted to the jury, to determine in the trial of civil actions what is strong, clear, and convincing proof, than he has, in the trial of a criminal action, to express an opinion as to whether guilt has been shown beyond a reasonable doubt." This has been cited and approved in *Lehew v. Hewitt*, 130 N. C. 22, 40 S. E. 769, and by Douglas, J., in *Ray v. Long*, 132 N. C. 891, 44 S. E. 652.

The fourth exception (for refusal to nonsuit the plaintiff at the close of all the evidence) and the fifth and sixth exceptions (for refusal to charge that there was not sufficient evidence, and that upon all the evidence the jury should answer the first issue "No") present substantially the same question, and should be considered together. Fraud is not charged, and the case in its general features resembles *Day v. Day*, 84 N. C. 408, and *Lehew v. Hewitt*, above cited. The

action is in the nature of a proceeding to reform the mortgage notes on the ground that by mutual mistake or the misapprehension or imposition of the draftsman (the defendant) the contract was not correctly reduced to writing. The plaintiff testified that the contract price was \$8 per acre; that the defendant made the calculations and wrote all the papers; that these were not read over to the plaintiff, who could neither read nor write; that he signed them because the defendant told him they were written according to the contract, and that he believed him. The plaintiff is corroborated by Byrum, who says the plaintiff told him at the time the contract price was \$8 per acre; also by Charles Jones and William Jones, who testified that they were present when the contract was made, and that the bargain was \$8 per acre. The plaintiff further testifies that he did not know, till just before bringing this action, that the notes were drawn upon the basis of \$10 per acre, and that he had tried to find out from the defendant what was the amount due on the notes, but he had put him off; that he did not see the notes till after this action was begun; and that the only paper he had—the deed, drawn also by the defendant—did not set out the purchase price, but recited a consideration of \$1 only. The only testimony that the contract price was \$10 per acre is that of the defendant, who had himself drawn the papers. If this evidence might tend to sustain a charge of fraud, the defendant certainly cannot complain that such charge is not made, and that the action is restricted by the complaint and issue (submitted without objection) to an inquiry whether there was a mutual mistake in drawing up the notes. It is no prejudice to the defendant, the draftsman, that his error in drawing up the notes is claimed to be due to mistake, and not to fraud on his part. *Moffitt v. Maness*, 102 N. C. 457, 9 S. E. 399, and *Taylor v. Hunt*, 118 N. C. 171, 24 S. E. 359, relied on by the defendant, seem to us not to be in point. Those were cases in which it was attempted to vary or contradict a written instrument by a contemporaneous parol agreement. Here the contention is that the agreement made was incorrectly put into writing by the mutual mistake of the defendant, who drew the papers, and of the plaintiff, who, being unable to read and write, was unable to correct the error, the papers not being read over to him. A mistake of one party will not entitle him to correction of a written instrument, but when there is mutual mistake, or mistake on one side, and either fraud, surprise, undue influence, misapprehension, imposition, or like cause on the other, giving rise to the plaintiff's mistake, the court will give relief. *White v. Railroad*, 110 N. C. 460, 15 S. E. 197; *Day v. Day*, supra; 20 Am. & Eng. Enc. (2d Ed.) 823.

No error.

(124 N. C. 357)

BROWN et al. v. STEWART, Mayor, et al.
(Supreme Court of North Carolina. March 8, 1904.)

STATUTES—PASSAGE—CONSTITUTIONAL REQUIREMENTS—READING BILL—EVIDENCE.

1. Const. art. 2, § 14, declares that no law shall be passed to pledge the faith of the state, directly or indirectly, or to impose any tax, or to allow any town to do so, unless the bill is read three times in each house. A bill which had passed the House, and been read once in the Senate, authorized a certain town to issue bonds, fixed their maturity, provided when the first annual tax for their payment should be levied, and provided that \$2,000 of the bonds should be paid in a specified year; and, after a first reading in the Senate, an amendment was made whereby the date of maturity was postponed, and the other dates so postponed as to preserve the harmony of the scheme, and the bill, as amended, passed upon its second and third readings. *Held*, that the statute was valid, notwithstanding that the amendment was not read three times, since it imposed no tax, etc., within the Constitution.

2. Const. art. 2, § 14, declares that no law shall be passed to pledge the faith of the state, directly or indirectly, or to impose any tax, or to allow any town to do so, unless the yeas and nays are entered on the journal. *Held*, that the journal is competent evidence to show whether the Constitution has been complied with.

Appeal from Superior Court, Beaufort County; Hoke, Judge.

Controversy between George H. Brown and others and E. T. Stewart, as mayor of the town of Washington, and others, submitted without action, pursuant to Code, § 567. From a judgment for plaintiffs, defendants appeal. Affirmed.

This is a controversy submitted to the court without action, pursuant to section 567 of the Code. The facts upon which the parties desire the decision of the court are set forth with care and clearness. The affidavit is in strict conformity with the statute. The plaintiffs are creditors of the defendant the city of Washington, and hold the bonds and other evidences of indebtedness referred to in the act of the General Assembly (chapter 48, p. 92, Priv. Laws 1903). Said bonds, etc., were issued for money borrowed for necessary expenses incurred in repairing streets, public buildings, etc. It is admitted that said bonds, etc., constitute valid and binding obligations of said city. The General Assembly, at its session of 1903, enacted chapter 48, p. 92, of the Private Laws of 1903; said act being ratified February 9th. The said act recites that the city is indebted in the sum of \$32,000, said debt being contracted for the purposes therein set forth, and evidenced as aforesaid, and is entitled "An act to authorize the board of commissioners of the town of Washington, North Carolina, to issue bonds to pay its existing indebtedness." The board of commissioners of said town are by said act authorized to issue bonds to the amount of \$32,000, bearing interest at the

rate of 5 per cent., and payable semiannually. The denomination of the bonds, the mode of authentication, and manner of sale, etc., are fully set forth therein. It is provided that the proceeds of the said bonds shall be applied exclusively to the payment of the aforesaid indebtedness. Section 2, p. 93, of the act, provides that "the principal of all said bonds shall be due and payable on the first day of May 1933, but it shall be the duty of the board of commissioners of said town to pay two thousand dollars of the principal of said entire bond issued on the first day of May 1918, and two thousand dollars on the first day of May of each year thereafter until the entire principal of each bond is paid." Provision is made for selecting by lot the bonds to be paid at the end of each year. By section 4 it is provided that the board of commissioners shall levy an annual special tax, sufficient to pay the interest on said bonds, and "shall also levy during the year 1917 and each year thereafter, a special tax to produce an annual sum sufficient to pay and discharge two thousand dollars of the principal of said bond as each installment falls due under the provision of this act." Said act was passed in strict conformity to the provisions of article 2, § 14, of the Constitution. The General Assembly at the same session enacted chapter 170, p. 355, of the Private Laws of 1903, being entitled "An Act to incorporate the city of Washington." Said act was introduced into the House of Representatives and read on three several days, passing its several readings. Upon each reading the yeas and nays were called and entered on the journal in strict accordance with section 14, art. 2, of the Constitution. The bill, after having passed the House, was sent to the Senate, duly read, and passed upon its first reading without amendment. On a subsequent day, sections 84, 85, and 86 were offered as an amendment, adopted by the Senate, and made a part of the bill. After being so amended, the bill passed upon its second and third readings, upon two several days, upon a call of the yeas and nays, recorded on the journal in accordance with the constitutional requirement. Section 85 of chapter 170, p. 388, Priv. Laws 1903, is as follows: "The several sections and provisions of an act of the General Assembly ratified February 9th, 1903, entitled 'An act to authorize the board of commissioners of the town of Washington, North Carolina, to issue bonds to pay its existing indebtedness,' are hereby made a part of this act, with the following amendments, viz.: Where figures or words occur in section two of said act of February 9th, 1903, they shall be changed to 1933, and where words or figures 1918 occur in said section of said act they shall be changed so as to read 1923, and where words or figures 1917 occur in the 4th section of said act of February 9th, 1903, they shall be changed so as to read 1922. All the bonds issued

in pursuance of this act or the act ratified February 9th, 1903, shall be exempt from municipal taxation by said city, and all shall be payable in the gold coin of the United States, and all the coupons receivable in payment of taxes by said city and the interest upon all shall be payable semi-annually upon 1st days of November and May of each year at such place as the board of aldermen may designate." The said bill, after being passed by the Senate as aforesaid, was returned to the House. The Senate amendment was concurred in, and the bill as amended duly read and passed on two several days; the yeas and nays being taken and recorded in accordance with the Constitution. Section 14, art. 2. Both of said acts were duly enrolled, ratified, and published by the Secretary of State as provided by law. It is admitted that the indebtedness for the payment of which said bonds were directed to be issued is past due and unpaid. The defendants duly advertised said bonds for sale in accordance with chapter 48, p. 92, of the Private Laws of 1903, as amended by section 85, c. 170, p. 388. They were bid off by one Stafford, who declined to take and pay for them; assigning as reason therefor that section 85 of chapter 170, p. 388, was not read three times in the Senate. The plaintiffs insist that it is the duty of the defendants to again offer said bonds for sale, as required by said acts of the General Assembly. His honor, upon the foregoing agreed state of facts, was of the opinion that chapter 170, p. 355, of the Private Laws of 1903, was duly and regularly enacted into law and ratified on February 27, 1903, in accordance with article 2, § 14, of the Constitution; that the amendment thereto having been adopted on and before the second reading of the bill, and the bill, so amended, having passed its several readings in accordance with the Constitution, said amendment constituted a part of said act, as passed and ratified; that the effect of the enactment of section 85, c. 170, p. 388, was to amend chapter 48, p. 92, of the Private Laws of 1903. It was thereupon adjudged that the defendants proceed to again offer the bonds for sale, and issue same in manner and form as set out in chapter 48, as amended by section 85 of chapter 170, and apply the proceeds as therein directed. From this judgment, defendants appealed.

S. G. Bragaw, for appellants. S. B. Shepherd, for appellees.

CONNOR, J. We do not entertain any doubt of the correctness of the conclusion reached and the judgment rendered by his honor. The board of commissioners of the town of Washington were empowered by chapter 48, p. 92, Priv. Laws 1903, to issue the bonds for the purpose of paying a valid, outstanding, and past-due indebtedness of said town, as therein stated. This act is full

and complete in its provisions, having been enacted in strict conformity to the constitutional requirement, as uniformly construed by this court, and there can be no possible doubt of its validity. We are unable to perceive how by any rule of construction the provisions of section 85 of chapter 170, p. 388, can be said to "pledge the faith" of the town, or "impose any tax." It will be observed that by chapter 48, § 2, p. 93, the bonds were to mature May 1, 1933. This date is changed to 1938. Two thousand dollars of the bonds were to be paid in 1918. The date is changed to 1923. The first annual tax to pay the first installment is directed to be levied in 1917. The date is changed to 1922. The effect of the amendment is to postpone the date of maturity five years, and the other dates are so changed that the harmony of the original scheme is preserved. Upon the principle announced in *Glenn v. Wray*, 126 N. C. 730, 36 S. E. 167, we can see no reason why the bill, as amended, was not passed in the Senate in conformity with the Constitution, and the well-known rules of procedure in both houses of the General Assembly of this state. We can see no reason why the amendment, imposing no tax, creating no debt, nor increasing the amount of the bonds, or the rate of interest thereon, could not be adopted by the senate, and incorporated into the original bill, on and before its second reading. Certainly this ruling in no manner conflicts with what is said in *Glenn v. Wray*, supra. His honor was of the opinion that the effect of section 85 of chapter 170 was to amend chapter 48. Much could be said in support of the view that chapter 48, as amended, was incorporated into, and made a part of, chapter 170. It is not very material which view we take, as the result will be the same. The judgment of his honor is affirmed.

To prevent any possible misconception, we think it proper to say that we have decided this case upon "an agreed state of facts," in a controversy without action. We do not pass upon the admissibility of the journals or other evidence for the purpose of invalidating or affecting the integrity of the certificates of the presiding officers that said act was "in the General Assembly read three times." It does not appear that there was any objection made to the evidence in *Glenn v. Wray*, supra. The court has held in *Bank v. Commissioners*, 119 N. C. 214, 25 S. E. 966, and several recent cases, that the journal is competent evidence to show whether the provisions of section 14, art. 2, of the Constitution, have been complied with. The writer of this opinion thinks it is not improper to say, speaking for himself, that, unless compelled by overwhelming and controlling authority, he would hold that the principle announced in *Brodnax v. Groom*, 64 N. C. 244, is to be rigidly adhered to, save in the clearly defined exception made in *Bank v. Commissioners*, supra.

The judgment of his honor is affirmed.

(24 N. C. 641)

STATE v. DANIELS.

(Supreme Court of North Carolina. March 8, 1904.)

GRAND JURY—SELECTION—RACE DISCRIMINATION—QUALIFICATIONS OF INHABITANTS—FINDING OF COMMISSIONERS—CONCLUSIVENESS—REQUIREMENT OF PAYMENT OF TAXES—EFFECT OF DISREGARDING—HOMICIDE—CONFESSION—ADMISSIBILITY—FOOTPRINTS—ARGUMENT OF COUNSEL.

1. The conclusion of county commissioners, on whom the duty of passing on the qualifications of the inhabitants of the county in making up the jury list is imposed by Code, §§ 1722-1725, is final, and not subject to review, in the absence of a finding that they failed to exercise good faith.

2. Code, c. 39, §§ 1722-1725, make it the duty of the county commissioners, at a stated time in each year, to select from the tax returns of the preceding year the names of such persons only as have paid their taxes for that year, and are of good moral character, etc., to constitute the jury list. This list is to be revised each year by the commissioners, etc. *Held* that, while the failure by the commissioners to make the payment of taxes a prerequisite to a place on the jury list was a censurable irregularity, it did not afford ground for quashing an indictment by a grand jury, the members of which were in fact duly qualified under the statute.

3. Code, c. 39, §§ 1722-1725, require the county commissioners yearly to select from the tax returns of the preceding year the names of such persons only, for the jury list, as have paid their taxes, and are of good moral character and sufficient intelligence. This list is to be revised each year, and the names of all inhabitants qualified to serve added thereto. The commissioners are to "carefully examine" the list, and "diligently inquire" whether any qualified persons are omitted, and whether any persons not qualified have been inserted, and to correct the list accordingly. On a motion to quash an indictment, the court found that the jury box from which the grand jury was selected contained 430 names. It did not appear, and the court was unable to find, whether any of these were negroes. There were 528 colored males in the county, qualified to serve as jurors. There were as many white males over 21 whose names were not in the jury box as there were colored males of the same age whose names were omitted. The jury boxes were revised as required by law, the commissioners selecting the names of those they thought competent and morally fit to sit on the jury. In making the selection the commissioners did not think of or discuss the race question, but passed on various negroes and white men, and rejected the names of those they thought incompetent. Before the commission of the offense charged, the grand jury was selected as required by law, and the members thereof were all duly qualified, and were all white. The defendant was a negro. The total population of the county was 8,239, of which 4,479 were whites, and 3,760 were colored. *Held*, that the motion was properly overruled.

4. A negro arrested for the murder of a white man was carried to another county, and, when brought back by the sheriff, on alighting from the train, saw a big crowd of colored "camp-meeting" people, and seemed to be scared. About halfway between where he left the train and the town, he said, "Do not let them hurt me." The sheriff said, "No one shall hurt you," and added that he would sit beside the prisoner, and that if they shot they would hit both. Two other persons were with the party, one of whom asked the prisoner "how it was." He then made a statement concerning the homicide. *Held*, that the statement was admissible.

5. Evidence of footprints near the scene of the crime is admissible in a prosecution for murder, though it is not shown that accused made tracks at the time similar to those found.

6. In a prosecution for the murder of a landowner by a poacher, it appeared that deceased had gone into the woods early in the morning of the day of the homicide, his body being found the next day, and that the accused crossed the river on that morning, with various circumstances tending to show his presence in the vicinity of the crime. There was evidence of threats by the accused against decedent, and of a statement made by accused that the homicide was in self-defense. Some circumstances, however, contradicted the idea of self-defense. *Held*, that allowing state's counsel to argue at length that accused waylaid the deceased was not error.

Appeal from Superior Court, Jones County; Moore, Judge.

Alfred Daniels was convicted of murder, and appeals. Affirmed.

J. C. L. Harris, for appellant. A. D. Ward and the Attorney General, for the State.

CONNOR, J. The prisoner was charged with the murder of F. G. Simmons, and in apt time filed a plea in abatement, and moved the court to quash the indictment, for that the list of 36 jurors drawn by the county commissioners of Jones county, from which the grand jury was drawn, and which found the bill of indictment, was revised with partiality, unjustly and purposely, against competent persons of the negro race, to which the prisoner belongs, on account of the race or color of such persons. The officers whose duty it was to revise the jury lists, and to draw the panel to be summoned, from which the grand and petit jury were drawn for the present term of the court, at which the indictment was found against the prisoner, with the unlawful and avowed purpose of discriminating against persons of the negro race, excluded persons who of right, being competent, should not have been excluded from the jury lists. That such unjust and unlawful discrimination against the prisoner deprives him of a fair and impartial trial in this court, as is guaranteed to him under the Constitution of North Carolina, and the thirteenth and fourteenth amendments to the Constitution of the United States, and the acts of Congress. That there are in Jones county about 7,000 persons, more than one-third of whom are of the negro race, who pay taxes on more than \$30,000 worth of property, a large number of whom are equal to the average citizen of said county. In accordance with the request of the prisoner, the court caused subpoenas duces tecum to issue to the chairman of the board of commissioners, the register of deeds (ex officio clerk to the board), and the sheriff of the county, commanding them to bring their several records into court, and also the jury boxes, etc. The motion to quash was founded upon the affidavit of the prisoner. The court, after hearing the testimony offered in support of

the motion, found the following facts: The jury box contains the names of 430 persons. It does not appear, and the court is unable to find, whether any of said persons are negroes. There are 528 colored males residing in Jones county, over 21 years of age, who had paid their taxes for the year 1902, prior to June 1, 1903. There are as many white males over 21 years of age and upwards, residing in said county, whose names are not in the jury box, as there are colored males of the same age whose names are not in said box. The jury boxes were revised on the first Monday in June, 1903, as required by law; the commissioners taking the tax books or lists for the preceding year, and selecting from said tax books or lists the names of such persons as they thought were competent and morally fit to sit on the jury, and placing the names thus selected in the jury box. In selecting the names to be placed in the jury box, the commissioners did not think of or discuss the race question. They considered only the question of competency and fitness. They did not make the payment of taxes a prerequisite. They discussed the qualification of various negroes and white men, and rejected their names when they decided they were not competent and fit. The only test which was applied was capacity and fitness of persons whose names appeared on the tax list. The commissioners, at their regular meeting in September, 1903, before the commission of the alleged offense for which the prisoner is indicted, drew from the jury boxes of the county the names of 36 persons to serve as jurors at this term of the court. They were drawn in the manner required by law. The 36 persons whose names were so drawn, and were summoned to serve as jurors at this term of the court, were all white persons. The grand jury was regularly drawn from the 36 jurors drawn and summoned as above set forth. It appeared from an examination of the said grand jurors before they were impaneled that each of said grand jurors had paid his tax for the year 1902. The total population of Jones county is 8,239, of which 4,479 are whites, and 3,760 are colored. The prisoner is a negro. Upon the foregoing findings of fact, the motion to quash the bill of indictment was overruled, and the defendant excepted, assigning as cause thereof, first, that the court erred in not finding that none of the names contained in the jury boxes are the names of negroes; second, that the court should, from the evidence, have found that the test was not honestly applied, and that negroes or persons of the colored race were unjustly excluded on account of race and color; third, that there is no evidence upon which to base the findings. The prisoner was thereupon arraigned, and pleaded "Not guilty." From a judgment pronounced upon a verdict of guilty of murder in the first degree, he appealed.

The prisoner, by his motion to quash the indictment for the causes set forth, evidently

intended to present the question passed upon by this court in *State v. Peoples*, 131 N. C. 784, 42 S. E. 814. In accordance with the ruling in that case, his honor granted to the prisoner a subpoena duces tecum for the chairman of the board of commissioners, with the jury box, and such other witnesses as the prisoner desired to examine. Counsel for the prisoner in this court conceded that there was nothing in the statutes prescribing the qualification of grand or petit jurors, or the mode of selecting them, conflicting with the Constitution of the United States, or the amendments thereto. His honor finds that, "in selecting the names to be placed in the jury box, the commissioners did not think of or discuss the race question. They considered only the question of competency and fitness. They did not make the payment of taxes a prerequisite. They discussed the qualifications of various negroes and white men, and rejected their names when they decided they were not competent or fit." In *Carter v. Texas*, 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839, the defendant, in apt time, and by a proper motion, alleged that all persons of the colored race, etc., were excluded from the jury list "on the ground of their race and color," etc. He offered to introduce witnesses, and requested the court to permit him to do so, to sustain the allegation. The court declined to hear any testimony in support of the motion, and overruled the same. The Supreme Court of the United States, reversing the Texas court, held that, upon the allegations made in the motion, the defendant had been denied a right duly set up and claimed under the Constitution of the United States. This ruling was followed by this court in *State v. Peoples*, supra. His honor, in strict conformity with these authorities, granted the subpoenas, heard the testimony, and found the facts in regard to the manner of making up the jury lists as set out in the record. The prisoner's counsel properly conceded that, upon the record, it does not appear that the prisoner has been denied any right secured to him by the federal Constitution. He insisted, however, that, upon the findings of the court, it appears that the commissioners have failed to comply with the statutes regarding the manner of making up the jury list from which the grand and petit jurors were drawn. He says: "According to section 1724 of the Code, the jury list must contain the names of all the inhabitants who are qualified, as provided in section 1722, to serve as jurors; and, if the list as made out by the clerk of the board of commissioners does not contain all the inhabitants, the commissioners are required to insert the names of such persons or inhabitants in the jury list. That section 1725 provides that the commissioners, after the jury list has been laid before them by the clerk, shall diligently inquire whether any person qualified to serve as a juror has been omitted, and, if so, to insert his name, and strike off such

as were not qualified." That the commissioners violated section 1722, by making competency and fitness the qualification, instead of obeying the requirements of that section. That the number of jurors whose names are in the box being less than one-third of the voting population of the county, and the further fact that there are 528 negro males more than 21 years of age who have paid their taxes, and that there are as many white males over 21 years of age residing in Jones county as there are colored males of the same age, whose names were not in the jury box, "emphasize the fact that the commissioners did not revise the jury list, but made a selection of the persons whom they desired to serve as jurors, and that there were gross irregularities in making up the jury list. * * * He insists that, upon these facts found by the judge, his motion to quash the indictment should have been allowed.

We do not care to place the disposition of this case upon the fact that the contention made in this court is different from and foreign to that made in the court below. The prisoner made his motion in apt time, and in accordance with the provisions of section 1741 of the Code. If, upon the facts found, there be any legal ground for quashing the indictment, we should not hesitate to grant the motion, although such grounds be different from those assigned in the superior court. Any suggestion made pursuant to the rules of practice prescribed either by statute or the procedure prevailing in the courts, involving the integrity of the jury lists, or the manner in which the law in respect to making up such lists has been executed, is entitled to the respectful and careful consideration of the court. It affects not only the honor of the state, but the lives, liberties, and property of the citizens. "At common law no such thing was known as the preparation of a list of persons who were liable to be summoned to serve as jurors at a succeeding term of the court, but the uncontrolled discretion was vested in the sheriff, in the coroner, or in officials called 'elisors,' of summoning such 'good and lawful men' as they might choose under the command of the writ of venire facias. This led to enormous abuses, chiefly in the packing of juries and the blackmailing of citizens, to remedy which American statutes have generally provided, with more or less particularity, for the preparation a given time before the commencement of any term of court, or at other stated periods, of a list of persons within the county or other jurisdiction from whom jurors are to be summoned." *Thompson on Trials*, § 13. In accordance with this policy of the law, there have been in force in this state, from the earliest period of our history, statutes prescribing the mode of making the jury lists from which the jurors to serve at each term of the court shall be selected by drawing the names thereof from a box provided for that purpose, by a child not more than 10 years

of age. The law in this respect is set forth in chapter 39 of the Code; the only change since the adoption of the Code being that the time at which the jury lists shall be revised is the first Monday in June, instead of September. It is made the duty of the commissioners, at the time stated, in each year, to cause their clerks to lay before them the tax returns of the preceding year for their county, from which they shall proceed to select the names of such persons only as have paid their taxes for the preceding year, and are of good moral character and sufficient intelligence. The names thus selected shall constitute the jury list. This list shall be revised on the first Monday in June of each year, and the names of all inhabitants qualified to serve, who may not be of said list, shall be added thereto. The commissioners are further required to carefully examine the list as already made out, compare the same with the tax returns, and diligently inquire whether any persons qualified to be jurors, as provided, are omitted, and whether any persons not qualified have been inserted, and to strike such names from the list. In these four sections is comprised the entire legislation on this subject in force in this state. The remaining sections of the chapter are directed to the manner of drawing from the list thus prepared the jurors to be summoned to attend upon the succeeding term of the court. It has been held from the earliest period of our judicial history that the provisions of these statutes are directory, and not mandatory. *State v. Seaborn*, 15 N. C. 305. In *State v. Haywood*, 73 N. C. 437, Bynum, J., says: "The facts are that the jury list, from which the grand jury finding the indictment was drawn, contained the name of 451 qualified jurors, but did not contain the names of 241 others who were also qualified, and ought regularly to have been on the list, but were omitted therefrom by the county commissioners in preparing and revising the jury list, from some cause not appearing, and not alleged to have been intentional or corrupt. Was the indictment well found? is the question. There is no allegation that any of the jurors comprising the grand jury were not properly qualified jurors and were not properly on the list drawn from, or that they were not in every other respect regularly drawn and impaneled in the manner prescribed by law." The learned justice further says: "It is highly conducive to the fair and impartial administration of justice that these details should be strictly observed and followed, and any intentional nonobservance of them is the subject of censure, if not of punishment. But it is well settled that they are only rules and regulations which are directory only, and have never been held to be mandatory, where the persons summoned are qualified jurors in other respects." *State v. Martin*, 82 N. C. 672; *State v. Smarr*, 121 N. C. 699, 28 S. E. 549. The record in this case does not show that any persons qualified to

serve upon the jury as jurors were excluded from the list. The argument that such is the case is based upon the facts found by the judge in respect to the number of inhabitants in the county, and the number of persons who had paid their taxes. There is no evidence and no finding that persons of good moral character or of sufficient intelligence, residing in the county, were omitted from the jury list. The duty of passing upon the qualifications of the inhabitants of the county in this respect is imposed upon the commissioners, and in the absence of any finding that they failed to discharge such duty, or exercise good faith in doing so, their conclusion is final and not subject to review. If, however, it be conceded that such persons were omitted from the jury list, it seems to be well settled both in this country and in England that this would not be a ground to quash the indictment. In the celebrated case of *O'Connell and others v. The Queen*, 11 C. & Fin. 155, it was held by the House of Lords, after a most able and exhaustive discussion, that a challenge to the array in the Court of Queen's Bench, alleging that the jurors' book had not been completed in conformity to the act of Parliament, in that the names of a number of persons qualified to act on juries had been fraudulently omitted from the general list from which the book was made up, for the purpose of prejudicing the defendants, could not be sustained. From this judgment, Lord Denman, in a masterly opinion, dissented. We are not called upon in this case to adopt the law as therein laid down, as there is no evidence or finding that there was any fraudulent omission of the names of persons from the list. We do not understand the American authorities upon this subject to approve the doctrine to the extent held in *O'Connell's Case*. The extent to which they go is thus stated in *Thompson on Trials*, § 33: "Statutes which prescribe the manner of selecting by county, town, or other officers the general list of persons liable to jury duty, from which the panel is drawn, are generally treated as directory, merely. It is hence a general rule that irregularities in the discharge of this duty constitute no ground for challenging an array. If the jurors who have been selected and drawn are individually qualified, that is generally deemed sufficient." In *People v. Jewett*, 3 Wend. 314, *Savage, C. J.*, says: "By the act directing the mode of selecting grand jurors, passed in 1827 (*Laws 1827*, p. 312, c. 286), the duty of making the selection is conferred upon the supervisors of the several counties of the state. They are required to select such men only as they shall know, or have good reason to believe, to be possessed of the necessary property qualification to sit as petit jurors; to be men of approved integrity, of fair character, of sound judgment, and well informed. Thus the qualifications of the grand jurors are defined by statute, and, if those selected possessed the required qualif-

cations, there can be no objection to the array. * * * A grand jury should be selected with a single eye to the qualifications pointed out by the statute, without inquiry whether the individuals selected do or do not belong to any particular society, sect, or denomination, social, benevolent, political, or religious." The learned chief justice says: "But if they did thus err, the array cannot for that purpose be challenged. Whilst those who are selected are unexceptionable, the fact that others equally unexceptionable are excluded is no cause of challenge of the array. A challenge can be supported only by showing that the persons selected are not qualified according to the requirements of the statute."

In this case his honor expressly finds that the grand jurors were examined before they were impaneled, and that each of them had paid his taxes for the year 1902. There is no suggestion that in any other respect they were not qualified in accordance with the statute. The jury list was revised several months before the commission of the homicide for which the prisoner is indicted. While we cannot approve the course pursued by the commissioners in failing to make the payment of taxes a prerequisite as required by the act, it having been found that the grand jurors were qualified in this respect, we can see no reason for quashing the indictment upon that ground. It is to be regretted that those who are commissioned to perform this important duty in the administration of public justice should fail to observe the clear and unmistakable requirements of the statute. In *Moore v. Guano Co.*, 130 N. C. 229, 41 S. E. 293, it appeared that there were gross irregularities in drawing the jury from the box, which this court held constituted good cause for challenge to the array. The conclusion to which we arrive in this case does not conflict with what is there said. We have carefully examined the several grounds set out by the prisoner in his motion to quash the indictment for alleged irregularities in making the list, and find no error in his honor's refusal to grant the motion. The law secures to him, as to every other citizen of the state, without regard to race, color, or other condition, the right to a fair and impartial grand jury, composed of the inhabitants of the county qualified to serve as jurors. This, upon the finding of the court below, he has had, and he has no just cause of complaint. We find in the record no other objection to the petit jury, either by way of challenge to the array or to the poll.

We proceed to pass upon the exceptions made to his honor's rulings on the trial. The testimony tended to show that the deceased was shot upon his own land, a short distance from the river low grounds; that he was last seen early in the morning of the day of the homicide, going into the woods; that about 9 o'clock a witness introduced by the state heard two guns fire down the river,

and, after the last firing, heard some one "holler." The deceased was 77 or 78 years old. The body was found, on the day following the disappearance of the deceased, about 150 yards from the road. It was lying on side. His gun was about 10 steps from him, and had not been discharged. Shells looked as if they had been in the gun 3 or 4 weeks. The woods where the body was found were right thick. One could not see the deceased from where he was found, to the river. The leaves were disturbed somewhat. Shot in the front. Six wounds just over the heart, ranged slightly up. There was evidence tending to show that the prisoner crossed the river on the morning that the deceased was missing; that he made a paddle of cypress boards. He had a gun with him. The paddle was found near the river, and identified as being the same one that the prisoner had made. One witness testified that, "on the morning the deceased was found, several persons took a boat, went up the river, and looked at the bank. Found that a boat had landed right off against where they found the body. The bank looked like some one had slipped in. Saw two tracks made by some foot, measuring 8 or 9 shoe. Sole of left shoe was cut and left there, and there was an impression where the man got up and got in a boat. Tracks went up to where the body was found, almost straight from where the boat landed. The witness got into a boat, and saw a boat, which in the morning had been a little down the river, on the opposite side of the river. Went across and landed, and saw tracks where a man had got out. A paddle was in the sunken boat. A chain was thrown around the cypress knee, but not fastened. Tracks on each side of the river were the same, sometimes walking and other times running. Followed the tracks up to the fields." The witness described the course of the tracks. One witness testified that he was with the prisoner in the woods some time before the homicide. The prisoner went to the house and got a gun and shot a squirrel, and hid the squirrel under bushes. Asked him why he did that. He said that Ed. Cox was as damned a rascal as Furney Simmons, the deceased, and that he would be out there directly. Said that Simmons would come into the woods and get after him for shooting. Said that he wished F. G. Simmons would run on him one time, and he would give him his dose and leave him there. Glen Simmons was the son of the deceased. This was in 1901. There was testimony to the effect that the prisoner had bought shells about two weeks before the homicide. They had No. 4 shot in them. There was evidence of some conversation between the prisoner and other persons in regard to hunting on posted land, and that the land of the deceased had been posted. The prisoner said frequently that he was going to hunt upon the land of the deceased. If he had to kill him. One witness swore that he saw

the prisoner about sunrise on the day of the homicide; that he said he was going towards Quaker Bridge, and down by the side of the river, and kill some squirrels. There was much other evidence of the same character, to which no exception was made. The prisoner was carried to the jail of Craven county. When brought back to Jones county in custody of the sheriff, he got off the train, and saw a big crowd of colored "camp-meeting" people, and seemed to be scared. About halfway between Core Creek, where he left the train, and Trenton, he made a statement. No one besides the sheriff, Will Barker, and the witness were with him. The prisoner said, "Do not let them hurt me." Sheriff Taylor said, "No one shall hurt you;" said that he would sit beside the prisoner, and, if they shot, they would hit both. The witness Brogden asked the prisoner how it was. He said he was coming up the river, and Mr. Simmons beckoned to him to come across the river. He said when he got up to the bank the deceased told him to stop; that he was close enough. The deceased said that he was tired of these negroes and white people hunting on his land, and that he was going to shoot him. The deceased threw up his gun to shoot him, and that he (the prisoner) began to "holler"; that the deceased took his gun down to cock it, and he shot him; that he then went across the river. The witness then asked him if the tracks found were his, and he said, "No;" that he was in the boat on the river when he shot the deceased, and the deceased was on the bank; that he was coming up the river. To all of this the prisoner objected, and excepted to its admission. This witness further testified that he went to where the body was found; that the banks were about six feet high, and the bushes were thick, and could not be seen by one on the river; would have to be on the bank. He saw where the boat had landed. Saw the track, which looked like a man had jumped downhill and slid. Did not see any tracks above there on the hill. The body was in the woods when he got there. No shots in the arm. Butt of the gun was towards the river. If the deceased was pointing the gun towards the prisoner, the muzzle would have fallen toward the river. We find no error in his honor's ruling in admitting this testimony. No threats were made. There is no suggestion that the crowd of people made any demonstration or did anything to put the prisoner in fear.

The prisoner objected to testimony in regard to the tracks, because no comparisons were made, and no similarity of tracks shown, other than that they were made by an 8 or 9 shoe. It is well settled that evidence in regard to tracks is of little value, unless it is shown that the person charged with the crime made tracks at the time similar to those found at or near the place of the crime. They are competent, however, in connection with other testimony, and en-

titled to such weight as the jury may give them.

The prisoner excepted because his honor allowed the state's counsel to argue at length that the prisoner waylaid the deceased, whereas there was no evidence to support his argument. We are of the opinion that there was no error in that respect. We find no exceptions to his honor's charge in the record. We have carefully examined the testimony and the entire record, and find no error therein. The question as to the prisoner's guilt depended entirely upon the finding of the jury as to the truth of the testimony, and the conclusions to be drawn therefrom.

Upon a careful consideration of the entire record, we think there is no error.

(124 N. C. 397)

SHEPHERD'S POINT LAND CO. v. ATLANTIC HOTEL.

(Supreme Court of North Carolina. March 16, 1904.)

NAVIGABLE WATERS — RIPARIAN OWNERS — GRANT—CONSTRUCTION—CONSTITUTIONAL LAW.

1. Code 1883, § 2751 (Pub. Laws 1854-55, p. 45, c. 21), provides that lands covered by navigable waters shall be subject to entry by riparian proprietors for the purpose of erecting wharves on the side of deep waters next to their lands. The Supreme Court decided that a grant by the state to persons as "owners and riparian proprietors" of a lot in a harbor, in a navigable arm of the sea in front of their lands, from high-water mark on the shores to the deep water, conveyed, under the statute, only an easement, which ran with the land, for the particular purpose of erecting wharves. *Held* that, the decision being but a construction of the contract, it cannot be contended that it violates U. S. Const. art. 1, § 10, providing that no state shall pass any law impairing the obligation of a contract.

Appeal from Superior Court, Carteret County; Moore, Judge.

Action by the Shepherd's Point Land Company against the Atlantic Hotel. From a judgment for defendant, plaintiff appeals. Affirmed.

Lindsay Patterson and W. W. Clark, for appellant. Simmons & Ward and O. L. Abernethy, for appellee.

CONNOR, J. When this cause was called for trial at the October term of the superior court of Carteret, pursuant to the judgment of this court rendered at the February term, 1903 (44 S. E. 39, 61 L. R. A. 937), the plaintiff company obtained leave of court, and, pursuant thereto, amended its complaint, alleging: "That the decision of the Supreme Court of North Carolina rendered in this cause at February term, 1903, impairs the obligation of the contract entered into between the state of North Carolina and its grantees, John M. Morehead and W. H. Arendell, in the grant from the state to said Morehead and Arendell, of date May 24, 1856, and the obligation of the contract entered into

between said grantees and the plaintiff by their deed to the plaintiff, of date July 2, 1857. That said decision of the Supreme Court is violative of the provisions of section 10, art. 1, of the Constitution of the United States." The defendants, by way of answer, denied the averment contained in the amendment to the complaint. The parties thereupon entered into a written agreement of record that the court should determine the rights of the parties, and direct the jury to answer the issues upon the same evidence, oral and documentary, set out in the case on appeal in this cause upon the trial before Judge Brown. It was further admitted by defendant that the conveyances introduced by the plaintiff cover lot No. 1 in the plot, and that defendant obtained title thereto through intermediate conveyances from the plaintiff. His honor instructed the jury to answer the issues as set out in the record, and rendered judgment against the plaintiff, to which exception was duly entered, and appeal taken to this court.

The plaintiff insists that the grant of May 24, 1856, was a contract between the state and the grantees, and for this contention relies on the case of *Fletcher v. Peck*, 6 Cranch, 88, 3 L. Ed. 162. There can be no doubt, we think, that this is true. This court, in the decision of this cause, certainly did not question it. Conceding the truth of the proposition, we endeavored to ascertain and declare the rights of the grantees under the grant. We stated the question presented thus: "A correct decision of this case involves an inquiry as to the extent to which the state has parted with the title to the land described in the grant under which the plaintiff claims, and what effect shall be given to the words, 'for the purpose of erecting wharves on the side of the deep waters next to their lands.'" The conclusion to which we arrived, after a careful consideration of the authorities, and upon "the reason of the thing," is thus stated: "We are of the opinion that the grant to Morehead and Arendell of square 83 operated to give them an exclusive right or easement therein as riparian owners and proprietors to erect wharves, etc.; that, when they ceased to be the owners of the land by conveyance to the Shepherd's Point Land Company, such easement passed as appurtenant thereto, and that it has passed by the several conveyances of the land as appurtenant to lot No. 1; that such easement passed to the defendant company, and the plaintiff has no such title to the soil under the navigable waters as entitles it to maintain this action." That we may determine whether a statute or decision of a court violates the obligation of a contract, we must first determine what are the relative contractual rights and obligations under the contract. This we have endeavored to do. If we have arrived at a correct conclusion in that respect, it is difficult to perceive how it

can be said that we have violated the obligation of the contract. The proposition advanced by the plaintiff assumes that its construction of the contract is correct, and from this assumption concludes that the obligation of the contract has been violated. The assumed premises constitutes the very question to be decided. This process of reasoning would always, when the rights of parties to a contract are controverted, place the court in the dilemma of violating the contract clause of the federal Constitution. We simply construed the contract in the light of the statute. Section 2751, Code 1883. For the reasons set forth in the opinion filed in this cause, and reported in 132 N. C. 517, 44 S. E. 89, 61 L. R. A. 937, we find that there is not error in the judgment of the superior court. Let this be certified to the superior court of Carteret county.

No error.

(124 N. C. 394)

HARGETT v. BELL.

(Supreme Court of North Carolina. March 16, 1904.)

INTOXICATING LIQUORS—VIOLATION OF LOCAL OPTION LAW—VALIDITY OF LICENSE—INJUNCTION—QUO WARRANTO—PROPRIETY OF REMEDY.

1. The question whether a liquor dealer has violated the local option law, involving the validity of a license issued to him, cannot be tested by injunction, but only by a criminal proceeding, in which the right of trial by jury guaranteed by Const. art. 1, § 13, can be accorded defendant.

2. A license to keep a dramshop is neither a "franchise," nor an "office," nor "letters patent," which, under Code 1883, §§ 607, 2788, can be tested or vacated by quo warranto.

Appeal from Superior Court, Onslow County; Ferguson, Judge.

Suit by the state, on the relation of F. W. Hargett, against J. F. Bell. From an order dissolving a restraining order, plaintiff appeals. Affirmed, and action dismissed.

Frank Thompson, A. D. Ward, and Busbee & Busbee, for appellant. W. D. McIver and E. M. Koonce, for appellee.

OLARK, O. J. This is an action in the nature of a quo warranto, and for an injunction to restrain the defendant from further selling spirituous liquors in the town of Jacksonville, alleging that an election was held for said town, under the provisions of chapter 233, p. 288, Laws 1903, on 10th December, 1903, whereat the majority of qualified voters cast their ballots "Against Saloons," and the result of said election was duly canvassed and declared accordingly; that after said election there was, notwithstanding, a license issued by both the county and town commissioners to defendant to sell liquor from 1st January, 1904, to 1st July, 1904.

The sole question is as to the validity of this license which the relator claims to be void. That matter can properly be deter-

mined, as to defendant, only by a criminal prosecution. When the license is set up as a defense, the court will pass upon its validity. The defendant, if he is selling liquor without a valid license, is entitled to a trial by jury, and cannot be deprived of it by a proceeding for contempt for violation of an injunction commanding him not to commit the crime. An injunction was held invalid to test the validity of a town ordinance in *Paul v. Washington* (at this term) 47 S. E. 703; *Scott v. Smith*, 121 N. C. 94, 28 S. E. 64; *Wardens v. Washington*, 109 N. C. 21, 13 S. E. 700; *Cohen v. Commissioners*, 77 N. C. 2, in which Reade, J., says: "We are aware of no principle or precedent for the interposition of a court of equity in such cases."

There is no equitable jurisdiction to enjoin the commission of crime. 1 High, Inj. (3d Ed.) § 20. The court of equity cannot enjoin the judge and solicitor from the enforcement of the criminal law, and an adjudication between the parties to this action would be a vain thing, for the solicitor could notwithstanding proceed in the criminal action, in which the validity of the alleged license must still be determined. On this ground, injunction against an alleged illegal sale of liquor was denied. *Atty. Gen. v. Schweickhardt*, 109 Mo. 515, 19 S. W. 47. In *Patterson v. Hubbs*, 65 N. C. 119, *Pearson, C. J.*, says that an injunction is "confined to cases where some private right is a subject of controversy." As is above said, if an injunction to prevent the commission of a crime could issue, the violation of the order—the crime—could be punished by proceedings for contempt by the judge without a jury, but the Constitution guaranties to one charged with crime the right of trial by jury. Article 1, § 13. The method here attempted, if sustained, would be "government by injunction."

Nor are we prepared to say that "a license to keep a dramshop comes within the definition of a franchise." *People v. Matthews*, 53 Ill. App. 805 and *Railroad v. People*, 73 Ill. 541, are directly in point, and hold that such license is not a franchise. Such business is not an office, so that the defendant's right to it shall be tested by a quo warranto under Code 1883, § 607; nor is the license "letters patent," to be vacated by a quo warranto under Id., § 2788.

By proper proceedings the declaration of the result of the election might be examined into, but the complaint does not impeach its validity, and, on the contrary, asserts it. Besides, such action would not be brought against this defendant.

The court below properly dissolved the restraining order, and, there being no cause of action stated, the court here will, ex mero, dismiss the action. Action dismissed.

WALKER, J., concurs only in result.

(134 N. C. 331)

DUVAL v. ATLANTIC COAST LINE R. CO.
(Supreme Court of North Carolina. March 8, 1904.)

RAILROADS — CROSSING ACCIDENT — NEGLIGENCE — EXCESSIVE SPEED — VIOLATION OF CONTRACT — IMPUTABLE NEGLIGENCE.

1. On the question of negligent speed of a train which collided with a team at a crossing in a city, evidence that the speed was in excess of that provided by a contract of the railroad company with the city, under which it obtained the grant of its right of way, is admissible, equally with the violation of an ordinance.

2. The negligence of one with whom plaintiff was riding as a guest in a buggy struck by defendant's train is not imputable to plaintiff.

Appeal from Superior Court, Jones County; Moore, Judge.

Action by Della Duval against the Atlantic Coast Line Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

D. L. Ward and M. De W. Stevenson, for appellant. Simmons & Ward and N. J. Rouse, for appellee.

DOUGLAS, J. This is an action for damages for personal injuries. The jury found that the plaintiff was injured by the negligence of the defendant, and that she contributed to her injury by her own negligence. There are but two exceptions that we think it necessary to pass upon in this appeal, both to the charge of the court.

Among other things, the court charged as follows: "The plaintiff introduced a contract wherein it is provided that East Carolina Land & Railway Company shall not run its locomotive through the streets of New Bern at a speed greater than three miles an hour; that the whistle shall be sounded before entering upon said street, and the bell upon the engine tolled while passing through the streets, etc. And it is admitted that the defendant has succeeded to the rights and liabilities of the East Carolina Land & Lumber Company. The court charges you that this is a contract between the city and the defendant company, and that there is no evidence that its provisions have been enacted into an ordinance by the city, and the jury cannot consider the provisions of the same as bearing upon the question of the negligence of the defendant." In this we think there was error. The only object the city could have had in limiting the rate of speed at which a train was permitted to run through its streets was the protection of the traveling public. It was similar to an ordinance in purpose and legal effect, at least in civil actions. We do not feel compelled in this case to go to the extent of saying that the violation of such a provision in a contract gives rise to a cause of action; but we hold that, equally with the violation of an ordinance, it is evidence of negligence on the part of the defendant. If the defendant obtained the

¶ 2. See *Negligence*, vol. 37, Cent. Dig. § 147.

grant of its right of way by virtue of such a contract, it has no right to complain at the reasonable enforcement of its conditions and limitations. *Gorrell v. Water Supply Co.*, 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598.

The court further charged the jury as follows: "If you find from the evidence, by the greater weight or preponderance thereof, that the plaintiff was riding in a buggy driven and controlled by her father, that the plaintiff's father was negligent in approaching the crossing, and that such negligence contributed to the injury of which the plaintiff complains as a proximate cause thereof, then such negligence of the plaintiff's father is imputable to the plaintiff as her own negligence." This also was error. Imputable negligence, or "identification," as it is sometimes called from analogy to the Roman law, has never been recognized in this state, and has received but scant recognition in any part of this country. The question was directly presented and expressly decided in *Crampton v. Ivie*, 126 N. C. 894, 36 S. E. 351, in which this court says: "We may regard it as settled law that the negligence of a driver of a public conveyance is not imputable to a passenger therein, unless the passenger has assumed such control and direction of said vehicle as to be considered as practically in exclusive possession thereof. In other words, the possession of the passenger must be such as to supersede for the time being the possession of the owner, to the extent of making the driver the temporary servant of the passenger."

In the case at bar it appears that the plaintiff was not traveling in a public conveyance, but in a buggy driven by her father. We will assume that she was not a passenger for hire, but was riding in her father's buggy as his guest. We do not think this makes any difference, either in principal or in legal liability. She was certainly not in exclusive control of the vehicle, nor could her father be considered in any sense as her servant. We are aware that in a few instances it has been held that, while contributory negligence cannot be imputed to one riding in a hired vehicle, it may be imputed to him if he is a mere guest. The overwhelming weight of authority is against any such distinction, and, in common with nearly all the courts of final jurisdiction, we are utterly unable to see any reasonable basis for such a conclusion.

The only ground for the doctrine of imputable negligence in any of its phases is the assumed identity of the passenger and driver, arising out of an implied agency. It is contended, as he selected his own driver, he made him his agent, not only for the general purposes of his employment, but for all possible contingencies that might happen. Under this doctrine it would seem that if the driver broke the passenger's neck he would be acting within the scope of his agency. This may be so, but it does not seem so to

us. Of course, if the passenger were injured through the negligence of the driver alone, he must look alone to him or to his master for his recovery; but if he is injured through the concurring negligence of the driver and some one else, he may sue either. This is equally true whether the plaintiff is a passenger for hire or a mere guest. We see no reason why the latter should be placed at any legal disadvantage. In fact, it would seem that, if there were any difference, the passenger for hire, having the legal right to the services of his driver, would be in a position to exercise a greater degree of control than one whose presence was merely permissive. An examination of the origin, growth, and decadence of the doctrine seems to us to show the correctness of our conclusions, aside even from the weight of authority.

The doctrine that the negligence of driver was imputable to the passenger is considered to have originated in the English case of *Thorogood v. Bryan*, decided in 1849, and reported in 8 C. B. 115. The action was brought against the owner of an omnibus by which the deceased was run over and killed. The omnibus in which he had been carried had set him down in the middle of the road instead of drawing up to the curb, and before he could get out of the way he was run over by the defendant's omnibus, which was coming along at too rapid a pace to be stopped in time to prevent the injury. The court directed the jury that, "If they were of opinion that want of care on the part of the driver of Barber's omnibus in not drawing up to the curb to put the deceased down, or any want of care on the part of the deceased himself, had been conducive to the injury, in either of those cases, notwithstanding the defendant, by her servant, had been guilty of negligence, their verdict must be for the defendant." This case, after being much criticised, was expressly overruled in 1888 by the House of Lords in the case of *The Bernina*, 13 App. Cas. 1, in which opinions were delivered by Lords Herschell, Bramwell, and Watson.

Among other things in his opinion, Lord Herschell says: "In support of the proposition that this establishes a defense, they rely upon the case of *Thorogood v. Bryan* (1), which undoubtedly does support their contention. This case was decided as long ago as 1849, and has been followed in some other cases; but though it was early subjected to adverse criticism, it has never come for revision before a court of appeals until the present occasion. * * * It is necessary to examine carefully the reasoning by which this conclusion was arrived at. Coltman, J., said: 'It appears to me that, having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and her servants that if any injury results from their negligence he must be considered a party to it. In other words, the passenger is so far identified with the carriage in which he is traveling that

want of care of the driver will be a defense of the driver of the carriage which directly caused the injury.' Maule and Vaughan Williams, JJ., also dwelt upon this view of the identification of the passenger with the driver of the vehicle in which he is being carried. The former thus expresses himself: 'I incline to think that, for this purpose, the deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased.' Vaughan Williams, J., said: 'I think the passenger must, for this purpose, be considered as identified with the person having the management of the omnibus he was conveyed by.' With the utmost respect for these eminent judges, I must say that I am unable to comprehend this doctrine of identification upon which they lay so much stress. In what sense is the passenger by a public stagecoach, because he avails himself of the accommodation afforded by it, identified with the driver? The learned judges manifestly do not mean to suggest (though some of the language used would seem to bear that construction) that the passenger is so far identified with the driver that the negligence of the latter would render the former liable to third persons injured by it. I presume that they did not even mean that the identification is so complete as to prevent the passenger from recovering against the driver's master, though, if 'negligence of the owner's servants is to be considered negligence of the passenger,' or if he 'must be considered a party' to their negligence, it is not easy to see why it should not be a bar to such an action. In short, so far as I can see, the identification appears to be effective only to the extent of enabling another person whose servants have been guilty of negligence to defend himself by the allegation of contributory negligence on the part of the person injured. But the very question that had to be determined was whether the contributory negligence of the driver of the vehicle was a defense as against the passenger when suing another wrongdoer. To say that it is a defense because the passenger is identified with the driver appears to beg the question, when it is not suggested that this identification results from any recognized principle of law, or has any other effect than to furnish that defense, the validity of which was the very point in issue. Two persons may no doubt be so bound together by the legal relation in which they stand to each other that the acts of one may be regarded by the law as the acts of the other. But the relation between the passenger in a public vehicle, and the driver of it, certainly is not such as to fall within any of the recognized categories in which the act of one man is treated in law as the act of another. I pass now to the other reasons given for the judgment in *Thorogood v. Bryan*. Maule, J., says: 'On the part of the plaintiff it is suggested that a

passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He selects the conveyance. He enters into a contract with the owner, whom by his servant, the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance, he is not obliged to avail himself of it. * * * But, as regards the present plaintiff, he is not altogether without fault; he chose his own conveyance, and must take the consequences of any default on the part of the driver whom he thought fit to trust.' I confess I cannot concur in this reasoning. I do not think it well founded either in law or in fact. What kind of control has the passenger over the driver which would make it reasonable to hold the former affected by the negligence of the latter? And is it any more reasonable to hold him so affected because he chose the mode of conveyance, that is to say, drove in an omnibus rather than walked, or took the first omnibus that passed him, instead of waiting for another? And when it is attempted to apply this reasoning to passengers traveling in steamships or on railways, the unreasonableness of such doctrine is even more glaring. The only other reason given is contained in the judgment of Creswell, J., in these words: 'If the driver of the omnibus the deceased was in had, by his negligence or want of due care and skill, contributed to an injury from a collision, his master clearly could maintain no action. And I must confess I see no reason why a passenger who employs the driver to convey him stands in any better position.' Surely, with deference, the reason for the difference lies on the very surface. If the master in such a case could maintain no action, it is because there existed between him and the driver the relation of master and servant. It is clear that, if his driver's negligence alone had caused the collision, he would have been liable to an action for the injury resulting from it to third parties. The learned judge would, I imagine, in that case have seen a reason why a passenger in the omnibus stood in a better position than the master of the driver. I have now dealt with all the reasons on which the judgment in *Thorogood v. Bryan* was founded, and I entirely agree with the learned judges in the court below in thinking them inconclusive and unsatisfactory."

In his opinion Lord Watson says: "It humbly appears to me that the identification upon which the decision in *Thorogood v. Bryan* is based has no foundation in fact. I am of opinion that there is no relation constituted between the driver of an omnibus and its ordinary passengers which can justify the inference that they are identified to any extent whatever with his negligence. He is the servant of the owner, not their servant; he does not look to them for orders, and they have no right to interfere with his conduct of the vehicle, except, perhaps, the right of

remonstrance when he is doing, or threatens to do, something that is wrong and inconsistent with their safety. Practically they have no greater measure of control over his actions than the passenger in a railway train has over the conduct of the engine driver."

We have quoted at length from this case because it is the distinct and final repudiation of the doctrine by the highest judicial tribunal in England, where it originated, as well as from the further fact that the reasoning upon which the learned and able opinions are founded apply equally to cases where the plaintiff is a mere guest. The same may be said of *Little v. Hackett*, 116 U. S. 386, 6 Sup. Ct. 391, 29 L. Ed. 652, which is cited with approval by Lord Herschell in *The Bernina*. *Hackett*, the plaintiff, was injured by the collision of a railroad train with the carriage in which he was riding. The evidence tended to show that the accident was the result of the concurring negligence of the managers of the train and of the driver of the carriage—of the managers of the train in not giving the usual signals of its approach by ringing a bell and blowing a whistle, and in not having a flagman on duty; and of the driver of the carriage in turning the horses upon the track without proper precautions to ascertain whether the train was coming. The defense was contributory negligence in driving on the track, the defendant contending that the driver was thereby negligent, and that his negligence was to be imputed to the plaintiff. The court left the question of the negligence of the parties in charge of the train and of the driver of the carriage to the jury, and no exception was taken to its instructions on this head. But with reference to the alleged imputed negligence of the plaintiff, assuming that the driver was negligent, the court instructed them that unless the plaintiff interfered with the driver and controlled the manner of his driving, his negligence could not be imputed to the plaintiff. Upon appeal the judgment was affirmed. Justice Field, speaking for a unanimous court, says on page 374, 116 U. S., and page 394, 6 Sup. Ct., 29 L. Ed. 652: "Cases cited from the English courts, as we have seen, and numerous others decided in the courts of this country, show that the relation of master and servant does not exist between the passenger and the driver, or between the passenger and the owner. In the absence of this relation, the imputation of their negligence to the passenger, where no fault of omission or commission is chargeable to him, is against all legal rules. If their negligence could be imputed to him, it would render him, equally with them, responsible to third parties thereby injured, and would also preclude him from maintaining an action against the owner for injuries received by reason of it. But neither of these conclusions can be maintained; neither has the support of any adjudged cases entitled to consideration. The truth is, the decision in *Thorogood v. Bryan* rests upon indefensible ground. The identifica-

tion of the passenger with the negligent driver or the owner, without his personal co-operation or encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver or the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world." Again the court says, on page 379, 116 U. S., and page 397, 6 Sup. Ct., 29 L. Ed. 652: "There is no distinction in principle, whether the passengers be on a public conveyance, like a railroad train or an omnibus, or be on a hack, hired from a public stand in the street, for a drive. Those on a hack do not become responsible for the negligence of the driver if they exercise no control over him further than to indicate the route they wish to travel or the places to which they wish to go. If he is their agent, so that his negligence can be imputed to them, to prevent their recovery against a third party he must be their agent in all respects, so far as the management of the carriage is concerned, and responsibility to third parties would attach to them for injuries caused by his negligence in the course of his employment. But, as we have already said, responsibility cannot, within any recognized rules of law, be fastened upon one who has in no way interfered with and controlled in the matter causing the injury. From the simple fact of hiring the carriage or riding in it no such liability can arise. The party hiring or riding must in some way have co-operated in producing the injury complained of before he incurs any liability for it. 'If the law were otherwise,' as said by Mr. Justice Depue in his elaborate opinion in the latest case in New Jersey, 'not only the hirer of the coach, but also all the passengers in it, would be under a constraint to mount the box and superintend the conduct of the driver in the management and control of his team, or be put for remedy exclusively to an action against the irresponsible driver or equally irresponsible owner of a coach, taken, it may be, from a coach stand, for the consequences of an injury which was the product of the co-operating wrongful acts of the driver and of a third person, and that, too, though the passengers were ignorant of the character of the driver, and of the responsibility of the owner of the team, and strangers to the route over which they were to be carried.'"

The court further cites with approval the case of *Dyer v. Ry.*, 71 N. Y. 223, in which the facts are very similar to those in the case at bar, in the following words: "The plaintiff was injured while crossing the defendant's railroad track on a public thoroughfare. He was riding in a wagon by the permission and invitation of the owner of the horses and wagon. At that time a train standing south of certain buildings, which prevented its be-

ing seen, had started to back over the crossing, without giving the driver of the wagon any warning of its approach. The horses, becoming frightened by the blowing off of steam from engines in the vicinity, became unmanageable, and the plaintiff was thrown or jumped from the wagon, and was injured by the train, which was backing. It was held that no relation of principal and agent arose between the driver of the wagon and the plaintiff, and, although he traveled voluntarily, he was not chargeable with negligence, and there was no claim that the driver was not competent to control and manage the horses."

In *Transfer Co. v. Kelly*, 36 Ohio St. 86, 38 Am. Rep. 558, the plaintiff below (Kelly) was injured while riding on a street car in collision with a car of the Transfer Company, and was permitted to recover, although it appeared that the servants of both companies were negligent. The Chief Justice, in delivering the opinion of the court, said: "It seems to us, therefore, that the negligence of the company or of its servants should not be imputed to the passenger, where such negligence contributes to his injury jointly with the negligence of a third party, any more than it should be so imputed where the negligence of the company or its servants was the sole cause of the injury." "Indeed," the Chief Justice added, "it seems as incredible to my mind that the right of a passenger to redress against a stranger for an injury, caused directly and proximately by the latter's negligence, should be denied on the ground that the negligence of his carrier contributed to his injury, he being without fault himself, as it would be to hold such passenger responsible for the negligence of his carrier whereby an injury was inflicted upon a stranger. And of the last proposition, it is enough to say that it is simply absurd."

In *Robinson v. Railroad*, 66 N. Y. 11, 23 Am. Rep. 1, Church, C. J., a distinguished jurist, speaking for an able court, says: "It is therefore the case of a gratuitous ride by a female upon the invitation of the owner of a horse and carriage. The plaintiff had no control of the vehicle, nor of the driver in its management. It is not claimed but that Conlon was an able-bodied, competent person to manage the establishment, nor that he was intoxicated or in any way unfit to have charge of it. Upon what principle is it that his negligence is imputable to the plaintiff? It is conceded that, if by his negligence he had injured a third person, she would not be liable. She was not responsible for his acts, and had no right and no power to control them. True, she had consented to ride with him, but as he was in every respect competent and suitable, she was not negligent in doing so. Can she be held, by consenting to ride with him, to guaranty his perfect care and diligence? There was no necessity for riding with him. It was a voluntary act on the part of the plaintiff, but it was not an unlawful or neg-

ligent act. She was injured by the negligence of a third person, and was free from negligence herself, and I am unable to perceive any reason for imputing Conlon's negligence to her." Again, the court says, on page 13, 66 N. Y., 23 Am. Rep. 1: "I am unable to find any legal principle upon which to impute to the plaintiff the negligence of the driver. The whole argument on behalf of the appellants on this point is contained in the following paragraph from the brief of its counsel: 'So, if the plaintiff had proceeded on this journey upon the invitation of Conlon for the like purpose, she having voluntarily intrusted her safety to his care and prudence, and thus exposed herself to the risk of injury arising from his negligence or want of skill, she would be precluded from recovering, if he thereby contributed to her injury.' If this argument is sound, why should it not apply in all cases to public conveyances, as well as private? The acceptance of an invitation to ride creates no more responsibility for the acts of the driver than the riding in a stage-coach or even a train of cars, providing there was no negligence on account of the character or condition of the driver, or the safety of the vehicle, or otherwise. It is no excuse for the negligence of the defendant that another person's negligence contributed to the injury, for whose acts the plaintiff was not responsible. The rule of contributory negligence is very strict in this state, and should not be extended, nor should the rule of imputable negligence be extended to new cases, where the reason for its adoption is not apparent."

In *Railway Co. v. Lapsley*, 51 Fed. 174, 2 C. C. A. 149, 16 L. R. A. 800, Sanborn, C. J., speaking for the court, says: "But where the owner and driver of a team and carriage invites another to ride in his carriage, no relation of principal and agent is created; no relation of master and servant is established: the owner and driver of the team are not controlled by, and are not in any sense the agents of, the invited guest; and to hold him responsible for the negligence of the former, by whose permission alone he rides, is unauthorized by the law and repugnant to reason. That he who suffers injury from another's negligence may recover compensation of the wrongdoer is a principle founded in natural justice and sustained by every precedent. That where the negligence of the person injured has contributed to the injury he cannot so recover, because it is impracticable, in the administration of justice, to divide and apportion the compensation in proportion to the varying degrees of concurring negligence, is equally well settled. But that he whose wrongful act or omission has caused the injury and damage, and who, upon every consideration of justice and reason, ought to make compensation for it, shall be permitted to escape because a third person, over whom the injured person had no control, and whose only relation to him was that of a guest to

his host, has been guilty of negligence that contributed to the injury, is neither just nor reasonable. According to the verdict of this jury, a loss of \$1,000 was entailed upon the decedent by the negligence of this defendant. The defendant's wrongful omission was the proximate cause of this damage. The decedent in no way caused or contributed, by any act or omission of hers, to this injury. She had no control over her brother, the driver, who may have contributed, by his carelessness, to the damage. Upon what principle, now, can it be justly said that the decedent must bear all this loss, when she neither caused, was responsible for, nor could have prevented it, because this third person assisted to cause the injury, the proximate cause of which was the wrongful act of the defendant company? If there exists in the realms of jurisprudence any sound principle upon which so unrighteous a punishment of the innocent and the discharge of the guilty may be based, we have been unable to discover it."

In *Dean v. Railway*, 129 Pa. 514, Clark, J., delivering the opinion of the court, says, on page 524, 18 Atl. 720, 6 L. R. A. 143, 15 Am. St. Rep. 733: "Quotations might be given, from many cases in the different states, illustrating the very firm and emphatic manner in which the doctrine of this celebrated case has been denied. The authorities in England and the great current of authorities of this country are against it. Nor can I see why, upon any rule of public policy, a party injured by the concurrent and contributory negligence of two persons, one of them, his common carrier, should be held, and the other released from liability. As to this, I speak only for myself. In my opinion, there is no principle consonant with common sense, common honesty, or public policy which should hold one not guilty of any negligence, either of omission or commission, for the negligence of another imputed to him under such circumstances. Although, in *Carlisle v. Brisbane* [113 Pa. 544, 6 Atl. 372], I may appear to have accepted that doctrine, I mean merely to state that the ground upon which this court had rested that rule was better than that taken by the English courts. But if this were not so, Fields was not a common carrier. Dean was riding in the wagon merely by invitation of Field, who happened to be going in the direction of Dean's home with a load of provisions. He was carried without compensation, merely as an act of kindness on the part of Fields, who had sole control of the team and of the wagon. The case is similar in this respect to *Carlisle v. Brisbane*, supra, and to the case of *Follman v. City of Mankato* [Minn.] 29 N. W. 317, 59 Am. Rep. 340. We are clearly of opinion that, if Dean himself was guilty of no negligence, the negligence of Fields cannot be imputed to him."

This case was expressly approved in *Bunting v. Hogsett*, 139 Pa. 363, 21 Atl. 31, 33, 34, 12 L. R. A. 268, 23 Am. St. Rep. 192,

where the court uses the following language, on page 376, 139 Pa., page 33, 21 Atl., 12 L. R. A. 268, 23 Am. St. Rep. 192: "But *Thorogood v. Bryan*, supra, which is the leading case, has been recently overruled in the English Court of Appeals. The *Bernine* (*Mills v. Armstrong*) 12 Prob. & D. 58. And the doctrine, although formerly accepted in many of the states, is now generally disapproved. The authorities in England and the great current of authority in this country are against it. The cases are collected in *Dean v. Railroad*, supra. They are numerous, and it is unnecessary to refer to them here. What was there said was given as an individual opinion merely, and was to some extent, perhaps, obiter dictum; but we are now unanimously of opinion that the views there expressed, somewhat in advance, contain the proper exposition of the law. The identification of the passenger with the negligent driver, or the owner, or with the carrier, as the case may be, without his co-operation or encouragement, is a gratuitous assumption. As Mr. Justice Field said, in *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652: "There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver or the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world." The rationale of the rule of *Thorogood v. Bryan* is expressly disavowed in our own case of *Lockhart v. Litchenthaler*, and it is now rejected as untenable and wholly indefensible. Nor is there any rule or principle of public policy which will support such a doctrine. If a person is injured by the concurrent and contributory negligence of two persons, one of them being at the time the common carrier of his person, there is no reason, founded in public policy or otherwise, which should release one of them and hold the other. It is true, the carrier may be subjected to a higher degree of care than his co-tortfeasor, but this affords no reason why either or both of them should not be held to that degree of care, respectively, which the law imposes upon them, and to be answerable in damages accordingly. The general rule undoubtedly is, if a person suffers injury from the joint negligence of two parties, and both are negligent in a manner which contributes to the injury, they are liable jointly and severally, and it would seem, in principle, to be a matter of no consequence that one of them is a common carrier. Neither the comparative degrees of care required, nor the comparative degrees of culpability established, can affect the liability of either."

It is unnecessary, as well as impracticable, to cite all the other cases we have examined on this subject, and so we will confine ourselves to a few in which the precise question under consideration is directly presented. That one who is injured by the joint or con-

curring negligence of a private person, with whom he is riding by invitation as a guest or companion, and a third person, is not chargeable with the negligence of the driver, is held in the following cases: *Masterson v. N. Y. C. R. Co.*, 84 N. Y. 247, 38 Am. Rep. 510; *Strauss v. Railroad* (Sup.) 39 N. Y. Supp. 998; *Kessler v. R. Co.* (Sup.) 38 N. Y. Supp. 799; *Street Ry. Co. v. Powell*, 89 Ga. 601, 16 S. E. 118; *Leavenworth v. Hatch*, 57 Kan. 57, 45 Pac. 65, 57 Am. St. Rep. 309; *Cahill v. Railroad*, 92 Ky. 345, 18 S. W. 2; *Noyes v. Boscawen*, 64 N. H. 631, 10 Atl. 690, 10 Am. St. Rep. 410; *Ouverson v. Grafton*, 5 N. D. 281, 65 N. W. 676; *St. Clair R. Co. v. Eadie*, 43 Ohio, 91, 1 N. E. 519; *Carlisle v. Brisbane*, 113 Pa. 544, 6 Atl. 372, 57 Am. Rep. 483; *P. W. & B. R. Co. v. Hogeland*, 66 Md. 149, 7 Atl. 105, 59 Am. Rep. 159; *B. & O. R. Co. v. State*, 79 Md. 335, 29 Atl. 518, 47 Am. St. Rep. 415; *R. Co. v. Davis*, 69 Miss. 444, 13 South. 693; *Follman v. Mankato*, 35 Minn. 522, 29 N. W. 817, 59 Am. Rep. 340; *Com'rs v. Mutchler*, 137 Ind. 140, 36 N. E. 534; 2 *Jaggard, Torts*, § 276, p. 982; *Bishop Noncont. Law*, § 1070.

The rule is thus stated in 7 Am. & Eng. Enc. 447: "Occupants of Private Conveyances. In the second class of cases there has been, and still is, much conflict among the authorities, but the true principle seems to be that when a person is injured by the negligence of the defendant and the contributory negligence of one with whom the injured person is riding as a guest or companion, such negligence is not imputable to the injured person; while, on the other hand, it may be imputable when the injured person is in a position to exercise authority or control over the driver." Judge Thompson, in his Commentary on the Law of Negligence, vol. 1, § 502, thus lays down the rule: "Negligence of the driver is not imputed to the passenger on a private conveyance riding by invitation. While there are a few untenable decisions to the contrary, nearly all American courts are agreed that the rule under consideration extends so far as to hold that where a person, while riding on a private vehicle by the invitation of the driver or the owner or the custodian of the vehicle, and having no authority or control over the driver, and being under no duty to control his conduct, and having no reason to suspect any want of care, skill, or sobriety on his part, is injured by the concurring negligence of the driver and a third person or corporation, the negligence of the driver is not imputed to him, so as to prevent him from recovering damages from the other tortfeasor."

We cannot better close this discussion than by the following quotation from 1 *Shearman & Redfield on Negligence*, § 66, and in doing so we deem it proper to say that, while we fully approve of the legal conclusions arrived at by the distinguished authors, we do not wish to be held entirely responsible for the vigor of their language: "Doctrine of Identi-

fication. As already stated, the fact that the injury was caused by the joint negligence of the defendant and a mere stranger is universally admitted to be no defense. But, in the famous case of *Thorogood v. Bryan*, an English court invented a new application of the old Roman doctrine of identification, and held that a passenger in a public vehicle, though having no control over the driver, must be held to be so identified with the vehicle as to be chargeable with any negligence on the part of its managers which contributed to an injury inflicted upon such passenger by the negligence of a stranger. In former editions, we devoted much space to the refutation of this doctrine of 'identification.' But it is needless to do so any longer, since the entire doctrine has, since our first edition been exploded in every court, beginning with New York and ending with Pennsylvania. It was finally overruled in England a few years ago. The only remnant of this doctrine which remains in sight anywhere is the theory that one who rides in a private conveyance thereby makes the driver his agent, and is thus responsible for the driver's negligence, even though he has absolutely no power or right to control the driver. This extraordinary theory, which did not even occur to the hairsplitting judges in *Thorogood v. Bryan*, was invented in Wisconsin, and sustained by a process of elaborate reasoning; and this Wisconsin decision, in evident ignorance of all decisions to the contrary, was recently followed, with some similar reasoning, in Montana, and in Nebraska without any reasoning whatever; which last is certainly the best method of reaching a conclusion, directly opposed to common sense and to the decisions of twenty other courts. The notion that one is the 'agent' of another, who has not the smallest right to control or even advise him, is difficult to support by any sensible argument. This theory is universally rejected, except in the three states mentioned, and it must soon be abandoned even there."

The doctrine of imputable negligence, as far as it relates to a child, has been fully discussed and expressly repudiated by this court in *Bottoms v. Railroad*, 114 N. C. 696, 19 S. E. 730, 25 L. R. A. 784, 41 Am. St. Rep. 799. Even if this phase of the question were now before us, we could add but little to what was there so fully and so ably said.

There must be a new trial.

(124 N. C. 319)

HAUSER et al. v. CRAFT et al.

(Supreme Court of North Carolina. March 8, 1904.)

WILLS—CONSTRUCTION—LIFE ESTATE—CONTINGENT REMAINDER—RULE IN SHELLEY'S CASE—WARRANTIES OF LIFE TENANT—STATUTE.

1. A will provided: "I give unto my granddaughter K. a tract of land called the Elder tract." Then followed bequests of personal

property to the same granddaughter. In the same item of the will, after several complete sentences and periods intervening, the item continued: "Also two acres of meadow land out of the River tract, . . . which is to be hers during her natural life only, and should the said K. die without leaving any child or children, then the property which I have given to her to be divided among the rest of my heirs." Held, that K. took a life estate in the Elder tract.

2. A will devising a life estate, which provides that should the devisee thereof "die without leaving any child or children, then the property which I have given to her to be divided among the rest of my heirs," creates a contingent remainder in the children of the life tenant surviving her at her death.

3. Where a devise of property is to the devisee for life, and should the devisee "die without leaving any child or children, then the property which I have given to her to be divided among the rest of my heirs," the rule in *Shelley's Case* does not apply.

4. Under Code, § 1834, providing that all collateral warranties are abolished, and all warranties made by any tenant for life of real estate descending to any person in remainder shall be void, and declaring that all such warranties shall be deemed covenants only, and bind the covenantor in like manner as other obligations, a warranty of title in fee simple in a deed from a life tenant, whose children were entitled to take the estate on her death under the will creating it, has the effect only of a personal covenant.

5. Adverse possession cannot be predicated of possession of real property by grantees of the life tenant as against the remaindermen during the life of the life tenant.

Appeal from Superior Court, Forsyth County; Neal, Judge.

Action by W. H. Hauser and others against N. W. Craft and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

This is an action for the recovery of real property, which was tried in the court below upon the following case agreed:

(1) Isaiah Coe died some time in 1836, leaving a last will and testament, dated February 5, 1836, in which are these words and figures: "Item 3. I give unto my granddaughter Katherine Scott, a tract of land called the Elder tract, being 166 acres, which adjoins Janus Fletcher. Also one negro woman named Bett and one boy named Lawson, one girl named Alley, and their increase from this time forward. Also one horse, bridle and saddle to be of the value of \$100; two cows and calves, five head of sheep, two beds and furniture, a walnut chest or bureau; also two acres of meadow land out of the River Tract, adjoining her grandmother Pierce, with the privilege of a cartway to and from the same, which is to be hers during her natural life only, and should the said Katherine Scott die without leaving any child or children, then the property which I have given to her to be divided among the rest of my heirs."

(2) Katherine Scott was a granddaughter of Isaiah Coe (her mother, a daughter of Isaiah Coe, having died prior to February 5, 1836), and living with her grandfather, and on May 22, 1840, the said Katherine Scott, for and in consideration of \$275, deeded to George Newman, in fee simple, the Elder

tract, containing 166 acres, more or less, which is the land in dispute, with the following clause of warranty: "The said party of the first part for the consideration aforesaid does hereby covenant and agree to warrant and defend the premises aforesaid to the said party of the second part, his executors, administrators and assigns against the claims and entries of all persons whatsoever, and she further covenants that she is seised of the premises in fee simple and has power to make and convey such an estate by this indenture, and has done the same by these presents."

(3) That Katherine Scott intermarried with Adam Hauser in 1842, and by him had the following children: W. H. Hauser, C. S. Hauser, M. E. Fleming, wife of J. C. Fleming, Louisa Scott, wife of S. W. Scott, and Sarah Chaplin, wife of J. M. Chaplin, who are the plaintiffs in this action.

(4) That subsequent to May 22, 1840, George Newman sold the above described land to W. F. Shore, who in 1874 conveyed said land to the defendants, and the defendants in said action have since their purchase put upon said land valuable improvements.

(5) That the defendants are now in possession of said land, and deny the right of the plaintiffs to recover; that the defendants, and those under whom they claim, have been in possession of said land, under known and visible lines and boundaries, since 1840, as shown in their deeds.

(6) That Katherine Hauser, née Scott, died during the year 1899, and this action was commenced on the 10th April, 1900.

(7) That said Isaiah Coe has descendants now living other than the plaintiffs in this action.

The plaintiffs claim the land as the children of Katherine Hauser, formerly Katherine Scott, under the third item of the will of Isaiah Coe; and their contention is that by a proper construction of that item their mother acquired only a life estate in the land, and at her death, by implication or construction of law, they took a remainder in fee. Their counsel also contended at the bar that, if they did not take under the will as the children of Katherine Hauser, then they took as heirs of Isaiah Coe under the ulterior limitation; and, while they are not all of his heirs, they can recover as tenants in common of their co-heirs the entire estate in the land as against the defendants, who have no share or interest therein. The defendants, on the contrary, insist that by the proper construction of the third item of the will Katherine Scott took a fee contingent upon her dying without leaving children, and, as children born of her marriage with Adam Hauser have survived her, the contingent estate became absolute and indefeasible, and this estate they have acquired by mesne conveyances from her. They also contend that the claim of the plaintiffs, who are heirs of Katherine Hauser, is rebutted by the war-

ranty in their ancestor's deed, which is relied on as a defense in bar of their recovery, and, if not, that it is barred by long-continued adverse possession under the statute of limitations. There was judgment for the plaintiffs, and the defendants excepted and appealed.

J. E. Alexander, A. E. Holton, and Benbow & Hall, for appellants. Glenn, Manly & Hendren, for appellees.

WALKER, J. (after stating the case). We decided at the last term in *Whitfield v. Garis*, 45 S. E. 904, that when property is given to a person absolutely, and, if he should die without leaving children or heirs of his body, then over, the primary devisee takes a fee, defeasible on his dying without leaving children, and that the children, if he leave any, take no estate as purchasers under the will by implication. If the first taker dies leaving children, and without having disposed of his defeasible estate, the children take from him by descent, and they cannot take it by implication as purchasers, unless that was the intention of the testator expressed in the will or to be clearly inferred therefrom. 1 Underhill on Wills, § 468. We could discover no such intention of the testator in that case. The rule thus stated also applies where the devise is in the first instance to the parent for life, and then over to ulterior devisees, if the parent dies without leaving children. But in the latter case it is said that the law will raise an estate in remainder by implication in favor of surviving children upon slight indication of an intention to that effect, and one reason for the rule is that it would be absurd to assume the testator intended that the death of the first taker, leaving no children, should entitle the devisee, who is to take in remainder or by way of executory devise, while the converse—that is, his death leaving a child—will defeat the limitation over without benefiting either parent or child. 1 Underhill on Wills, § 468, p. 623; *Kinsella v. Caffery*, 11 Ir. Ch. Rep. 154; *Ex parte Rogers*, 2 Maddox, Ch. (1 Am. Ed.) 576. Whether this be the correct principle or not, it is certainly true that, if it sufficiently appears from the will the testator so intended, the law will raise an estate by implication in favor of the children in such a case, notwithstanding the estate is not expressly limited to them in the will. We must therefore determine in our case whether Katherine Hauser took only a life estate in the Elder tract of land, which is the property in dispute, or an estate in fee, and, if she took only a life estate, whether the plaintiffs took an estate in remainder by implication, or, if not, whether, lastly, they took as heirs of the testator under the ulterior limitation. It is admitted that Katherine Hauser took only a life estate, if the words in the third item, namely, "which is to be hers during her natural life only," should not be confined to the gift of the

"meadow land and cartway," but should be extended to the limitation of the Elder tract. The defendants contend that, if the third item of the will is construed as it is punctuated, the qualifying words apply only to the meadow tract and cartway, and not to the Elder tract. That a will is couched in ungrammatical language, and is incorrectly punctuated, are facts of little importance in construing it. The punctuation may, in certain cases, have some effect in ascertaining the true meaning, and it is said to be a guide, though not a very reliable one, to aid us in seeking for the testator's intention; but the latter must always be determined exclusively from the words employed by the testator, viewed in the light afforded by the context. The punctuation, or the lack of it, is not material, and may be omitted or supplied by the court. Commas may be inserted for periods, or vice versa, in order to accomplish the paramount object, which is the ascertainment of the testator's will or meaning. 1 Underhill, supra, § 369. But, while this may be done when necessary to effectuate the intention of the testator, we do not think that the punctuation of the third item of the will evinces a purpose to separate the qualifying clause from that part of the devise which precedes the reference to the meadow land and cartway, and to restrict its operation entirely to the latter. It is evident, from the entire structure of that item of the will, that the testator intended to limit the interest of Katherine Hauser in all the property described in it to a life estate. If he had intended differently, he would in some way have indicated his purpose to give a fee in the property, other than the meadow land and cartway, in more explicit language. There is just as much reason for holding that the restrictive words apply to the Elder tract of land as there is for construing the will so that they may be confined in their operation to the meadow land and cartway.

The relative pronoun "which" must be understood to refer to all that precedes in that item of the will, and especially is this so when the clause which it introduces is placed in immediate connection with the last provision of the item, namely, "and should the said Katherine Scott die without leaving any child or children, then the *property* which I have given to her to be divided among the rest of my heirs." (*Italics ours*.) This provision follows the clause, "which is to be hers during her natural life only," and is joined to it by the conjunction "and," which shows that the testator intended that the two should be taken and construed together, and, if this is done, it is perfectly clear that the testator intended to give his granddaughter Katherine Scott a life estate in the Elder tract. The interpretation we have thus placed upon the item seems to us to be the only natural and reasonable one, and, besides, we are utterly unable to see any good reason why the testator should

have given his grandchild an estate for life in the two acres of meadow land and the cartway and a fee in the other property. A careful reading of the item shows that his purpose was to make ample provision for this grandchild, who lived with him, and who was dependent upon him, by giving her a farm, with slaves to cultivate it, and other necessary personal property for its better and more convenient enjoyment, and the meadow land, "with the privilege of the cartway to and from it," as a means of ingress and egress, was given as an appurtenance to the larger tract, and as being necessary also for its advantageous enjoyment. It is all one devise and bequest, and the use of periods and capitals was not intended to disassociate the different clauses so as to constitute each one of them as the expression of a separate and distinct gift of the property therein described.

The defendants' counsel contended that, because of the peculiar punctuation and the use of capitals, the restrictive clause applied only to the meadow land and cartway; but, if we consider the method of punctuation as indicating the intention, there is no reason why that clause should not be as well applied to the horse, bridle, and other species of personal property mentioned and described immediately before the meadow land and cartway. They are separated only by semicolons, and the grammatical construction would require the restriction to be extended to them.

In construing wills, as exactly the same language or form of expression is rarely used, each case must, generally speaking, be decided upon its own facts, and the intention of the testator is to be diligently sought for, and when found is to be carried out if not contrary to the law; but the intention must be gathered from the whole will. We can derive little aid from merely technical rules. In this case it appears that at the time the will was executed Katherine Scott was living with her grandfather and was unmarried. It is manifest he intended that in the distribution of his estate she should represent her mother, who was his daughter (which is admitted in the defendants' brief), and doubtless he would have given the property to Katherine in fee, as he did to all his daughters, but for the fact that the latter were married, or had been, and were of sufficient age and experience to manage what he should give them with judgment and discretion. They were practically settled in life. With his grandchild, who must have been the object of his most anxious care and solicitude, it was quite different. He knew full well that she might not, as she did not, attain her majority until long after his demise, and that, inexperienced as she was, she perhaps would not have any one to advise her in the management of her estate. It was for the purpose of providing against ultimate loss by reason of her own improvi-

dence, or that of her husband, if she should marry, that he did what seemed to him best to safeguard what may be called her patrimony, so that she could enjoy the use and income of it during her life, and so that the remainder would be preserved for her children, if she had any. No other reason can be assigned for his making the distinction which he did between her and his daughters. We could not for a moment yield to the suggestion that his affection for her was not as strong as it was for them, and that he wished to discriminate against her. Her peculiar and dependent situation was calculated to arouse in him a very tender and anxious regard for her future condition in life, and, though not abating any of his affectionate interest in her, nor desiring less to see her as well placed as the others, he no doubt felt that, as her future course in life was uncertain, and her ability to prudently manage what she would receive from him was unknown, it was best she should not have the absolute ownership of the property; but, whatever may have been his motive, we are unable to look at this will from any standpoint which does not reveal the clear intention of the testator to give the property, and all of it, to Katherine Scott for life. This conclusion takes the title out of the defendants, but it does not alone entitle the plaintiffs to succeed in this action, because they are suing for the recovery of real property, and, according to the invariable rule, they must recover upon the strength of their own title, and not upon the weakness of the title of their adversaries. The defendants are not required to show that they have any title in the land, but the plaintiffs must show affirmatively that they have a title which is good against the world, or good against the defendants, by estoppel. So that we must go further, and decide whether the children of Katherine, who are the plaintiffs in this action, took an estate in remainder at her death, by implication. There is no express gift to them, and if they took at all it must have been by construction of law. We are clearly of the opinion that they did so take. The limitation is, "should the said Katherine Scott die without leaving any child or children, then the property which I have given to her to be divided among the rest of my heirs." It will be observed that Katherine had only a life estate, and therefore at her death all of her interest ceased and determined. The heirs of the testator could not take unless she died without children, because it is expressly provided by the will that they should take only upon the contingency of her dying without leaving children, and the fact that she died leaving children completely divested the testator's heirs of all right or title in the land. The presumption is that he did not intend to die intestate as to any of his property, and this presumption is strengthened by the very language of the will, which on its face

shows that he intended to dispose of all of it. If the estate of Katherine expired at her death, and the heirs cannot take because she left children, who then can take, unless it be the children? *White v. Holton*, 23 N. J. Law, 330; *Theobald on Wills*, p. 569. The implication is not only necessary, but irresistible, that in the situation of the parties as now presented to us, and giving to the will of the testator a natural and reasonable construction, it was intended by him that the plaintiffs should be the objects of his bounty, and should take the property in remainder after the death of their mother. In this respect the case is not at all like that of *Whitfield v. Garria*. There was nothing in the will under construction in that case to raise any such an implication, as the estate was limited to Franklin Whitfield in fee, and besides the presumption was that the testator did not intend to disinherit his own heirs. There were others than the children who could take, and the children could take only by descent from their parent. In the case at bar we must hold either that it was intended the children should take a remainder at the expiration of their mother's life-estate, or that the fee should be in abeyance, or we must disregard the plainly expressed intention and direction of the testator, and hold that he intended that at the death of the tenant for life the estate should go to his heirs. The adoption of either of the last two alternatives would be opposed to every known principle of the law applicable to such cases. We must abide by the rule as established by the authorities we have cited, and give our decision upon this point in favor of the plaintiffs.

It was suggested by counsel at the bar that Katherine Scott, under the rule in *Shelley's Case*, took an estate tail, which by the statute of 1784 (Code, § 1325) was converted into a fee simple. The rule does not apply to this devise. The words of limitation are not such as bring our case within the principle of that rule, and we do not think it can be shown by any of the authorities to have the slightest bearing upon the question involved. There are no words used which indicate any intention on the part of the testator that Katherine Scott should take an estate of inheritance, either in fee simple or in fee tail, as the only word used is "children," and that word, by all of the authorities, is not sufficient for the purpose of creating such an estate. *Moore v. Parker*, 34 N. C. 123; *Ward v. Jones*, 40 N. C. 400; *Howell v. Knight*, 100 N. C. 254, 6 S. E. 721; *Mills v. Thorne*, 95 N. C. 362; *Starnes v. Hill*, 112 N. C. 1, 16 S. E. 1011, 22 L. R. A. 598; *Leathers v. Gray*, 101 N. C. 162, 7 S. E. 657, 9 Am. St. Rep. 30. The estate of the children could not become absolute and indefeasible until the determination of the life estate, as the remainder was contingent, and this pre-

vented the operation of the rule. *Starnes v. Hill*, supra. Besides, the application of the rule would defeat the well-defined intention of the testator, and there are not sufficient technical words in the will to override this intention. In such a case the rule can have no place.

Counsel further contended that the plaintiffs, as the children of Katherine Hauser, formerly Katherine Scott, are rebutted by the warranty in her deed under and through which the defendants claim the land. This position is equally untenable. All collateral warranties are abolished; and all warranties made by any tenant for life of lands, tenements, or hereditaments, the same descending or coming to any person in reversion or remainder, shall be void; and all such warranties as aforesaid shall be deemed covenants only, and bind the covenantor in like manner as other obligations. This is the language of the statute (Code, § 1334), and is too clear and explicit to admit of any doubt as to its true meaning. It covers the case completely, and is a full and conclusive answer to the contention, and, besides, the authorities are all against the defendants upon this point. The warranty of Katherine Scott, who had only a life estate, does not bar or rebut the plaintiffs, who are her children, because the latter claim as remaindermen, and therefore not by descent, but by purchase. This is the construction of our statute, it being a re-enactment of 4 Anne, Ch. 10, § 21, which has received the same interpretation. *Moore v. Parker* and *Starnes v. Hill*, supra. The matter is fully and ably discussed by Pearson, C. J., in *Southerland v. Stout*, 68 N. C. 446. The warranty in our case has the force and effect only of a personal covenant, the difference between which and a warranty, which operates as a bar by way of rebutter, is explained in *Wiggins v. Pender*, 132 N. C. 628, 44 S. E. 362, 61 L. R. A. 772.

The last defense is that the defendants have had adverse possession for a sufficient length of time to bar the right of the plaintiffs; but this position is clearly untenable, as it is agreed in the case that Katherine Hauser did not die until the year 1899, and this action was commenced in 1900. The statute was not set in motion until her death, as the plaintiffs had no right to the possession before she died or during the continuance of her life estate.

It was agreed in the court below that certain questions as to rents, profits, improvements, and betterments should be reserved to be considered and decided hereafter in that court.

We find no error in the judgment of the superior court, and it will be so certified, to the end that further proceedings may be had in accordance with the agreement of the parties and the law. No error.

(134 N. C. 658)

STATE v. GREEN.

(Supreme Court of North Carolina. March 16, 1904.)

ASSAULT AND BATTERY—SELF-DEFENSE—EVIDENCE—INSTRUCTION—FORM.

1. Evidence held to present a question for the jury whether one accused of assault and battery struck the prosecuting witness in self-defense.

2. Under Code, § 413, providing that the court shall state to the jury in a plain and correct manner the evidence given in the case, and explain the law arising thereon, the formula, "If you believe the evidence you should convict the defendant," is open to criticism.

Montgomery, J., dissenting.

Appeal from Superior Court, Craven County; Moore, Judge.

Thomas Green was convicted of assault and battery, and appeals. Reversed.

The defendant was indicted for assault and battery upon Mack Hudson. There was testimony on the part of the state tending to show that the prosecuting witness was employed in a barroom as a clerk, and that about 11 o'clock at night the defendant, together with one Flowers, entered the barroom and called for the witness Hudson; that he came into the room, and immediately Flowers demanded of him to know what he had been saying about the defendant. Thereupon a dispute arose between Flowers and the witness, which was followed by Flowers striking Hudson with his fists and knocking him down. The defendant testified as follows: "Flowers hit Hudson. He, Hudson, went behind the counter and got a pot and threw it at me, and I struck him with a bottle. I had to strike him to keep him from striking me. Hudson was drinking." On cross-examination he said: "After Hudson threw the pot at me, he was advancing on me. He was as far from me as the post at the corner of the bar, 15 or 20 feet, behind the counter. I threw the bottle, partly filled with benzine, at him. He had thrown the pot at me. I threw the bottle at him because he threw the pot at me. I think he would have thrown something else at me. He was advancing on me when I struck him, but had nothing in his hand. Flowers had knocked Hudson down. I think Hudson intended to strike Flowers with the measuring pot which he threw." This was all the evidence offered by the defendant. The court instructed the jury that if they believed the evidence they should convict the defendant. The defendant excepted, and appealed from the judgment pronounced upon a verdict of guilty.

D. L. Ward, for appellant. The Attorney General, for the State.

CONNOR, J. The sole question presented upon the appeal is whether the court was correct in instructing the jury that in any phase of the defendant's testimony he was guilty. This excludes from our consideration

the testimony in behalf of the state. We are of the opinion that the case should have been submitted to the jury with proper instructions, to the end that the jury should say what portion of the defendant's testimony was true and what portion of it was untrue. His testimony, taken in one aspect, certainly establishes his guilt; it is equally true that, taken in another aspect, he was not guilty. It is the province of the jury to say what portion of the testimony they will believe and what portion they will reject. Taking his testimony alone, there is nothing to show that he went there for the purpose of provoking or engaging in a difficulty with the state's witness. As he states the transaction, Flowers hit Hudson, Hudson threw a missile at him, and he was advancing on him when he struck Hudson with the bottle. He says: "I had to strike him to keep him from striking me. He was advancing on me when I struck him, but had nothing in his hands." It is true that he says that he threw the bottle because Hudson threw the pot at him. It was the province of the jury to reconcile these statements, or reject that which they find untrue. If the jury shall find this to be a correct statement of the transaction, and shall further find that he had reasonable ground to apprehend that he would be stricken, that the witness was advancing upon him, and that he used no more force than was necessary, or reasonably appeared to be necessary under the circumstances, to prevent the assault, he would not be guilty. *State v. Davis*, 23 N. C. 125, 35 Am. Dec. 735. If, on the other hand, the jury should find that he threw the bottle at the witness because he threw the pot at him, he would undoubtedly be guilty; or, if they should find that he did not have reasonable ground to apprehend that he would be stricken, or, having such reasonable ground, he used excessive force, that is, more force than was necessary or reasonably appeared to be necessary, he would be guilty. These are questions for the jury, and not for the court, to decide.

If the jury find the transaction to be as testified by the state's witness, he would undoubtedly be guilty; but, for the purpose of passing upon the defendant's exception, we must take his testimony as being true, and exclude the consideration of the state's evidence. We would suggest that this court has held that the formula used by his honor to the jury, that "if they believed the evidence they should convict the defendant," is open to criticism. *State v. Barrett*, 123 N. C. 753, 31 S. E. 731; *Sossamon v. Cruse*, 133 N. C. 470, 45 S. E. 757. Section 413 of the Code prescribes the duty of the judge in charging the jury: "He shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon." We feel sure that the error of the learned and careful judge who tried this case was an inadvertence. The testimony strongly

tended to show the defendant's guilt, and doubtless so impressed his honor. In the administration of the criminal law, it is wise to observe the "landmarks" and preserve the well-defined rights and duties of the court and jury.

The defendant's exception to his honor's charge must be sustained, and for the errors complained of he is entitled to a new trial.

MONTGOMERY, J. (dissenting). I regret to have to enter my dissent to the opinion of the court, but, after a careful examination of the evidence, I am so clearly of the opinion that his honor correctly instructed the jury as to their duty that I am constrained to do so. The state introduced evidence to the effect that the prosecuting witness, Mack Hudson, a negro, was employed in a barroom conducted by a negro, in the city of New Berne, as a clerk, and that about 11 o'clock one Saturday night, in July, 1903, the defendant, Thomas Green, together with a man by the name of Flowers, both white men, entered the barroom and called for Hudson; that Hudson came into the room, whereupon Flowers demanded of him to know what he had been saying about the defendant, Green, and that instantly a dispute arose between Flowers and Hudson, which resulted in Hudson being knocked down by Flowers. There was evidence, too, that the defendant, Green, threw a bottle, partly filled with benzine, which struck Hudson on the forehead. The injury from the blow was a severe one. Prior to the throwing of the bottle by Green, there had been no words between Green and Hudson, and no demonstration by Hudson against Green, and Green cursed Hudson before he struck him with the bottle. Green was examined as a witness in his own behalf, and said that Hudson went behind the counter, and got the pot and threw it at him, and that he struck Hudson with the bottle. He said, further, that he had to strike Hudson to keep Hudson from striking him, and that Hudson was drinking and advancing on him. On his cross-examination, however, he said that Hudson was 15 or 20 feet off and behind the counter when he (the witness) threw the bottle at him, and that he threw the bottle at him because Hudson had thrown the pot at him. In the conclusion of his cross-examination he admitted, too, that he thought Hudson had intended to strike Flowers with the measuring pot when he threw it. The court instructed the jury that if they believed the evidence they should convict the defendant.

From a careful examination of the evidence in the case, and from the testimony, especially of the defendant, it appears that, even if Hudson had ever intended to or actually did have trouble with Green, the defendant, he (Green) provoked it, and was therefore himself guilty. But his own cross-examination shows that Hudson was behind his counter, 15 or 20 steps from the defend-

ant, at the time when the defendant threw the bottle of benzine. The defendant, as we have seen, admitted, too, that he thought Hudson, when he threw the measuring pot, intended to strike Flowers, who had knocked Hudson down. The testimony of the defendant in respect to the reason which he gave for his assault on Hudson, viz., that he threw the bottle of benzine at Hudson because Hudson had thrown the measuring pot at him, cannot be a justification or excuse for his act. The law does not justify an assault by way of retaliation or revenge for a blow previously received. *State v. Gibson*, 32 N. C. 214. It appears, further, that Green did not deny that he cursed Hudson before any demonstration or word had been made or spoken by Hudson, and, as we have seen, the defendant admitted, at the end of his cross-examination, that he thought Hudson threw the measuring pot at Flowers.

Upon the whole matter, as I see it, there were no variant aspects of the evidence to be submitted to the jury. If it was true, the defendant was guilty in law; otherwise he was not. His honor expressed no opinion as to whether the jury ought or ought not to believe the evidence. He simply said, "If you believe the evidence, the defendant is guilty."

(134 N. C. 400)

WILSON v. BROWN et al.

(Supreme Court of North Carolina. March 16, 1904.)

ADMINISTRATORS—SALE OF REAL PROPERTY—DEFENSES—REPLY—ADVERSE POSSESSION—COLOR OF TITLE—TRUST—QUESTION FOR JURY—EVIDENCE—SUFFICIENCY.

1. Evidence examined in proceeding by administrator for license to sell real property alleged to belong to estate of his intestate, in which the defense was interposed that defendants had obtained a judgment against the intestate in G. county, which had been docketed in the county where the proceedings were pending, and the homestead of the intestate allotted on execution thereon issued from G. county, thereby constituting the judgment a lien on the land sought to be sold, and held sufficient to show that the execution issued as alleged.

2. In a proceeding by an administrator for license to sell real property alleged to belong to the estate of his intestate, in which the defense was interposed that defendants had obtained a judgment against the intestate in G. county, which had been docketed in the county where the proceedings were pending, and the homestead of the intestate allotted on the execution issued thereon, a reply "that it is denied on information and belief that execution on said judgment was properly and lawfully issued from G. county, and the homestead legally and regularly allotted under the same, and it is specifically averred that said execution was irregular and void," is insufficient as a denial of the allegations of the answer.

3. Possession of land under perfect legal title prior to sale thereof on execution and passing of sheriff's deed to the purchaser, cannot be tacked to possession continuing after the passing of the sheriff's deed, to establish title by adverse possession as against the holder of the sheriff's deed.

4. The deed under which a judgment debtor became the owner of land does not constitute color of title after sale of the land on execution

and passing of the sheriff's deed, though the judgment debtor continued in possession.

5. The proof to establish that the purchase of property at sheriff's sale upon execution was for the use and benefit of the judgment debtor continuing in possession must be strong, clear, and convincing.

6. Whether the proof that the purchase of property at sheriff's sale upon execution was for the use and benefit of the judgment debtor continuing in possession was sufficient to establish the trust is a question for the jury.

Walker and Douglas, JJ., dissenting in part.

Appeal from Superior Court, Pitt County; Moore, Judge.

Action by H. H. Wilson, administrator of the estate of B. J. Wilson, deceased, against J. W. Brown and others. From a judgment for defendants, plaintiff appeals. **Affirmed.**

Skinner & Whedbee and Fleming & Moore, for appellant. Y. T. Ormond, for appellees.

CONNOR, J. The plaintiff, administrator of B. J. Wilson, filed his petition against the defendants, heirs at law, etc., for the purpose of procuring license to sell certain real estate of which he alleged his intestate was the owner at the time of his death, to make assets, etc. The petition includes two tracts of land, one "known as the homestead of B. J. Wilson," etc., the other "known as a part of the John S. Brown land, lying on the east side of the Greenville and Washington road," etc. The petition contained the necessary averments to entitle the plaintiff to relief. The defendant G. C. Edwards filed an answer admitting the material averments, and further alleged that he and his wife had recovered in the superior court of Greene county, on the 1st day of October, 1889, a judgment against the plaintiff's intestate, which was duly docketed in Pitt county; that an execution thereon had issued from the superior court of Greene county, and the homestead of the defendant therein duly allotted; that said judgment remained unsatisfied, and constituted a lien upon that portion of the land described in the complaint known as the "homestead." To this answer the plaintiff filed a reply admitting the recovery of the judgment. The second paragraph of the reply is as follows: "That it is denied on information and belief that execution on said judgment was properly and lawfully issued from the superior court of Greene county, and the homestead legally and regularly allotted under the same, and it is specifically averred that said execution was irregular and void." The plaintiff pleaded the bar of the statute. The defendants B. W. Brown and others, by their guardian, filed an answer denying that the plaintiff's intestate was at the time of his death the owner of the tract of land on the east side of the road, etc. They further alleged that they were the owners in fee of said land. To this answer the plaintiff filed a reply denying the affirmative allegations, and pleading the 20 and 7 years'

statutes of limitation in bar of their claim, etc. The plaintiff further alleged that at a sale of said land made by the sheriff, F. W. Brown, the father of the defendants, purchased the same upon a parol trust to hold the title to the use of plaintiff's intestate; that he remained in possession, paying taxes and receiving the rents of said land, for more than 20 years, and until his death. The cause was, upon issues made by the pleadings, transferred to the civil issue docket for trial. In regard to the defendant Edwards the court submitted the issue upon the statute of limitations. The defendant introduced the clerk of the superior court of Pitt, who produced the record showing transcript of judgment from Greene, docketed in Pitt October 5, 1889. The docket showed the entry: "Fl. fa. issued October, 1889. Homestead appraised and set off and return made October 14, 1889." He next introduced the record of the return of the sheriff showing allotment of homestead and personal property exemption, under execution on judgment of G. C. Edwards and wife against B. J. Wilson, dated October 14, 1889. (It did not appear from said return from what county the execution was issued.) The defendants introduced a deed from the sheriff of Pitt county to F. W. Brown, in which a sale under two executions issued from the superior court of Greene county upon judgments in favor of G. C. Edwards and wife against B. F. Wilson and "Julia C. Dixon, Ex'x, v. B. F. Wilson," is recited. The levy is recited as made on October 14, 1889. This was all the evidence in regard to the controversy upon the lien of the Edwards' judgment. His honor instructed the jury that if they believed the evidence they should answer the issue "No." Plaintiff excepted.

We concur with the opinion of his honor. There was uncontradicted evidence amply sufficient to show that the execution issued on the Edwards judgment from the superior court of Greene county. It is very doubtful whether the reply sufficiently denied the averment. We think that upon a proper construction of the paragraph in the reply it may well be said that it was not denied. From any point of view his honor correctly instructed the jury.

The court submitted the following issue to the jury: "Did Dr. Frank W. Brown take the legal title to the tract of land described in the sheriff's deed introduced for the use and benefit of B. J. Wilson?" The plaintiff tendered, in addition, an issue directed to the inquiry whether plaintiff's intestate had been in the open and adverse possession of the land in controversy for more than 20 years; also in regard to adverse possession under color of title for more than 7 years. His honor declined to submit either of these issues, and the plaintiff excepted. His honor's ruling was correct. The possession of plaintiff's intestate could not possibly have been adverse to Dr. Brown for 20 years, for

the manifest reason that the sheriff's deed was executed March 7, 1890, before which time Dr. Brown had no right of action or right of entry. The plaintiff's intestate prior to that time had a perfect title to the land. In regard to the second issue tendered, there was no evidence that the plaintiff's intestate had possession of the land after March 17, 1890, the date of the sheriff's deed under color of title. We have no difficulty in holding, upon the authorities, that, in the absence of any explanation, the possession of plaintiff's intestate after the right of action accrued to Dr. Brown was adverse to him, and, if continued for 20 years, would have ripened into perfect title. *Scarboro v. Scarboro*, 122 N. C. 234, 29 S. E. 352. The deed under which plaintiff's intestate became the owner of the land could not constitute color of title after the execution of the sheriff's deed. In *Johnson v. Farlow*, 35 N. C. 84, *Pearson, J.*, says: "McCracken, after his deed to the lessor, had no color of title, and the adverse possession which he held was naked. It is absurd to suppose that the deed under which he had originally acquired the land could serve his purpose as color of title after he had passed all of his estate, interest, and claim under it to the lessor. Color of title is something which purports to give title, but he had nothing of the kind. The deed to him was *functus officio* except as one of the mesne conveyances of the lessor. If McCracken had taken a deed from a third person, that would have been color of title, and seven years' adverse possession under it would, in the language of the cases, 'have ripened it into a perfect title,' thus originating, which did not exist at the date of his deed, for the averment of this new title would not be inconsistent with the admission which he was bound to make that his deed had passed the title to the lessor." Brown's legal title was but a continuance of the title of the plaintiff's intestate, the defendant in the execution. After the sale and execution of the sheriff's deed, the character of the possession retained by plaintiff's intestate was open to explanation. *Ruffin v. Overby*, 88 N. C. 369; *Bryan v. Spivey*, 109 N. C. 57, 13 S. E. 766; *Boomer v. Gibbs*, 114 N. C. 76, 19 S. E. 226.

His honor properly refused to submit either of the plaintiff's issues tendered. His honor instructed the jury in regard to the issues tendered: "That if the plaintiff had satisfied them by strong, clear, and convincing evidence that Dr. F. W. Brown took the legal title to the tract of land described in the sheriff's deed introduced for the use and benefit of B. J. Wilson, they should answer the third issue, 'Yes,' and that unless the plaintiff had satisfied them by strong, clear, and convincing evidence that Dr. F. W. Brown took the legal title to said tract of land for the use and benefit of B. J. Wilson, they should answer the third issue, 'No.'" The instruction was in accordance with the

decisions of this court. *Smith, C. J.*, in *McNair v. Pope*, 100 N. C. 404, 6 S. E. 234, says: "But, to ingraft such a trust upon a legal estate, the proof of its formation should be strong and convincing." In *Summerlin v. Cowles*, 101 N. C. 473, 7 S. E. 881, it is said: "To attach a trust to a legal estate by parol, or to convert a deed absolute in form into a security merely, and perhaps in other cases invoking the exercise of equitable judicial functions for relief, more proof is required than that which preponderates and governs in the trial of ordinary questions of fact." In *Cobb v. Edwards*, 117 N. C. 244, 23 S. E. 241, *Avery, J.*, says: "Where the judge is not at liberty to say that there is no evidence of the kind required by the rule of law prescribed in such cases, it is his duty to tell the jury that the law requires clear, strong, and convincing proof to show the agreement as well as the subsequent acts or admissions, and that it is their province to say whether that offered does so convince them of its truth." This, and other decided cases in our Reports, sustain his honor's charge to the jury. While the testimony in regard to the inadequate price paid for the land, the continued possession of the judgment debtor, payment of taxes, the reduction of the mortgage indebtedness upon the land, the relation between himself and the purchaser, might well have justified the jury in finding that Dr. Brown held the title upon some trust or understanding between himself and the judgment debtor, these questions are peculiarly within their province, and, in the absence of any error in the instructions by which they were guided, we are not permitted to question their verdict.

Upon careful examination of the entire record, we find no error.

WALKER, J. (dissenting as to homestead tract). The case shows that the defendant G. C. Edwards and his wife recovered a judgment in the superior court of Greene county on the 1st day of October, 1889, against B. J. Wilson, the intestate of the plaintiff, and the said judgment was docketed in the superior court of Pitt county on the same day. The plaintiff brought this proceeding for the purpose of selling the land of his intestate to pay debts, and in his petition he asks for the sale of the land known as the "homestead tract," which is on the west side of the road, and contains about 100 acres, and also of the land known as the "Brown tract," lying on the east side of the road, it being the excess of the homestead, and containing about 220 acres. An execution was issued to the sheriff of Pitt county, and levied on the said 320 acres of land. The homestead was set apart on the 14th day of October, 1889, and the excess, described in the pleadings as containing 220 acres, and in the sheriff's deed as containing about 100 acres, was sold, and bought by F. W. Brown, father of the defendant B. W. Brown and others. The plaintiff alleges

that this particular purchase was made by Brown at the nominal sum of \$5, for the use and benefit of his uncle, B. J. Wilson, defendant in the execution, and upon the parol promise or trust that he would hold the same for his use and benefit, and, upon the repayment of the sum disbursed by him, that he would convey the land to his said uncle, the plaintiff's intestate. I fully concur in the opinion of the court, so far as it relates to this part of the case, but I do not concur in its decision as to the disposition of the fund arising out of the sale of the homestead tract. The defendant G. C. Edwards, who answers for himself and as administrator of his deceased wife, alleges that execution issued on his judgment from the superior court of Greene county to the sheriff of Pitt county, and that the homestead was regularly allotted; and the plaintiff, in his reply, avers that no execution was ever lawfully and properly issued from the superior court of Greene county, nor was the homestead ever regularly or legally allotted under the same, and he therefore further avers that the Edwards judgment is barred by the statute of limitations, as the attempted allotment of the homestead was void, and of no effect, and did not, therefore, suspend the operation of the statute and prevent the bar. I think, though my Brethren do not, that the allegation of the answer that execution had issued from Greene county is sufficiently met and denied by the reply. In the construction of a pleading for the purpose of determining its legal effect its allegations shall be liberally construed with a view to substantial justice between the parties. Code, § 260. We should remember that the subtle science of pleading heretofore in use is not merely relaxed, but in a large measure abolished, by the Code, and the rule of the common law that every pleading must be construed against the pleader has been reversed by the present system, and we must try to ascertain the intention of the pleader, however it may be expressed, and without putting a too strained and technical construction upon his words. *Moore v. Edmiston*, 70 N. C. 510; *Stokes v. Taylor*, 104 N. C. 394, 10 S. E. 566. As said by Clark, J., in the last-cited case, when the defect is in the form, rather than in the substance, the proper method of correction is not by demurrer, nor yet by excluding evidence at the trial, but by motion before the trial to make the averment more definite. *Bule v. Brown*, 104 N. C. 335, 10 S. E. 465; *Purcell v. Railroad*, 108 N. C. 414, 12 S. E. 954, 956, 12 L. R. A. 113. The denial in this case was quite as sufficient to raise an issue as were the allegations and averments in *Moore v. Edmiston* and the other cases cited. But it was not necessary that the plaintiff should reply to this allegation, as the new matter in the answer, not being a counterclaim, "is to be deemed controverted by the plaintiff as upon a direct denial or evidence, as the case may require" (Code, §

268), the court not having ordered the plaintiff to reply thereto (section 248). An issue having been raised, how stood the proof? It may be conceded that the recitals in the sheriff's deed are prima facie evidence not merely of the sale, but also of the judgment and execution, and of all facts necessary to be recited, in order to show his power and the correct execution of it with reference to the sale, and that this is so even when the party claiming under the deed is the plaintiff in the judgment. *Rollins v. Henry*, 78 N. C. 342; *Curlee v. Smith*, 91 N. C. 172. And yet the fact in this case is that as to the homestead tract there was no sale by the sheriff, and therefore the recital could not be evidence of an allotment, nor even of the issuing of the execution under which it is alleged the allotment was made. The authorities do not fit the case. The recitals are prima facie evidence for the purpose of supporting the sale only, and there was no sale of this tract. To permit the execution to be evidence of the issuing of the execution in this case would violate the well-settled rule that a party upon whom rests the burden of proving a fact must offer the best attainable evidence of it. In *Rollins v. Henry*, supra, the court, by Rodman, J., says: "The return to an execution is ordinarily the best evidence of a levy and sale under it. But when the execution has not been returned to the clerk's office, and it, with any return on it, has been lost or destroyed, and it is proved otherwise than from the recitals that there was a judgment and execution [italics mine], the recital in a sheriff's deed is prima facie evidence of the levy and sale, they being official acts of the sheriff, even although the sale was not a recent one." But assuming, for the sake of the argument, that the recitals were evidence of the issuing of the execution, they were only prima facie evidence, and open to rebuttal. I think there was sufficient testimony to be submitted to the jury for that purpose. There is this entry on the execution docket of the superior court of Pitt county: "Fl. fa. issued Oct. 1889. Homestead appraised and set off and return made October 14, 1889." It is not the duty of the clerk of the court of the county, whose sheriff has received an execution issued from another county, to note on his docket the fact that the execution has issued. He is required to make an entry in regard to the homestead allotment when it is returned to him. Code, § 504. If there are any payments on the judgment, they are certified to him by the clerk of the court where the judgment was taken, and must be entered on his docket. The execution goes directly from the clerk of the court in which the judgment was rendered to the sheriff of the county where the defendant's land is situated, and where the judgment has been docketed, and the clerk of the latter county has nothing to do with it. His judgment roll and docket are not required to show anything in

connection with it except the credits on the judgment and the return of the homestead allotment, and the latter is required also to be returned by the officer having the execution to the clerk of the court where the judgment was rendered. Acts 1887, p. 515, c. 272. The entry, therefore, of the clerk of Pitt superior court, was some evidence that the execution had been issued from that court, for, if it had been, his duty would have been to make just such an entry as he did make. Whether this was sufficient to rebut any evidence introduced by the defendant was a question for the jury to decide, and not for the judge. All such matters should be left to the triers of the facts appointed for the purpose of deciding such issues between the parties, and should not be decided as matters of law. The entry on the docket in Pitt county was certainly as reliable as the recitals in the sheriff's deed, and those recitals constituted all of the defendant's evidence. I do not understand why the defendant did not introduce the original execution, if one ever issued from the superior court of Greene county. If it had been lost, he could have proved that it had been issued by the entries on the clerk's docket in Greene county, or by the sheriff who acted under it. The fact that no such evidence was offered tended greatly to weaken the defendant's case and to strengthen that of the plaintiff.

DOUGLAS, J., concurs in the dissenting opinion.

(134 N. C. 636)

STATE v. EDWARDS.

(Supreme Court of North Carolina. March 8, 1904.)

INTOXICATING LIQUORS—SALE ON ELECTION DAY—STATUTE—CONSTRUCTION.

1. Acts 1901, p. 266, c. 89, providing a complete scheme for the conduct of regular elections in the state, supersedes all preceding acts to the same general effect.

2. Under Acts 1901, p. 266, c. 89, § 76, providing that any person who shall give away any intoxicating liquors on election day shall be guilty of a misdemeanor, it is no offense for one who has a license to retail spirituous liquors to sell intoxicating liquors on an election day.

Appeal from Superior Court, Craven County; Moore, Judge.

A. M. Edwards was prosecuted for unlawfully selling intoxicating liquor on election day. From an order sustaining a motion to quash the indictment, the state appeals. Affirmed.

The Attorney General, for the State. W. D. McIver, for defendant.

MONTGOMERY, J. The question raised by the appeal of the state in this case is whether or not the sale of intoxicating liquors on an election day by one who had a license to retail spirituous liquors is unlawful. For nearly a third of a century—from

the year 1868 down to 1900—it was the settled policy of our law that the giving away and the sale of intoxicating liquors within five miles of any polling place on an election day should be prohibited. We first meet with the legislative purpose in section 2740 of the Code, in the chapter entitled "Elections Regulated." That section is in these words: "Any person who shall give away or sell any intoxicating liquors, except for medical purposes and upon the prescription of a practicing physician, at any place within five miles of the polling place, at any time within twelve hours next preceding or succeeding any public election, whether general, local or municipal, or during the holding thereof, shall be guilty of a misdemeanor, and fined not less than one hundred nor more than one thousand dollars." Then the General Assembly, at its session of 1895, enacted a new election law, the act being entitled "An act to revise, amend and consolidate the election laws of North Carolina" (Laws 1895, p. 211, c. 159). The first section of the last-mentioned act repeals the chapter of the Code entitled "Elections Regulated," embracing section 2740, and all laws and clauses of laws relating to elections enacted subsequent to the Code; but section 2740 of the Code was re-enacted in the act of 1895 (page 231, c. 159, § 61), and in the election laws of 1899 and 1900 (page 682, c. 507, § 78) the exact words of section 2740 were incorporated. Under the general election law enacted by the General Assembly at its session of 1901, section 2740 of the Code was again, word for word, with the exception of the words "or sell," incorporated. Laws 1901, p. 266, c. 89, § 76. From the reading of these various statutes it appears from both the language and the captions that each one of them was a separate and complete election law of itself. Each one was a revising and consolidating statute, covering the whole subject-matter of the antecedent ones, and was therefore a repeal of the others; the last one (that of 1901) being the whole law in North Carolina on the subject of "Regulation of Elections." Winslow v. Morton, 118 N. C. 486, 24 S. E. 417. It will be remembered that section 76 of the act of 1901 is section 2740 of the Code, with the words "or sell" left out, and it is therefore perfectly clear that the matter of selling or giving away liquor, the use of liquor, at or near polling places on election days, was considered by the General Assembly when the act of 1901 was passed; and, that being so, it necessarily follows that its last expression on the subject is a repeal by implication of the words "or sell" as they had appeared in the former statutes. But, if there could be any error in that construction of the law, the matter is clinched by section 86, p. 270, c. 89, of the Laws of 1901, which is as follows: "That chapter 507 Public Laws of 1899 and chapter 1 Public Laws of 1900, and all other laws and clauses of laws in conflict with this act

are hereby repealed, and the law regulating elections as contained in this act shall be construed as above, and not in connection with any existing provisions of law for the regulation of elections. (Italics ours.) Those last words confine the courts to the law on the subject of this indictment to section 76 of the act of 1901 as it is written there. His honor properly quashed the bill of indictment, for the defendant, under his license to retail spirituous liquors, was not prohibited from selling intoxicating liquors on an election day. It would have been unlawful for him to have given away liquor on that day, but it was not unlawful to sell it.

No error.

WALKER, J. (concurring). I concur in the conclusion of the court in this case, but not for the reasons given in its opinion. The general or common-law rule seems to be that the simple repeal, suspension, or expiration of a repealing statute revives the repealed statute, whether such repeal was express or implied. *Brinkley v. Swicegood*, 65 N. C. 626; *Sutherland*, Stat. Const. § 168. But this rule is subject to a well-recognized exception, which is that; when the repeal of a repealing statute is for the purpose of substituting another provision in its place, the implication of an intention to revive the repealed statute cannot arise, and especially if the substituted provision is repugnant to the original provision, or is not properly cumulative to it. So the repeal of a statute which was a revision of and a substitute for a former act to the same general effect, and which was therefore repealed, cannot be deemed to revive the previous act, for this would be plainly contrary to the intention of the Legislature. *Endlich*, *Interp. of Statutes*, § 475; *Dwarris on Statutes*, p. 159; *Sutherland*, Stat. Const. p. 228. Our case, I think, falls within the exception. By a succession of acts, commencing with chapter 16 of the Code, which was followed by Acts 1895, p. 211, c. 159, Acts 1899, p. 682, c. 507, Acts 1900, p. 1, c. 1, and finally by Acts 1901, p. 266, c. 89, the Legislature has, from time to time, provided a complete scheme for the conduct and regulation of elections in the state, and it was manifestly the purpose that each of said acts should be a substitute for the one that preceded it, and that the last act, which entirely covered the ground of each of the others, should supersede them, and become itself the final and full expression of the legislative will on the subject. I can discover nothing on the face of the last act to rebut the intent which the law infers from the very nature of the several acts, but, in my opinion, there is everything to indicate that the real intention of the Legislature was in strict accordance with that which is presumed by the law. Again, the

provision, by which the sale of liquor within five miles of a polling place and within the twelve hours next preceding or succeeding the day on which any public election is held was inserted in Acts 1899, p. 682, c. 507, and Acts 1900, c. 1, it being section 78 of each of said chapters; and it would be strange, indeed, if the Legislature intended to revive section 61, p. 231, of chapter 159 of the Acts of 1895, containing the same provision, or section 2740 of the Code, as argued in this court, that it should have expressly repealed two acts with that provision in them without making the slightest reservation in respect to it. As far as the act of 1895, § 61, is concerned, we find, upon examination of the statutes, that it was expressly repealed by Acts 1899, p. 682, c. 16, and as the latter act simply contained a repeal of the act of 1895, and nothing more, the general rule applied, and the Code chapter 16, including section 2740, and any intervening general election law repealed by the act of 1895, were thereby revived; but, as the Acts of 1899 and 1900 revised all prior general election laws, and substituted for them a scheme complete in itself, the Code chapter 16 was repealed by them (*Winslow v. Morton*, 118 N. C. 486, 23 S. E. 417), and the subsequent repeal of those two acts by Act 1901, p. 266, c. 91, did not revive the provisions of the Code, under the rule to which I have referred. It all, therefore, results in this: that Act 1901, p. 266, c. 91, was, at the time the offense is alleged to have been committed, the only law in force which regulated elections. I do not attach any special importance, in this discussion, to the words in section 86 of the act of 1901, namely, "The law regulating elections, as contained in this act, shall be construed as above and not in connection with any existing provisions of law for the regulation of elections." These words could not have referred to the Code, the act of 1895, or any other intervening act in regard to general elections, for they had been repealed by the act of 1899 and the act of 1900, successively, and therefore were not "existing provisions of law"; and they could not have had reference to the Acts of 1899 and 1900, as they were expressly repealed by the act of 1901, and could not, therefore, be construed in connection with the latter. While the omission of the words "or sell" from the act of 1901 may have been the result of inadvertence, the general law, when considered in the light of well-settled rules of interpretation, does not now forbid the sale of liquor in the manner in which it is charged in the indictment to have been made, and the court was right in granting the motion to quash.

OLARK, C. J., and DOUGLAS, J., concur in the concurring opinion.

(68 S. C. 150)

BAILEY & SON v. WELLS.

(Supreme Court of South Carolina. March 4, 1904.)

RES JUDICATA.

1. An assignee of a note and mortgage sent it to the attorney of the assignor, at his request, for foreclosure, and had notice that such attorney had commenced the suit in the name of the assignor. *Held*, that he was estopped, after judgment against the assignor, to sue thereon in his own name.

Appeal from Common Pleas Circuit Court of Newberry County; Aldrich, Judge.

Action by Bailey & Son against Mary F. Wells. Judgment for plaintiffs, and defendant appeals. Reversed.

Schumpert & Holloway, for appellant. Johnstone & Welch, for respondents.

WOODS, J. As her first defense to this action for foreclosure, the defendant alleges that a judgment in her favor in the suit instituted by one George T. Reid to foreclose the same mortgage is binding on the plaintiffs by reason of their conduct respecting that suit. These are the material facts of the Reid suit, so far as they affect this issue: The defendant gave to Reid a note and mortgage for \$1,060.35 on January 22, 1887, which he subsequently assigned to the plaintiffs, along with other collateral, to secure a large indebtedness. The papers were never re-assigned to Reid, but he wrote to the plaintiffs, requesting that they be sent to Messrs. Johnstone & Welch, attorneys at law, for suit. About the same time he retained these attorneys to foreclose a mortgage, without stating the name of the debtor or any other particulars. In pursuance of Reid's request, Bailey & Son sent the note and mortgage to Messrs. Johnstone & Welch, with a letter in these words: "At the request of Mr. Reid, we send you enclosed note and mortgage for suit." The note and mortgage bore no evidence of assignment, and the letter gave no intimation that Bailey & Son claimed any interest in them. Suit for foreclosure was commenced in Reid's name, and after protracted litigation the defendant prevailed on the plea of payment. Some time before the Reid suit was brought, Bailey & Son told the defendant's husband, who was her agent, that they held the papers as collateral for a debt due by Reid. About "three or six months," as Mr. Bailey states it, after its commencement, Bailey & Son ascertained that the suit had been instituted and was still pending in Reid's name; but the evidence does not disclose that they made any objection, or gave any notice to the defendant that they repudiated the course that had been taken.

Sending the papers to Reid's attorneys at his request, the terms of the letter written to them, their neglect to inquire about the suit or concern themselves with it, and their failure to repudiate Reid's suit when it was

brought to their attention, indicate with perfect clearness that Bailey & Son intended to place the papers and suit entirely under Reid's control, and to abide by the result. They cannot now take an inconsistent position. *Hand v. S. & C. R. Co.*, 12 S. C. 314; *St. Paul National Bank v. Cannon*, 46 Minn. 95, 48 N. W. 526, 24 Am. St. Rep. 189.

We are unable to perceive how Bailey & Son's mere expectation that Reid would have the suit properly brought, could avail them. They gave him no instructions, but, if they had, this could not protect them from defendant's charge that they put Reid in control, and must abide the result of his action. If, in fact, they intended to retain control of the papers and to sue in their own name, by their negligence in clothing Reid with the apparent ownership of the papers and control of their collection they misled the defendant into prosecuting an expensive litigation, and are now estopped from alleging against the judgment in that cause.

The fact that Bailey & Son had, some time before the Reid suit was commenced, told Mrs. Wells' husband, who was her agent, that they held the papers by assignment as collateral for a debt due by Reid to them, does not help the respondents. We cannot hold that the pledgee of collateral can avail himself of a notice of his right once given, when he afterwards deliberately turns over to the pledgor such collateral, and places it in his complete control, to be pressed by him. Such action indicates that the debt has been satisfied and the collateral released, or at least that the pledgor is authorized to collect it.

Take the view of the facts most favorable to the plaintiffs. Assume for a moment that Mr. Bailey is correct in saying that he directed the suit brought in the name of Bailey & Son, that Mr. Welch is mistaken in his statement of the contents of the letter inclosing the papers for suit, that Reid was not placed in control of the papers and the suit, and that it was due to the misunderstanding of their attorneys, Messrs. Johnstone & Welch, that the action was not brought in the name of Bailey & Son; they admit that the alleged error of the attorneys to whom they had intrusted the suit was discovered some time before the close of the litigation, and yet they deliberately elected to keep silence and let the suit in Reid's name proceed to its conclusion. It was clearly their duty then to speak, to the end that the defendant might not incur further expense in defending a suit which, in their view, would decide nothing.

In any view that can be taken, plaintiffs are concluded by the result of the suit of Reid against this defendant, and it is unnecessary to consider the other defenses.

The judgment of this court is that the judgment of the circuit court be reversed, and the complaint dismissed.

(68 S. C. 138)

STATE v. SANDERS.

(Supreme Court of South Carolina. March 1, 1904.)

CRIMINAL LAW—REFUSAL OF CONTINUANCE.

1. Where the solicitor told defendant's attorney that no bills would be given out during the term of the court, but a bill was handed out the next day on the request of the grand jury and the trial of defendant ordered on the following day, it was not an abuse of discretion to refuse a motion for continuance, in the absence of a showing that the defendant's witnesses were without the county.

Appeal from General Sessions Circuit Court of Sumter County; Townsend, Judge.

Judy Sanders was convicted of a violation of the dispensary laws, and appeals. Affirmed.

L. D. Jennings, for appellant. John S. Wilson, for the State.

POPE, C. J. The appellant pleaded guilty to an indictment which charged her with the crime of a violation of the dispensary laws of this state, and was duly sentenced by Judge Townsend, at the November term, 1902, of the court of general sessions of Sumter county, of this state. She thereupon appealed from such judgment on two grounds, to wit: "First Exception. It is respectfully submitted that the presiding judge abused his discretion in forcing the defendant to trial under the circumstances in this case, in that his honor would not allow the defendant time in which to get her testimony, and in forcing her to trial when the solicitor, John S. Wilson, had informed her attorney, on Wednesday night, November 6th, that he would not give out a bill that term of court, and forcing her to trial Friday morning, November 8th, when the true bill had not been found until November 7th, and she had not had time in which to get ready, not expecting to be tried after the state's attorney had said he would not give out a bill at said term of court; that she entered the plea of guilty for the reason that she was not prepared to make her defense; that, if she had been prepared to make her defense, she would not have entered the plea of guilty. Second Exception. It is respectfully submitted that his honor abused his discretion in passing sentence on defendant, in that said sentence was oppressive, unreasonable, and disproportionate to the offense for which the defendant had been found guilty."

1. It seems from the statement of facts set out in the "case" that there had been some conversation between the solicitor of the Third Circuit and the attorney for the defendant; that the former stated to the latter on the 6th day of November, 1902, that he would not give out a bill of indictment in this case "during the present term of court." It seems that after that day, to wit, on the 7th day of November, 1902, the grand jury insisted that the bill of indictment should be preferred at once, and that the solicitor yield-

ed to that demand of the grand jury, and handed out a bill of indictment on said 7th day of November, 1902, upon which the grand jury found a true bill on that day. The cause being placed on the docket by the clerk of court of general sessions, which it was his duty to do, the circuit judge on the 8th day of November, 1902, called the case for trial. Thereupon the defendant's attorney moved for a continuance, basing this motion upon the foregoing facts, together with the fact that the defendant had made no arrangements to go to trial, not having any witnesses. The circuit judge overruled the motion for a continuance, and ordered the cause to be set down for trial. Then the defendant entered a plea of guilty, and was duly sentenced. We are obliged to overrule this ground of appeal. The solicitor was controlled by the grand jury. There was only a delay of a few hours—from the night of 6th of November, 1902, to the day of 7th November, 1902. The defendant knew the charge was pending in the court. She resided in the city of Sumter. She did not, in her showing for a continuance, make it appear that any of her witnesses lived beyond the limits of the city of Sumter, or that any of them were beyond the limits of Sumter county. She had the power of the court to summon witnesses. Besides all these matters, continuances are governed by the discretion of the circuit judge. There are many decisions of this court which so hold. It is only when the circuit judge abuses his discretion in refusing this motion that this court will interfere. This exception is overruled.

2. It is nowhere made to appear that the circuit judge exceeded his power under the law in fixing the terms of his sentence. These are matters within his discretion. This court will not interfere with the exercise of this discretion by the circuit judge. So long as the limits of the law as to punishment are observed by the circuit judge, we will not interfere. This exception is overruled.

It is the judgment of this court that the judgment of the circuit court be, and the same is, affirmed.

(68 S. C. 119)

STATE v. WIDEMAN.

(Supreme Court of South Carolina. Feb. 23, 1904.)

CRIMINAL LAW—EVIDENCE—ADMISSIONS—MALICIOUS MISCHIEF—NEW TRIAL.

1. On a criminal trial, evidence of statements by defendant that another had committed the crime, but that he would pay the prosecutor to settle it, are admissible.

2. Where, on motion to strike out an entire declaration, a part only is stricken, and that left is objectionable because of its disconnection, the remedy of the party moving to strike is to move that the whole be restored subject to objection.

3. Where defendant pleads an alibi, refusal to permit a merchant to refresh his memory as to what hour defendant delivered a bundle

to him by looking at his order for the bundle is not error.

4. Where the evidence as to commission of the crime was circumstantial, the presiding judge properly confined witnesses who testified as to horse tracks to a description of the peculiarities of the track and the corresponding peculiarities of the feet of defendant's horse.

5. On trial for malicious mischief, evidence of ill will on the part of accused towards prosecuting witnesses was admissible.

6. Where there was circumstantial evidence supporting a conviction, refusal of a new trial will not be reversed.

Appeal from General Sessions Circuit Court of Greenwood County; Buchanan, Judge.

Lige Wideman was convicted of malicious mischief, and appeals. Affirmed.

Sheppards & Grier and Caldwell & Park, for appellant. T. S. Sease and Ellis G. Graydon, for the State.

WOODS, J. The defendant was convicted of malicious mischief in burning a lot of cord wood belonging to one J. W. Tolbert. The witness Boney Williams testified, in substance, that in conversation with him the defendant said he did not burn the wood, but, in order to end the lawsuit, he would pay Mr. Tolbert for it; that the burning was done by Hutchinson, a white man, with whom he had had a difference, in consequence of which Hutchinson had laid it at his door, and that it would not do for him to tell all he knew about it. The defendant objected to this statement on the grounds that it was not a confession, and did not tend in any way to connect the defendant with the burning; that an offer to compromise is not admissible against the party who makes it; and that the statement was made under duress. We think all this evidence was clearly competent in support of the circumstantial evidence offered by the state as tending to show defendant's knowledge of the commission of the crime. There was no evidence whatever that the statement was made under duress. Evidence of an offer to compromise is not inadmissible in a criminal case as opposed to public policy, because the public is not concerned in the private compensation for losses resulting from crime, but rather in the public punishment of crime as an offense against society. Conversations indicating a willingness to compromise, as in this case, or a direct offer to compromise a criminal charge, may indicate either a consciousness of guilt or merely fear or anxiety to avoid the risk of a miscarriage of justice. Whether it comes from the one or the other of these mental conditions, it is generally for the jury to determine, under all the circumstances attending it. In general, not only are all declarations of a defendant tending directly to show that he committed the crime charged competent evidence against him, but all declarations indicating his knowledge of the crime, especially if such knowledge is kept secret, and the crime be so clandestine that the perpetrator may be discovered only

by circumstantial evidence. This view is not inconsistent with the rule laid down in *State v. Mitchell*, 49 S. C. 413, 27 S. E. 424. There nothing more was decided touching this point than that the mere statement of one defendant exculpating himself and laying the crime on his codefendant is incompetent against the codefendant as being hearsay, and of no value against the defendant making the statement, because it was a denial of all guilt and guilty knowledge. See *State v. Smith* (Conn.) 5 Am. Dec. 134; *Commonwealth v. Crowe* (Mass.) 42 N. E. 563.

Upon defendant's motion to strike out this entire conversation the court struck out all except the words, "He said it would not do for him to tell what he knew about it." As we have endeavored to show, the whole conversation was competent, including the words above quoted. If the defendant regarded himself prejudiced by the isolation of this sentence from the remainder of the statement attributed to him, he had a right to restore it to its connection by asking for all that was said qualifying this remark, subject to his objection to the competency of the entire conversation. This disposes of the first, second, and third exceptions.

We do not think there was reversible error in refusing to allow the defendant's witness Craig to refresh his memory by referring to an order sent to him by McCaslan on the day of the fire. The purpose of this evidence was to support the statement of the defendant that he carried from Craig, a merchant at Greenwood, merchandise ordered by McCaslan, and, after delivering the bundle, he stayed at McCaslan's until after the hour the fire occurred. The uncontradicted testimony of McCaslan's father was that a bundle was delivered to his son at his home that night by the defendant. We do not perceive how the fact that the bundle was brought from Craig's store could strengthen this evidence of alibi. The fourth and fifth exceptions are therefore overruled.

The presiding judge confined the witnesses who testified as to the horse tracks to a description of the peculiarities of the track and the corresponding peculiarities of the feet of the horse of the defendant. *State v. Green*, 40 S. C. 330, 18 S. E. 933, 42 Am. St. Rep. 872. The inquiry made by the witness Pickens Brooks of the defendant as to his puppies, was an inconsequential part of the narrative, and could not have had any effect on the issue. Evidence of ill will between the owner of the property destroyed and the defendant was competent to show the motive for the crime. The seventh, eighth, ninth, tenth, and eleventh exceptions cannot be sustained.

As we understand, the defendant insists in his sixth exception that it was an abuse of discretion for the presiding judge to refuse the motion for a new trial, made on the ground that there was no evidence to support the verdict. There was evidence of

horse tracks corresponding to those of defendant's horse leading by the place on the road where the wood was burned, of indications that the horse had been hitched there, that defendant was in the vicinity on the night of the fire, and that he confessed to knowledge of the malicious burning of the wood. Whether this testimony was credible and strong enough for conviction, was a question primarily for the jury. It is manifest this court should not say that it was incredible, or, if credible, so weak that there was an abuse of discretion in refusing to set the verdict aside.

The judgment of this court is that the judgment of the circuit court be affirmed.

(68 S. C. 148)

STATE v. FIELDS.

(Supreme Court of South Carolina. March 4, 1904.)

CONSTITUTIONAL LAW—TITLE OF ACT.

1. Acts Gen. Assem. 1883, p. 547, entitled "An act to amend the criminal law by providing for the punishment of abortion," is unconstitutional so far as it provides a punishment for persons who shall advise the commission of such crime.

Appeal from General Sessions Circuit Court of Darlington County; Aldrich, Judge.

Boyd Fields was convicted of crime, and appeals. Reversed.

Coggeshall & Edwards, for appellant. J. M. Johnstone and J. Monroe Spears, for the State.

POPE, C. J. When the above-stated action was called for trial, the defendant interposed a motion to quash the indictment upon the ground that section 2 of the act of 1883 whose title is "An act to amend the criminal law by providing for the punishment of abortion" (see Acts Gen. Assem. 1883, pp. 547, 548, vol. 18) was unconstitutional, because in violation of section 17, article 3, of the Constitution adopted in the year 1895, that "every act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." The circuit judge overruled the motion, whereupon the cause proceeded to trial, and resulted in conviction and sentence. The defendant has appealed. So that now the only question presented by the appellant is, was the refusal of the motion to quash the indictment under the circumstances above quoted error? We think there was error, for the following reasons: The act of 1883 plainly announced in its title and the specific provisions of the said act that the purpose of the General Assembly was to so amend the criminal law of this state on the subject of abortion as to provide a punishment therefor. Abortion, as a crime, was already denounced by our law. The subject of the act was the punishment for abortion. This subject might include the means of its accom-

plishment. The cases of *City of Charleston v. Oliver*, 16 S. C. 56, and *State v. Crosby*, 51 S. C. 249, 28 S. E. 529, are authority in the matter of a divergence in the body of an act from the language of the title of the act. The case of *Barksdale v. City of Laurens*, 58 S. C. 413, 36 S. E. 661, shows very plainly in what class of cases the subject of an act may be referred to in upholding the provisions of the act germane to the subject. It may be conceded that our authorities should not be searched to show that the title of an act does not cover the body of the same. Still great care should be observed in seeing to it that the title does cover the provisions of the act. Thus it seems to us that, where an act in its title states that the criminal law of the state is to be amended by providing for the punishment of a crime already existing, to wit, the crime of abortion, and the body of the act provides a punishment for persons who shall advise the commission of the crime of abortion, such legislation, so far as the second clause of this act is concerned, is unconstitutional.

The judgment of this court is that the judgment of the circuit court be reversed.

(68 S. C. 116)

FIRST NAT. BANK OF CHARLOTTE v. LEE et al.

(Supreme Court of South Carolina. Feb. 19, 1904.)

REFERENCE—JURISDICTION.

1. After adjournment of court, but before decree rendered, a judge at chambers in another county than that in which the cause was heard can refer the case to the referee, take evidence on the issues, and permit other attorneys to appear on behalf of the person whose interest may be affected, though the result of the order is, in effect, to grant a new trial.

Appeal from Common Pleas Circuit Court of Fairfield County; Dantzler, Judge.

Action by the First National Bank of Charlotte against T. B. Lee, Jr., and William H. Lyles. From an order referring the case, plaintiff appeals. Affirmed.

D. W. Robinson, for appellant. Wm. Elliott, Jr., for respondents.

GREEN, Acting Associate Justice, in place of POPE, C. J., disqualified. This is an appeal from an order of Judge Dantzler in terms granting a new trial, permitting the intervention of counsel on behalf of certain taxpayers of Fairfield county, and referring the cause to J. E. McDonald, Esq., to take the testimony upon the issue in the case, including the question raised on the motion for intervention, and the affidavit in support thereof, and "report the same, with his findings of fact and his conclusions of law upon all issues in the case." The cause is an action for the foreclosure of a mortgage of certain real estate in Fairfield county, brought by the mortgagee against the mort-

gator and a subsequent purchaser from him. The breach alleged is a covenant in the mortgage to pay or tender the taxes assessed against the mortgaged premises for the year 1900. The answer denies the breach, and with particularity sets out the history and legislation of the revenue bond scrip of the state, and a tender of the amount of the taxes due—a portion in money and a portion in revenue bond scrip. The cause was by consent referred by the clerk to Hunter A. Gibbes, Esq., as special referee, to take the testimony and report the facts, and was heard upon the report of the referee and testimony at February term, 1903, of the court of common pleas for Fairfield county by his honor Judge Dantzler, then presiding in the Sixth Circuit, who took the case under advisement, with a view of rendering and filing his decree subsequent thereto. After the final adjournment of the court of common pleas for Fairfield county, which occurred on February 28, 1903, and before any decree had been rendered, a motion, upon notice supported by affidavit, was made before Judge Dantzler at Yorkville, upon the hearing of which he granted the order from which the plaintiff appeals to this court upon the exceptions set out in the record.

The third exception was abandoned at the hearing. The other exceptions practically raise three questions: (1) Want of jurisdiction to grant the order at the time and place it was granted; (2) error in granting new trial, and want of jurisdiction in granting the same at the time and place it was granted; and (3) error in reopening the whole case and referring it to McDonald, referee. These questions will be considered in their order.

It appears that while the order appealed from was granted at chambers, without the county of Fairfield, and after the adjournment of the February term of the court of common pleas for that county, it was nevertheless granted by the judge who had the cause under advisement after a hearing in court in the proper county, and before any decree had been filed in the cause. Under such circumstances, the judge who heard the cause had jurisdiction to make any order he deemed proper in the cause. *Hellams v. Prior*, 64 S. C. 543, 43 S. E. 25; *State v. Fullmore*, 47 S. C. 84, 24 S. E. 1028.

The fact that the order, in terms, grants a new trial, cannot affect the question, for the reason that a new trial presupposes the rendition of a judgment, which, as we have seen, had not been done in this case. *Hellams v. Prior*, supra. For this reason, the cases cited by appellants are not in point.

Under the authority of *Lowndes v. Miller*, 25 S. C. 122, *Hellams v. Prior*, supra, *Bank v. Fennell*, 55 S. C. 379, 33 S. E. 485, and *Muckenfuss v. Fishburne*, 65 S. E. 573, 44 S. E. 77, after hearing, and before filing decree in an equity cause, the judge has power at chambers, in a county other than the one in which the action is pending, to grant an or-

der bringing in new parties defendant, and recommitting or referring the cause. Whether the judge would refer the whole case, or only refer or recommit for further testimony, is matter addressed to the discretion of the court, as matter of administration, for the purpose of preparing and speeding a hearing of the cause upon its merits. It determines no rights or issues. It does not involve the merits, and does not affect any substantial right, which in effect determines the action and prevents a judgment. An appeal from such an order will not be entertained unless it operates to deny to a litigant a mode of trial to which he is entitled by law, or unless the order is assailed for want of jurisdiction. *Muckenfuss v. Fishburne*, 65 S. C. 574, 44 S. E. 77. This is an equity cause. It is not excepted by appellants that the order operates to deny plaintiff the mode of trial to which it is entitled by law. As we have seen, the judge had jurisdiction to grant the order.

It follows that the exceptions must be overruled, and the order appealed from affirmed. It is the judgment of the court that the exceptions are overruled, and the order appealed from is affirmed.

(102 Va. 498)

RICHMOND PASSENGER & POWER CO. v. GORDON.

(Supreme Court of Appeals of Virginia. March 10, 1904.)

STREET RAILROADS—CROSSING ACCIDENT—NEGLIGENCE—INSTRUCTIONS—ERROR.

1. In an action against a street railroad for personal injuries by being struck by an electric car while driving across defendant's tracks, the plaintiff is entitled to recover where the motorman could have avoided the accident by the use of ordinary care after he saw, or by the use of ordinary care might have seen, that the plaintiff was on, or very near, the track, and driving towards it, and was in danger of being struck by the car, though the plaintiff was guilty of want of ordinary care in attempting to cross the tracks.

2. In an action against a street railroad for personal injuries by being struck by an electric car while driving across defendant's tracks, where there is evidence that the case comes within the general rule as to contributory negligence, and also that the case comes within the exception to the rule, it is error to refuse a charge requested by defendant that there can be no recovery where the accident was caused by the concurrent negligence of the motorman and the plaintiff, due to each failing to keep a proper lookout.

3. A charge that it is not negligence, as a matter of law, to omit to look and listen for cars when one is about to cross the tracks of a street railway, but the question is "whether a man of ordinary prudence exercising ordinary care and prudence would have thought it unnecessary to do so," contains a proper definition of ordinary care.

4. Where the evidence in an action against a street railroad for personal injuries by being struck by a car while driving across defendant's track raised the questions of negligence and contributory negligence, a charge correctly stating the law as to the burden of proof on those questions cannot be regarded as abstract, or as tending to mislead the jury.

Error to Law and Equity Court of City of Richmond.

Action by John W. Gordon against the Richmond Passenger & Power Company. From a judgment for plaintiff, defendant appeals. Reversed.

Henry Taylor, Jr., for appellant. Meredith & Cocke, for appellee.

BUCHANAN, J. This action was instituted by John W. Gordon to recover damages for injuries done him at a street crossing in the city of Richmond by the alleged negligent running of an electric street railway car operated by the Richmond Passenger & Power Company.

Upon the trial of the cause the plaintiff asked for eight instructions, and the defendant for three. All the instructions asked for were given as asked, or with such modifications as the court saw proper to make. No objections are made here to instructions numbered 2, 3, 4, 5, and 8 given for the plaintiff, nor to instruction "a" given for the defendant. The assignments of error chiefly relied on are the giving of the plaintiff's instruction No. 7, and the refusal of the court to give the defendant's instructions "b" and "c" as asked, and in giving them as modified by the court.

The following is a copy of instruction No. 7:

"If the jury find that the plaintiff was guilty of want of reasonable and ordinary care in attempting to cross the tracks of the defendant under the circumstances referred to, then he is not entitled to recover, unless they believe from the evidence that the motorman could have avoided the accident by the use of ordinary care after he saw, or by the use of ordinary care might have seen, that the plaintiff was on the track, or very near thereto, and driving towards the same, and was in danger of being struck by the car; and, if they shall so believe, then they must find for the plaintiff."

The objection made to that instruction is, first, that there was no evidence to show that the motorman could have avoided the accident by the exercise of ordinary care after he saw the plaintiff's peril; and, second, that the proposition that they must find for the plaintiff if the jury believed that the motorman might, by the exercise of ordinary care, have seen the plaintiff's peril, and avoided the accident, is not law.

There is no evidence that after the motorman saw the plaintiff's danger he could have avoided the accident; but there is evidence tending to prove that, if the motorman had been exercising ordinary care as his car approached the crossing, he could have seen the plaintiff's peril in time to have prevented the injury. There is evidence tending to show that the plaintiff, as he drove along Floyd avenue towards the crossing where that avenue intersects Harrison or Beech street, stopped or checked the one-horse vehi-

cle in which he, his wife, and son were riding about 40 feet from the crossing at the time a north-bound street car crossed Floyd avenue, and that he then proceeded towards the crossing; that the north-bound car passed the car going south, which did the injury, from 60 to 75 feet north of Floyd avenue; that from that point there was nothing to prevent the motorman on the south-bound car from seeing the plaintiff's vehicle as it approached the street car track; that from the point where the cars passed each other to the point where the plaintiff's vehicle was struck was 100 feet or more; that a car running at the rate of 6 or 7 miles an hour, as the motorman said his car was running, could, under favorable circumstances, be stopped in about a car length, which was shown to be about 35 feet, and that the car was actually stopped in about 45 feet after the motorman saw the plaintiff's vehicle. This evidence was sufficient to justify the court in giving the instruction in question, under a long line of decisions of this court.

In the case of *R. & D. R. R. Co. v. Anderson*, 31 Grat. 812, 31 Am. Rep. 750, decided a quarter of a century ago, it was held, Judge Burks delivering the opinion of the court, that, though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse the defendant. To sustain the conclusion reached in that case the learned judge approved and followed the decision of the House of Lords in the case of *Radley v. London, etc., Ry. Co.*, 1 App. Cases (Law Rep. 1875-76), 754, 759, which cites and affirms *Davies v. Mann*, 10 M. & W. 545, and *Tuff v. Warman*, 5 C. B. N. S. 578.

In the case of *Marks, etc., v. Petersburg R. R. Co.*, 88 Va. 1, 10, 13 S. E. 299, which was an action for damages for causing the death of a traveler at a street crossing by the defendant railroad company's cars, it was said by Judge Lewis, in discussing the subject of contributory negligence: "If a person attempts to cross a railroad at a highway crossing without using his senses of sight and hearing, even though the company be negligent, the law, as well as common prudence, condemns his act as careless. But this is a mere presumption, which may be repelled by evidence showing that the case is within one or more of the exceptions to the general rule before mentioned. In the absence of such evidence, however, the contributory negligence of such person, when injured, will preclude a recovery, unless the company might, by the exercise of ordinary care on its part, have avoided the consequences of the plaintiff's negligence." "This qualification of the doctrine of contributory negligence," he continues, "is laid down in the leading case of *Tuff v. Warman*, 2 C. B.

(N. S.) 740, and so often recognized by this court." After citing a number of the decisions of this court, he adds: "Applying this test to the present case, we are of opinion that the plaintiff is not entitled to recover, for it is manifest that ordinary care on the part of the defendant could not have discovered the negligence of the deceased in time to avoid the accident."

In the case of the Seaboard, etc., R. R. Co. v. Joyner, 92 Va. 354, 23 S. E. 773, this court, in considering the question of the duty of a railroad company to avoid injuring a trespasser, said: "The law upon this subject is, we think, properly stated in the ninety-ninth section of Shearman & Redfield on the law of Negligence (4th Ed.), where it is said that: 'The plaintiff should recover, notwithstanding his own negligence exposed him to the risk of injury, if the injury of which he complains was proximately caused by the omission of the defendant, after having such notice of the plaintiff's danger as would put a prudent man on his guard, to use ordinary care for the purpose of avoiding such injury. It is not necessary that the defendant should actually know of the danger to which the plaintiff is exposed. It is enough if he have sufficient notice or belief to put a prudent man on the alert, and he does not take such precautions as a prudent man would take under similar notice or belief.'" To the same effect is Tucker's Case, in 92 Va. 549, 24 S. E. 229, and Dunnaway's, in 93 Va. 29, 36, 37, 24 S. E. 698.

In the case of B. & O. R. R. Co. v. Few's Ex'r, 94 Va. 82, 89, 26 S. E. 406, it was held that a railroad company is liable for a personal injury inflicted on a traveler at a public crossing if its agents or servants in charge of a moving train saw him in a position of danger, or by the use of diligence might have seen him, and failed to stop the train, and prevent it from injuring him.

In Blankenship's Case, 94 Va. 449, 457, 27 S. E. 20, 22, it was said in discussing this question and explaining what was meant by certain language used in Dunnaway's Case, *supra*, that: "By the use of the language 'when the trespasser is discovered, or by ordinary care and caution might have been discovered,' it was not intended to say that under ordinary conditions it was the duty of the railroad company to keep a lookout for trespassers (for the question was not involved in that case), but to declare, where it had such notice or belief that some one might be in danger as ought to put a prudent man on the alert, it became the company's duty to be on the lookout, and it might be held responsible for injuries done a trespasser under such circumstances, not only after his danger was discovered, but where, by ordinary care and caution, it might have been discovered, unless it did all that could be done to avoid injuring him consistently with its higher duties to others."

In Washington, etc., R. Co. v. Lacy, 94

Va. 460, 476, 26 S. E. 834, 839, which was also a street crossing case, it was said, after declaring what the duty of a traveler was in approaching a street crossing over which a steam railroad was operated, that: "If he fails to use these necessary precautions, and injury ensues, he cannot recover, unless the defendant company, by the exercise of ordinary care and diligence, might have prevented the injury after it discovered, or ought to have discovered, his peril."

In C. & O. Ry. Co. v. Rodgers, 100 Va. 324, 325, 41 S. E. 732, where the party injured was walking on the defendant company's track at a point where persons were accustomed to walk, it was held that in such a case a defendant was liable for the injury inflicted upon the plaintiff, notwithstanding the latter's negligence, if, by the exercise of reasonable care, the plaintiff's danger could have been discovered in time to save him.

Richmond, P. & P. Co. v. Steger, 101 Va. —, 43 S. E. 612, and Richmond Traction Co. v. Martin's Adm'r, 102 Va. —, 45 S. E. 886, are to the same effect. In the last-named case, decided at the December term, 1903, it was said by Judge Whittle, speaking for the court, that: "The well-known rule in this class of cases is that a plaintiff seeking to recover damages for an injury caused by the negligence of the defendant must himself be free from negligence, and, if it appears that his negligence has contributed as an efficient cause to the injury of which he complains, the court will not undertake to balance the negligence of the respective parties for the purpose of determining which was most at fault. The law recognizes no gradations of fault in such case, and, where both parties have been guilty of negligence, as a general rule, there can be no recovery. There is really no distinction between negligence in the plaintiff and negligence in the defendant, except that the negligence of the former is called 'contributory negligence.'

"The general rule adverted to is subject, however, to the qualification that, where the negligence of the defendant is the proximate cause of the injury, and that of the plaintiff only the remote cause, the plaintiff may recover, notwithstanding his negligence; the doctrine in that respect being that the law regards the immediate or proximate cause which directly produces the injury, and not the remote cause which may have antecedently contributed to it. From that principle arises the well-established exception to the general rule that if, after the defendant knew, or, in the exercise of ordinary care, ought to have known, of the negligence of the plaintiff, it could have avoided the accident, but failed to do so, the plaintiff can recover. In such case the subsequent negligence of the defendant in failing to exercise ordinary care to avoid injuring the plaintiff becomes the immediate or proximate and efficient cause of the accident, which inter-

venes between the accident and the more remote negligence of the plaintiff."

These cases establish the doctrine that, where a railroad company or a street railway company knows or has reason to believe that persons are likely to be on their tracks at a particular point, such company owes two duties to such persons: First, to keep a lookout in approaching such point; and, second, to avoid injury when it sees such persons in peril, if it can be done by the exercise of ordinary care. And if it fails to keep such lookout, and thereby fails to see such persons' peril, and inflicts injury, it cannot escape liability on that ground, but its liability will depend not upon what it actually knew, but upon what it would have known if it had performed its duty in keeping a proper lookout. And this seems to be the rule generally.

Shearman & Redfield, in their work on Negligence (section 484, 5th Ed.), say that: "The rule that a plaintiff is as a matter of law negligent if he fails to see what he was bound to look for and ought to have seen, is rigidly enforced; and the same rule must, in common justice, be applied to the defendant. And in fact it actually is in almost every court where the question is squarely presented." And in section 485c they say that: "The operator of a street car, especially if it is impelled by cable or electric power, is bound to keep a constant watch for persons and vehicles on the street; and although he is not bound to anticipate that foot passengers will attempt to cross otherwise than at regular crossings, and therefore need not maintain quite the same degree of vigilance elsewhere, he is always responsible for failing to see even persons crossing at other places, if he would have seen them, had he been in the exercise of ordinary care. The rule exempting railroads from responsibility where trainmen do not in fact see a person on the track * * * certainly applies only against trespassers, and therefore does not apply to city streets or street cars."

The court did not err in giving the instruction in question.

Instruction "b," as offered, is as follows:

"The court further instructs the jury that if they believe from the evidence that John W. Gordon slowed down his horse when about forty feet from the track to allow the north-bound car to pass, and shall further believe from the evidence that after the north-bound car had passed he quickened the pace of his horse, and shall further believe that in the exercise of reasonable care, by looking or listening, he could have seen or heard the car approaching before getting into a position of danger, and failed to so ascertain the approach of the car, and that he thereby contributed to the accident, they must find for the defendant."

Instruction "b," as offered, stated the general rule on the subject of contributory negligence, but failed to state the exception to

it. In that respect it was amended by the court. As offered, it was in conflict with instruction No. 7, which, as we have seen, was properly given. There was no error either in refusing to give instruction "b" as offered or in giving it as modified by the court.

Instruction "c," as asked for by the defendant, was in the following words:

"The court further instructs the jury that if they believe from the evidence that this accident was caused by the concurrent negligence of the motorman and of John W. Gordon, due to each failing to keep a proper lookout, they must find for the defendant."

If the proximate cause of the injury was the negligence of both plaintiff and defendant concurring and co-operating together, then the general rule as to contributory negligence, and not the exception to the rule, applied, and the plaintiff was not entitled to recover. Beach on Contributory Negligence, § 56.

The defendant therefore had the right to have that theory or view of the case submitted to the jury. Where there is evidence tending to prove that the case comes within the general rule as to contributory negligence, and also evidence tending to prove that the case comes within the exception to that rule, each party has the right to have his theory or view of the case presented to the jury by proper instructions. If any authority were needed for this statement, it will be found in the case of Richmond Traction Co. v. Martin's Adm'x, supra.

The court therefore erred in refusing to give instruction "c" as offered, which presented the defendant's theory of the case, and which, if sustained by the evidence, would have entitled it to a verdict.

In the modified form in which the court gave it it was clearly erroneous. If the proximate and efficient cause of the accident was the concurrent negligence of both parties, the plaintiff could not bring himself within the exception to the general rule, and he was not entitled to recover.

Instruction No. 1, as given by the court, is as follows:

"The jury are instructed that travelers may walk, ride, or drive either across or along a street railway track just as freely as upon any other part of the street, so long as they do not obstruct the cars, or carelessly expose themselves to danger. And while, generally speaking, one who is about to cross a street railway should both look and listen for cars, this is not an inflexible rule, nor is it to be enforced with any such strictness as in cases of an ordinary steam railway. It is not negligence as a matter of law to omit to do so. The question is whether men of ordinary prudence, exercising ordinary care and prudence, would have thought it unnecessary to do so."

The last sentence of this instruction is criticised as not correctly stating the rule by

which the jury might determine whether or not the plaintiff exercised ordinary care in approaching the street car crossing. The language used varies somewhat from the usual statement of the rule as to what constitutes ordinary care. It is difficult, if not impossible, to frame a definition of "ordinary care" which will be perfectly clear and accurate. But the definition given in the instruction does not differ in substance from that usually given in such cases, and the jury could not have been misled by it.

Objection is also made to instruction No. 6, which is as follows:

"The jury are instructed that the burden is on the plaintiff to prove the negligence of the defendant company as charged in the declaration; and that, if the defendant relies on the contributory negligence of the plaintiff as a defense, the burden is on the defendant to prove such contributory negligence, unless it is disclosed by the plaintiff's evidence, or may be fairly inferred from all the circumstances of the case; and in the absence of such proof and inferences from the circumstances the plaintiff is presumed to have been without fault."

It is conceded that this instruction (No. 6) correctly states the law as an abstract proposition, but it is insisted that the court erred in giving it because it had no application to the facts of this case.

The case before the jury was one involving the questions of negligence and contributory negligence. An instruction which correctly stated to the jury upon whom the burden of proof was in such a case cannot be regarded as erroneous, or as tending to mislead the jury.

It is unnecessary to consider the remaining assignment of error that the verdict is against the evidence, as the judgment will have to be reversed, the verdict set aside, and a new trial awarded for the error committed by the court in refusing to give instruction "c," as offered, and in giving it as amended by the court.

(102 Va. 520)

SOUTHERN RY. CO. v. GLENN'S ADM'R.
GLENN'S ADM'R v. SOUTHERN RY. CO.
(Supreme Court of Appeals of Virginia. March 10, 1904.)

TRUSTEE—COMPENSATION—ILLEGAL ALLOWANCE—INTEREST—APPEAL—PARTIES—STATUTE—MANDATE—MISNOMER.

1. Where a mandate of the Supreme Court of Appeals provides that the directions to the lower court contained therein shall be so carried out as not to conflict with the written opinion of the court, and, through inadvertence, names the person affected thereby as W. W. Glenn, as appears from a reading of the written opinion, in which the correct name of the person affected is shown to be John Glenn, the action of the lower court in making the mandate operative against John Glenn is not an amendment, but a construction, of the mandate.

2. Where a recital in a mandate of the Supreme Court of Appeals of the name of a per-

son affected thereby was unnecessary, an inadvertent misnomer therein of such person will not vitiate the mandate as to the person intended to be named—the correct name appearing in the written opinion in the cause—but the name will be treated as surplusage.

3. Under Code 1887, § 8454, declaring that any person who is a party to any case in chancery wherein there is a decree or order adjudicating the principles of the cause, who thinks himself aggrieved thereby, may present a petition for an appeal from such decree or order, an appellant can only be one who is a party to the suit in the court below, and presents a petition for an appeal from such decree.

4. Where parties stand on distinct and unconnected grounds, their rights being separate and not equally affected by the same decree, the appeal of one on behalf of others will not bring up for adjudication the rights or claims of any but the one appellant.

5. Where a trustee, under a reasonable belief that his right to extra compensation which he retained out of the receipts would never be an after-subject of controversy, continued in the faithful discharge of his duties for many years, and until his death, when appeals from the decrees of the court allowing the extra compensation resulted in requiring the amount to be returned to the trust on the admission of another party into the case as assignee of claims represented by counsel, who had, along with the court and the commissioner, assured the trustee that the extra compensation was justly his, interest will not be required to be paid thereon from the estate of the deceased trustee.

Buchanan and Cardwell, JJ., dissenting.

Appeal from Circuit Court, Henrico County.

Proceedings between the Southern Railway Company and John Glenn's administrator. From a decree permitting other creditors than one successfully appealing to participate in the benefit of the decision, the administrator appeals. Reversed. From a decree denying interest on extra compensation illegally retained by the administrator's decedent, the railway company appeals. Affirmed.

Munford, Hunton, Williams & Anderson, for railway company. McGuire & Riely, Chas. U. Williams, Chas. Biddle, and B. E. L. Marshall, for administrator.

HARRISON, J. These two appeals are from decrees in the same cause, and have been heard together here. They are the sequel to the cause of Southern Railway Company v. Glenn's Administrator, etc., decided by this court in June, 1900, 96 Va. 309, 36 S. E. 395.

For present purposes the facts are sufficiently stated in the opinion of this court on the former appeal, and therefore need not be repeated. It was there decided that certain commissions allowed John Glenn, trustee, were in excess of his legal right, and for that error the decree complained of was reversed, and the cause remanded to the circuit court, with directions to disallow such additional compensation in settling the accounts of the trustee, as to the appellants in that cause.

In the mandate of this court on the former appeal, the name of the trustee was inadvertently and erroneously recited as W. W.

Glenn, instead of John Glenn. It is contended that this error renders the mandate void as against the estate of John Glenn, trustee; that for the circuit court to make the mandate operative against the estate of the trustee, John Glenn, would be for that court to amend the mandate of this court, which it has no power to do.

It is not competent for the circuit court to amend or correct the mandate of this court. We are ourselves powerless to amend or correct our own mandate after the term at which it was rendered has passed, and the time for a rehearing has expired. The question involved, however, is not the right of the court to amend, but its power to construe the mandate and declare its meaning. From a casual reading of the mandate, it is manifest that the recital of the name of the trustee was wholly unnecessary. The presence of the name of W. W. Glenn in the mandate takes nothing from its force. The order would have been complete and effective without it. The name W. W. Glenn may therefore be regarded as surplusage which does not vitiate that which is otherwise good. Broom's Legal Maxims (7th Ed.) p. 626; *Lavery v. Moore*, 33 N. Y. 663; *Campbell v. Ayres*, 6 Iowa, 339. The mandate provides that the directions to the lower court contained therein shall be so carried out as not to conflict with the written opinion of this court. This practically makes the opinion a part of the mandate, and, when the opinion is looked to, the meaning of the mandate is free from all doubt and difficulty. It there clearly appears that John Glenn was the trustee who had claimed and received the extra compensation, and the only trustee before the court when the additional compensation was allowed. The mandate and opinion, read together, further clearly show that it was the extra commissions allowed John Glenn, trustee, that were disallowed as to the claim of the appellants. Under these circumstances, it was not error in the circuit court to treat the misnomer as a mere clerical error, not affecting the substance of the mandate, which was clear and specific in its directions with respect to the disallowance of the extra commissions as to the appellants.

The administrator of John Glenn, late trustee, further assigns as error the action of the circuit court in holding that the term "appellants," as used in the opinion and mandate of this court on the former appeal, embraced not only the Southern Railway Company, but all those creditors in whose behalf it claimed to sue. It is contended by counsel for the creditors that the expression "appellants in this cause" was intended to embrace, and did embrace, all of the creditors of the National Express & Transportation Company enumerated in the decree dated April 8, 1895, except the personal representative of W. W. Glenn, deceased, the Philadelphia, Wilmington & Baltimore Rail-

road Company, and the First National Bank of Charleston; it being insisted that all of said creditors were appellants on the former appeal, and entitled to participate in the benefits of the decision then made.

If this court had intended to order a general accounting for the benefit of all the creditors mentioned, its decree should have directed that the estate of the late trustee be required to account for all the extra compensation he had received, and return the same to the trust fund for the benefit of the creditors generally. This was not done. On the contrary, the opinion and mandate on the former appeal expressly limit the benefits of the decree then made to the appellants in that cause. Therefore the question presented for our present consideration is, who were the appellants before this court on the former appeal?

The petition presented on the former appeal, which alone determines who were appellants, is in the name of the Southern Railway Company, suing for itself and in behalf of all other creditors of the defendant company. At the conclusion of the petition, immediately following the usual prayer for an appeal, is this statement: "The petitioners as above mentioned (except John M. Glenn, personal representative of W. W. Glenn, deceased, the Philadelphia, Wilmington & Baltimore Railroad Company, and the First National Bank of Charleston), being all the creditors enumerated in the last decree of dividends, to wit, that of April, 1885, by the Southern Railway Company, suing for itself and in their behalf."

The doctrine of parties by representation, and other rules of equity practice with respect to parties, are relied on and have been much discussed by counsel. These rules have, however, no application in determining who are appellants in a cause pending before this court. The benefit of appeal is a purely statutory right. When parties come to this court to have reviewed the action of a lower court, their only warrant for doing so is the statute, and its terms must be strictly complied with. Section 3454 of the Code of 1887 declares that any person who is a party to any case in chancery wherein there is a decree or order adjudicating the principles of the cause, who thinks himself aggrieved thereby, may present a petition for an appeal from such decree or order. The person referred to in this statute has been decided to be such person as was a party to the suit in the court below, and who was aggrieved by the decree therein rendered; and, to make him a proper party to an appeal, these two circumstances must concur. *Barton's Chancery Practice*, p. 167, § 42; *Supervisors of Culpeper v. Gorrell*, etc., 20 Grat. 484-520.

A person desiring an appeal must present his petition therefor, accompanied by a copy of the record, to this court in session, or to one of the judges thereof. Whether or not

an appeal be taken, rests entirely with the party affected by the decree of the lower court. No person can be forced by another party to the same suit to appeal against his will; hence the petition must show, by name, the parties who claim to be aggrieved by the decree complained of, and who desire to have such decree reviewed. Where there are a number of parties affected by the same decree, and they all desire to appeal, it is not necessary for each to present a separate petition. They can all unite by their respective names in one petition, and show thereby wherein each is aggrieved. A party can only show that he is aggrieved by joining in the petition. An appellant, therefore, is one who has presented his petition to this court for an appeal, showing that he is aggrieved, or has united with others in an appeal setting forth his grievance, by pointing out the error of the lower court. The rights of persons who have not appealed, and, indeed, who are not technically parties to the proceedings in the court below, may sometimes be finally determined by the judgment of this court; but that arises where the parties appealing and those not appealing stand upon the same ground, and their rights are involved in the same question, the decision of which must of necessity affect all alike. Where, however, the parties, as in the case at bar, stand upon distinct and unconnected grounds—where their rights are separate, and not equally affected by the same decree or judgment—then the appeal of one will not bring up for adjudication the rights or claims of the others. *Barton's Ch. Pr.* p. 167, § 42; *Walker's Ex'r v. Paige*, 21 *Grat.* 636.

Parties not named cannot become appellants by virtue of a petition in the name of one person on behalf of himself and a number of others whose names are not mentioned. The only appellant in such a case is the person whose name appears in the petition. Those not named, on whose behalf the petition professes to be presented, are not recognized as appellants. This plainly appears from the writ issued by the experienced clerk of this court, wherein the appellee is summoned to answer the Southern Railway Company, "as to whom manifest error is said to have intervened to its damage, as shown by its petition. And whereas the Southern Railway Company upon its petition has obtained an appeal upon condition of its giving bond," etc. It is essential, as already seen, that the party appealing should be aggrieved, and the petition must set forth that grievance. This court must know at the time it makes its decree the names of the parties aggrieved, and the appellee is entitled to know against whom he is to defend, and to whom he is to look for the payment of costs in the event the appeal is decided against the appellant.

On the former appeal the name of the Southern Railway Company alone appears as

petitioner, and it alone claims to be aggrieved by the decree of the lower court. If the decree complained of on the former appeal had been affirmed, there could have been no judgment for costs against any other party than the Southern Railway Company, and yet it is insisted that there were a large number of other persons who were appellants. This cannot be. If they would not have been responsible for the burdens, they cannot claim the benefits. There must be no uncertainty as to who are appellants, and hence those persons only who appear by name in the petition to this court can be recognized as such. Otherwise, upon a successful appeal, all would then wish to be treated as appellants, whereas, in case of failure, all would seek to avoid the consequences of defeat.

We are of opinion that the Southern Railway Company was the only appellant before this court on the former appeal, and therefore it was the only creditor entitled to the benefits flowing from that decision. This court had no jurisdiction, upon the petition and record formerly before it, to reverse the decree of the lower court in favor of creditors who did not appear as appellants, and its decree was not intended for their benefit.

The Southern Railway Company assigns as error the action of the circuit court in holding that the estate of John Glenn, the late trustee, was not chargeable with interest on the several amounts received by him as extra or additional commissions from the time such sums came into his hands until repaid into court in this cause.

The general rule undoubtedly is that he who has the use of another's money must pay interest upon it from the time he receives it until he repays it, unless there be an agreement, express or implied, to the contrary. *Craufurd's Adm'r v. Smith's Ex'r*, 93 *Va.* 623, 23 *S. E.* 235, 25 *S. E.* 657. This rule is not, however, in equity, enforced without discrimination in every case. On the former appeal one of the claims of creditors was that the trustee should be charged interest on balances retained in his hands, upon the semiannual settlement of his accounts, because the decree under which he was acting required him to pay any balances in his hands into the Planters' National Bank, to the credit of the court in the cause. This court held that the settlements of the trustee, reported to the court from time to time, showed that these balances had not been paid over as required; that no objection appeared to have been made to the action of the trustee in retaining in his hands such balances, but that during the many years the trustee was executing the trust, and until his death, the parties, as well as the commissioners who settled the accounts, and the court which approved and confirmed them, seem to have concurred in the trustee's construction of the decree; and that he was not chargeable with interest on said balances. The extra or additional commissions were re-

tained by the trustee under the express authority of decrees which declared that they were lawfully his. It is true that in the beginning the allowance of the extra commissions was objected to by one of the counsel for the creditors. This same counsel, however, in his deposition in the cause, says that he did not appeal from the decree allowing the commissions, because he wished the trustee to be fully compensated. For a number of years after the decree allowing the commissions was entered, the trustee made regular semi-annual settlements of his accounts, retaining the extra commissions without further question from any quarter. No one can read the record without being impressed with the general acquiescence by all parties in that allowance, nor fail to see that the trustee was thereby lulled into the belief that the extra commission was his, and that no further question would be raised on that subject. We concur in the views so well expressed by the learned judge of the circuit court in disposing of this question. He says: "The Court of Appeals (98 Va. 320, 36 S. E. 395) has, *una voce*, approved the action of this court in rejecting a claim against the trustee for interest which had far higher merits than the claim for interest on these retained commissions. That claim was for interest on amounts reported by the trustee as in his hands, and not deposited, as he was authorized and required to do, to the credit of the court, in bank. This is a claim for interest upon moneys retained by the trustee under the authority of the court. That authority the Court of Appeals, after the lapse of many years, has said was not properly exercised, but nevertheless, until superseded or reversed, the trustee was authorized to regard his retention of these commissions as lawful and right. Not only this, but, while he was admonished that the right of the court to allow this extra compensation was made matter of question by a slumbering exception upon the record, he was assured all the time that, in the opinion of the court and counsel and commissioner, these extra commissions were, *ex sequo et bono*, his well-earned due. One of the counsel for all the creditors, Colonel Marshall, was pronouncedly of opinion that this extra allowance was not only equitably, but legally, his property. The only other counsel for creditors, the late Mr. Howard, who filed the exception to its allowance, in his deposition filed in this cause, states that he did not appeal from the court's action in allowing such compensation, because he wished the trustee to be fully compensated. Under a reasonable belief that his right to this extra compensation would never be an after-subject of controversy, the trustee continued in the faithful and efficient discharge of the duties of his trust until his death. And not until after his death, and the admission into the case of another party, the Southern Railway Company, as assignee of claims which had been heretofore, all

through the progress of this litigation, represented by Col. Marshall and Mr. Howard, was there any suggestion of purpose to appeal from the decrees of this court."

The administration of this trust has involved a magnitude of labor and responsibility that rarely falls to the lot of a fiduciary. The collection and disbursement of its widely scattered assets has made necessary hundreds of suits all over the country. This cause, in which the trust has been administered under the guidance of a court of equity, has extended over many years. The counsel who, from the beginning until a comparatively recent date, represented all of the creditors, have passed away. The learned and venerable judge who has throughout all these years presided over this litigation has, since the decrees now under review, sought retirement from a lifetime of judicial labor. This court has, by its former decision, awarded the Southern Railway Company its legal right, in requiring the estate of the late trustee to account for its proportionate share of the extra commissions retained. To allow the appellant now, under the facts and circumstances to which we have alluded, interest upon these several sums, would be a measure of relief not demanded by the law, and which would, in our opinion, result in great injustice to the trustee's estate.

In the view we have thus far taken of the case, it becomes unnecessary to consider other questions raised and elaborately discussed before this court.

For these reasons, the decrees complained of must be reversed in so far as they hold that any other creditor of the defendant express company than the Southern Railway Company is entitled to participate in the results of the former decision of this court, and in all other respects such decrees will be affirmed, with costs to the administrator of John Glenn, deceased, as the party substantially prevailing.

BUCHANAN, J. (dissenting). I concur in the opinion of the court, except in so far as it holds that the Southern Railway Company is not entitled to interest on its pro rata share of the moneys improperly retained by Glenn, trustee, on account of commissions for his services. Upon that question I dissent.

It was determined by this court upon the former appeal (*Southern Ry. Co. v. Glenn's Adm'r*, 98 Va. 309, 36 S. E. 395) that the action of the lower court in allowing commissions to the trustee for his services beyond those provided by the deed of trust was unauthorized and illegal, except as to the creditors who assented to or acquiesced in such allowance. The railway company, or its predecessors in interest, having objected to such allowances when made, and having succeeded in having the decrees making them reversed and annulled, and its right established

to its pro rata share thereof, I know of no rule of law by which that company can be denied interest on the principal sum thus declared to be due it. Upon the former appeal it was held that it had not lost its rights by acquiescence, or by not appealing earlier than it did. If the objections made to such allowance in the year 1886 or 1887, and continued from time to time, in one form or another, until the decrees making them were reversed and annulled, were sufficient to preserve its right to the principal sum to which it was entitled, I am unable to see why they were not sufficient to preserve its right to interest thereon.

The courts of this state, with some aid from the Legislature, have established the doctrine that it is natural justice that he who has the use of another's money should pay interest on it. 4 Minor's Inst. 819, and cases cited; Templeton v. Fauntleroy, 3 Rand. 436, 446, 447; Ross' Ex'r v. McLaughlin's Adm'r, 7 Grat. 86.

The fact that the trustee held the money under orders of court, made over the railway company's objection and in violation of its rights, which were afterwards reversed so far as they affected the railway company, cannot, in my judgment, affect the question of the right of the railway company to interest, any more than it can affect its right to the principal. Having succeeded, after long protracted and hotly contested litigation, in establishing its right to its pro rata share of the overpaid commissions, it seems to me that it is entitled to have interest on that sum during the many years the trustee has deprived it of the use thereof by improperly withholding the money and resisting its payment.

CARDWELL, J., concurs.

(102 Va. 581)

COLIN v. WELLFORD.

(Supreme Court of Appeals of Virginia. March 17, 1904.)

BUILDING ASSOCIATIONS—WITHDRAWING MEMBER—INSOLVENCY—COMPROMISE OF CLAIM.

1. A withdrawing member of a building association which was insolvent at the time notice of withdrawal was given, though no legal steps had been taken to wind up its affairs, and whose insolvency, though in fact existing, was not then notorious, does not by the act of withdrawal become a creditor entitled to satisfaction before other members, nor does an agreement entered into between himself and the association, compromising his claim, change his status.

Appeal from Chancery Court of Richmond.

Petition of one Colin against one Wellford, receiver of the United Banking & Trust Company, for allowance of claim. From a decree denying the prayer of petitioner, he appeals. Affirmed.

Legh R. Page, for appellant. B. Rand. Wellford, for appellee.

KEITH, P. The record in this case discloses the following state of facts: The appellant was the owner of certain certificates of installment and prepaid stock in the United Banking & Trust Company, and, in the exercise of his right under the charter and by-laws of the company, on the 25th of January, 1901, he gave written notice of the withdrawal of his certificates of stock, which notice was duly served on the company, and accepted by it as sufficient and regular in every respect. On the 28th of March, 1891, 60 days (the period required under the by-laws) having expired, he made demand upon the company for the sum due him, and was promised payment at an early day. The promise was not kept. He was put off from time to time, and on or about the 22d of May, 1901, was informed that the board of directors rejected his demand for the payment of his claim in full, and offered \$4,006.75 in compromise and settlement, to be paid in 13 monthly installments, bearing interest at the rate of 3 per cent. per annum. This proposition was accepted by appellant, and, upon the receipt of the obligations of the company, as provided by the settlement, he surrendered his certificates of stock, which were marked "cancelled and withdrawn," and appellant's name was stricken from the books of the company as a shareholder. The first of the 13 monthly installments was paid at maturity, but before the second became due a bill was filed to wind up the affairs of the company, and on the same day receivers were appointed, who refused further payment to appellant.

In July, 1902, appellant filed his petition, asking to be placed upon the footing of a creditor of the company for the amount of the 12 matured and unpaid obligations above referred to, and the matter was referred to a commissioner, who reported adversely to appellant's claim. The exceptions to that report were overruled by the court, a decree was entered denying the prayer of petitioner, and the case is before us for review.

The report of the commissioner proceeds upon the theory that the company was insolvent at the date of the notice of withdrawal, and the opinion of the learned chancellor is to the same effect. There is a strong presumption in favor of the correctness of this finding of fact on the part of the commissioner, thus approved by the court, and there is nothing in the record to lead us to a contrary conclusion. We shall therefore proceed with the consideration of the case, taking the insolvency of the company, at least as early as January, 1901, as a fact established. The term "insolvency," as here used, has no reference to outside creditors, for there are none, but to the inability of the company to satisfy the demands of its own members.

We have had no adjudication in this state upon the precise question here involved.

In *Andrews v. Building Association*, 96

Va. 445, 36 S. E. 531, 49 L. R. A. 659, we held that a withdrawing member of a building association does not lose all of his rights and interests as such in the association. Though he is not, strictly speaking, a creditor of the association, he can maintain no suit to recover the withdrawal value of his stock until a fund for its payment has been provided, and until then the act of limitation does not begin to run against his demand. On the other hand, it is the duty of the association to provide such a fund, in accordance with its charter and by-laws, and in default thereof the member may ask the appointment of a receiver, and, it may be, a winding up of the affairs of the association.

In *Eastern Building & Loan Ass'n v. Snyder*, 98 Va. 710, 37 S. E. 298, it was held that a solvent building association, in the absence of bad faith on its part, is not in default, and cannot be sued by a withdrawing member, until there are funds in the treasury of the association out of which he is entitled to be paid.

We are in this case called upon to define the rights of a withdrawing member of a building association which was insolvent at the time notice of withdrawal was given, though no legal steps had been taken to wind up its affairs, and whose insolvency, though in fact existing, was not then notorious.

As shown in *Andrews v. Building Association*, supra, the tendency of the English courts, while recognizing that withdrawing members are not creditors of the association in the ordinary sense of the word, has been to allow them a preference over those who have given no withdrawal notice. *Sibun v. Pearce*, L. R. 44 Ch. Div. 354.

It was held, however, in *Re Sunderland*, Queen's Bench Div. 24 L. R. 894, that the rule of the company provided only for withdrawal from the societies while they were or were believed to be solvent, and that, therefore, notices of withdrawal which were given or which matured at a time when the societies were known to be insolvent, though before the actual date of the winding-up order in each case, did not entitle the shareholders who had given them to be paid the amount of their subscriptions in priority to other shareholders in the winding-up.

The strong preponderance of the authorities in this country, where insolvency exists, seems to be in accord with the decision of the Supreme Court of Pennsylvania in *Christian's Appeal*, 102 Pa. 184. The court said: "While, in a qualified sense, withdrawing stockholders may be considered creditors of the association, their rights, as against those with whom they have been associated, are very different from those of general creditors, whose claims are based wholly on outside transactions. If the association has been prosperous, they have a right, under certain limitations and restrictions, to demand and receive their proportionate share of the ac-

cumulated fund; but if bad investments have been made, or losses have been sustained, before actual withdrawal, they must bear their just proportion thereof. * * * But the right of withdrawal, and the extent to which it may be exercised, presupposes that at least a relative proportion of the assets will remain for the benefit of those who continue to be active members of the association.

"When a building association has failed to fulfill the object of its creation, and has become hopelessly insolvent, it cannot be justly or equitably wound up on any other principle than that above suggested. After expenses incident to the administration of its assets are deducted, the general creditors, if any, should be first paid in full, and the residue of the fund should be distributed pro rata among those whose claims are based upon stock of the association, whether they have withdrawn, and hold orders for the withdrawal value thereof, or not. Both classes are equally meritorious, and in marshaling the assets neither is entitled to priority over the other. The claims of each are alike based upon their relation to the association as members thereof; * * * and while it may be true that a stockholder may recover judgment against the corporation, and thus become, in a certain sense, a creditor thereof, he is nevertheless not a creditor within the meaning of our assignment laws."

The doctrine of *Christian's Appeal* has been quite generally accepted by courts and text-writers. *Chapman v. Young*, 85 Ill. App. 131; *Gibson v. Safety Homestead Ass'n*, 170 Ill. 46, 48 N. E. 580, 39 L. R. A. 202; *Heimbokel v. National Savings Ass'n*, 58 Minn. 340, 59 N. W. 1050, 25 L. R. A. 215, 49 Am. St. Rep. 519; *Hohenshell v. Loan Ass'n*, 140 Mo. 566, 41 S. W. 948; *Rabbitt v. Wilcoxen*, 108 Iowa, 35, 72 N. W. 306, 38 L. R. A. 183, 64 Am. St. Rep. 152.

The text-writers are of a like opinion.

Endlich on Building Associations (2d Ed.) § 108, says:

"The right of withdrawal, however, exists and may be exercised only while the association is a going concern, or the series to which the stock belongs running. It cannot be exercised when the stock has reached par, and the association or series exists only for the purpose of liquidation. Nor, as has been settled in England, can it be exercised where the association is, at the time, known to be insolvent. The provisions for withdrawal are not intended to apply to the latter, any more than to the former case. 'It would be altogether unreasonable to suppose that it was intended, in the event of insolvency, to permit one set of members to escape from liability at the expense of the others. * * * The rule (as to withdrawals) seems * * * not to contemplate any such contingency as a suspension of its business, and therefore only to provide for a withdrawal from the society while it was, or was believed to be, still solvent.' That this doctrine is correct, as

far as it goes, is self-evident. But there is no reason why it should not go a step further by omitting the qualification introduced by reference to the notoriety of the fact of insolvency. Apart from the consideration that one who knows the association to be insolvent is guilty of bad faith towards his fellow members when he attempts to get himself paid at their cost, there is every bit as much reason why an actual state of insolvency, though unknown at the date of the giving of a withdrawal notice, should prevent it from becoming effectual. The payment of the claims in the one case, as in the other, would give an unfair advantage to the withdrawing, and entail an undue injury upon the remaining members. Accordingly, it has been decided in Pennsylvania that the fact of insolvency of an association negatives the right of any one to obtain a priority over his fellows by giving notice of withdrawal. "The right of withdrawal presupposes that at least a relative proportion of the assets will remain for the benefit of those who continue to be active members of the association." Whilst, therefore, it has been held that members who had given notice to withdraw, and whose notices had matured before the society's insolvency was manifest or declared, were entitled to stand upon their rights as withdrawing members, even to the detriment of those who had not withdrawn or whose notices had not matured, the better and more logical doctrine would seem to be that the existence of a state of insolvency at the time of the giving of the withdrawal notice, ascertained at any time before actual payment of the claim, renders the notice abortive, and destroys the right to withdraw, or to claim any benefit under the notice already given. This principle does not, of course, invalidate settlements already made in good faith with withdrawing members who have been paid out, nor subject the right of withdrawing members to claim payment, in accordance with the provisions relating to withdrawals, to jeopardy by reason of causes of insolvency arising after notice of withdrawal." *Thompson on Building Associations* (2d Ed.) p. 289.

It seems, indeed, to be the accepted American doctrine that, when an association is in fact insolvent, a withdrawing member has only the right to a pro rata share in the distribution of its assets. Nor is the situation affected by any assurance given by the officers of the association to the withdrawing member as to the solvency of the society at the date of the notice. The authorities cited establish the principle that, when insolvency exists as a fact, the right of the shareholders to equality in the distribution of the assets attaches, and constitutes a paramount equity in their favor. The fact of insolvency being established, and the right to equality of distribution having attached, it cannot be defeated by a notice of withdrawal upon the part of a member, nor by any dealing

between him and the officers of the association which falls short of actual payment.

In *Rickert v. Suddard*, 80 Ill. App. 204, it was held that "where a member gives notice of his withdrawal, and is paid by a check upon the funds of the association in bank, but before such check is presented for payment the funds of the association are withdrawn and the association itself becomes insolvent, the rights of the holder of the check are to be determined by the solvency of the association at the time that the check was given," and that the insolvency of the association was a question of fact to be determined in the same way as similar questions of fact arising in other causes.

In the *Columbus Building Association v. Kriete*, 192 Ill. 128, 61 N. E. 510, the withdrawing stockholder has reduced his claim to a judgment, but the court held that this gave him no priority over other stockholders.

Appellant had perfected his notice to withdraw, and, if the association could be treated as a going concern, he should have been paid the full withdrawal value of his certificates. The association declining to pay him in full, he suffered an abatement, and now claims to be entitled to relief by virtue of a compromise entered into between him and his debtor. The principle of equality, as established by the authorities cited, would in any event be fatal to this contention. The principle of equality which defeats the appellant, were he standing alone upon his notice of withdrawal, is sufficient to repel the equity which he asserts, and sufficient to defeat his right to recover by virtue of his so-called compromise, for it strikes at the root of the power of the officers of an insolvent association to create any preference among stockholders in the distribution of its assets. A view of the case may well be taken in which the willingness to compromise may be construed as tending to impair rather than strengthen the position of appellant. The knowledge that there were many other stockholders in like case with himself who had, in advance of action upon his part, given notice of withdrawal, and whose demands had not been satisfied; the fact that there was no money in the treasury of the association which could properly be appropriated in payment of withdrawal claims, and that he was ready to accept in satisfaction of his demand a material abatement of its amount, not to be paid in cash, but in promises to pay in installments distributed over a period of 18 months is persuasive that appellant was aware of the financial condition of the association. As was well said by the learned chancellor in his opinion: "It must have been manifest to Colin, in taking the notes, that there were no funds on hand properly applicable to the discharge of his claim, for the by-laws [of the association], with which Colin must be presumed to have been acquainted, plainly contemplated that these withdrawals

should be settled by cash payments made out of funds already in hand, derived from fixed sources, and would not be settled by notes. The very manner in which the notes were made out called attention to the irregularity of the settlement. Colin has obtained an apparent advantage which the principle of mutuality applicable to the distribution of the assets of an insolvent company of this kind do not permit him to hold. These associations partake of the nature of partnerships, and no member can take any advantage over his fellows not clearly legal. The settlement made is not so far executed as to be beyond recall, and Colin can be remitted to his position as stockholder without any injustice to him."

We are of opinion that the decree appealed from should be affirmed.

(102 Va. 576)

OLD DOMINION S. S. CO. v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. March 17, 1904.)

TAXATION—STEAMSHIPS—INTERSTATE TRAFFIC—ENROLLMENT OUTSIDE OF STATE.

1. Steamships owned by a foreign corporation, and enrolled outside of the state, and which are used mainly in transporting passengers and freight upon foreign tickets and bills of lading between points in the state to and from the ocean-going vessels of the corporation, have their legal situs for purposes of taxation within the state.

Appeal from Finding of State Corporation Commission.

The state corporation commission entered a finding on the — day of November, 1903, declaring the steamers Mobjack, Accomack, Hampton Roads, Luray, Virginia Dare, Brandon, and Berkeley, the steam tug Germania, and seven barges, property of the Old Dominion Steamship Company, taxable under the laws of the state of Virginia, and imposing a property tax thereon for the year 1903. Said steamship company appeals. Affirmed.

Wm. H. White, for appellant. The Attorney General, for the Commonwealth.

PER CURIAM. The facts presented by the transcript of the record of the finding aforesaid are as follows:

That the Old Dominion Steamship Company was a nonresident corporation, having been incorporated by the Senate and House of Representatives of the state of Delaware. That it was then, and had been for many years theretofore, engaged in the transportation of passengers and freight on the Atlantic Ocean and communicating navigable waters, between the city of New York, in the state of New York, and Norfolk and certain other ports within the state of Virginia. That said steamship company in the prosecution of its said transportation business owned

and operated the vessel property above named. That these vessels, with the exception of the tug Germania, whose movements and use will be hereinafter stated, visited various ports or points within the state of Virginia for the purpose of receiving freight and passengers, for which they issued bills of lading and tickets to points outside the state of Virginia. That, owing to the shallow waters where these vessels plied, it was impossible in most instances for the larger ocean-going steamers of the company to be used. That in consequence the vessels above enumerated were used to receive the freight and passengers as aforesaid, giving the shipper of freight a bill of lading for the same destined to New York and other points outside of Virginia, and the passenger a ticket to his destination, and thus transported such freight and passengers to deeper water at Norfolk and Old Point Comfort, where, upon such bills of lading and tickets, the passengers and freight were transferred to one of the larger ocean-going vessels of the steamship company, and so the ultimate destination, namely, New York, and elsewhere outside of Virginia, was reached. That any other business transacted by the above-named vessels was incidental in character, and comparatively insignificant in amount. That the said vessels were built and designed for interstate traffic especially, and were adjuncts to or branches of the main line of the Old Dominion Steamship Company between New York and Norfolk. That each and all of the said vessels were regularly enrolled under the United States laws, outside of the state of Virginia, with the name and port of such enrollment painted on the stern of each of them. That the said vessels, though regularly enrolled and licensed for coastwise trade, were then used on old established routes upon navigable waters within Virginia as follows, to wit:

First. The steamer Hampton Roads between Ft. Monroe and Hampton and Norfolk.

Second. The steamer Mobjack between points in Mathews and Gloucester counties and Norfolk.

Third. The steamers Luray and Accomack between Smithfield and Norfolk.

Fourth. The steamer Virginia Dare between Suffolk and Norfolk.

Fifth. The steamers Berkeley and Brandon between Richmond and Norfolk.

The steamers Berkeley and Brandon ply between Richmond and Norfolk. These two steamers were completed in the year 1901, or early in 1902, one of them having been constructed at the William R. Trigg shipyard in the city of Richmond, and the other outside of the state of Virginia. Early in the year 1902 they were placed upon the line between Norfolk and Richmond, one steamer leaving Richmond each evening and arriving in Norfolk each morning, thus giving a night trip every night each way between Richmond and Norfolk. At the time these steam-

ers were placed upon this route and since that time the Old Dominion Steamship Company has by public advertisement called attention to the fact that these two steamers were especially fitted in the matter of state-room accommodations for carrying passengers between Richmond and Norfolk, and the said two steamers have since that time been advertising for the carriage of passengers and freight on their route between Richmond and Norfolk, and have been regularly carrying freight and passengers between the said two points in Virginia, as well as taking on freight and passengers for further transportation on their ocean steamers at Norfolk. The Old Dominion Steamship Company applied under the revenue laws of the state of Virginia for a license to sell liquor at retail on each of these steamers, and on July 1, 1902, there was granted through the commissioner of the revenue of the city of Richmond a license to the Old Dominion Steamship Company for the sale of liquor at retail on each of these steamers, said licenses to expire on April 30, 1903. On or about the same time the said steamship company complied with the revenue laws of the United States, and paid the necessary revenue tax through the custom house at the city of Richmond for the purpose of selling liquor at retail on each of these steamers. In the spring of 1903 the said steamship company, in order to obtain licenses to sell liquor at retail on each of these steamers, applied for the same in the city of Richmond, and complied with the requirements of section 143 of the new revenue law approved April 16, 1903, and so obtained licenses for the year 1903-04 to sell liquor at retail on each of these steamers on their route between the city of Richmond and Norfolk, and likewise on or about the same time complied with the revenue laws of the United States in the matter of selling liquor at retail on each of the said steamers on said route.

Sixth. The steam tug *Germania*, which was used in the harbor of Norfolk and Hampton Roads for the purpose of docking the large ocean-going steamers of the Old Dominion Steamship Company and the transferring from different points in those waters freight from connecting lines destined to points outside of Virginia.

And the court, having maturely considered said transcript of the record of the finding aforesaid and the arguments of counsel, is of opinion that the legal situs of the vessels and barges assessed for taxation by the finding of the state corporation commission is, for that purpose, within the jurisdiction of the state of Virginia, and that said property is amenable to the tax imposed thereon, notwithstanding the fact that said vessels and barges are owned by a nonresident corporation, that they may have been enrolled under the act of Congress at some port outside the state of Virginia, and that they are engaged in part in interstate commerce; and

doth so decide and declare. Therefore it seems to the court here that the finding of the state corporation commission appealed from is without error, and said finding is approved and affirmed. It is further considered by the court that the appellee recover against the appellant \$30 damages and its costs by it about its defense expended upon this appeal. All of which is ordered to be entered upon the order book here, and certified to the state corporation commission, to be entered of record in its order book there, as required by law.

Affirmed.

(102 Va. 435)

**SOUTHERN RY. CO. v. WASHINGTON,
A. & MT. V. RY. CO.**

(Supreme Court of Appeals of Virginia. March 10, 1904.)

**RAILROADS—COMPULSORY CROSSINGS—BOARD
OF PUBLIC WORKS—DETERMINATIONS—RES
JUDICATA—INJUNCTION—GROUNDS.**

1. An affidavit to a bill for injunction, signed in the name of complainant corporation by its president, and stating that the signer is such president, that he has read the bill, that the allegations therein contained of which he has knowledge are true, and that the other matters he believes to be true, is sufficient to satisfy the requirements of Code 1887, § 3440, providing that an injunction shall not be awarded unless the judge be satisfied of plaintiff's equity, and section 3282, providing that an affidavit in support of a pleading is sufficient if affiant swears that he believes it to be true.

2. An adjudication of the board of public works, made pursuant to Code 1887, § 1064, as amended (Acts 1896-04, p. 186, c. 191), and authorizing defendant railroad to cross plaintiff's tracks, was not conclusive of defendant's right to reduce the grade of the outer rail of plaintiff's track, so as to preclude plaintiff from suing to restrain defendant from so changing the grade in a manner dangerous to travel.

3. Where the board of public works had merely authorized defendant railroad, in general terms, to cross plaintiff's tracks, and defendant thereupon threatened to change the grade of one rail, which, according to the testimony of plaintiff's engineers, would render travel on plaintiff's road less safe, and impede the speed of its through trains, whereas defendant's crossing was merely to accommodate a private shipper, the court properly awarded an injunction to restrain defendant from so interfering with plaintiff's grade, and remanded the parties to the board of public works to have the question at issue between them there determined.

Appeal from Circuit Court, Fairfax County.

Bill for injunction by the Washington, Alexandria & Mt. Vernon Railway Company against the Southern Railway Company. From decrees refusing to dissolve the injunction, etc., defendant appeals. **Affirmed.**

Munford, Hunton, Williams & Anderson, for appellant. R. Walton Moore, for appellee.

CARDWELL, J. This appeal is from two decrees of the circuit court of Fairfax county, entered in the chancery suit therein pending in which the appellee, the Washington,

Alexandria & Mt. Vernon Railway Company is the complainant, and the appellant, the Southern Railway Company, is the defendant. The facts and circumstances out of which the controversy arises are as follows: Appellee owns and operates a line of electric railway from the city of Washington, through Alexandria City, to Mt. Vernon, in Fairfax county, Va., over which a large number of passengers are daily transported. Appellant owns and operates an extensive line of steam railroad, with certain terminal facilities, yards, etc., in the city of Alexandria; and deeming it necessary, in the conduct of its business, to build a branch line or spur track from the termination of its line on Union street, in the city of Alexandria, to the plant of the Alexandria Brick Company, lying a short distance away from the main line of appellant, which branch line or spur track had necessarily to cross the track of appellee, the appellant sought an amicable agreement with the appellee by which this crossing could be made, but, failing in this, resort was had to the provisions of section 1094 of the Code of 1887, amended by an act of February 9, 1894 (Acts 1893-94, p. 186, c. 191; Pollard's Supp. p. 111). Pursuant to the provisions of the act, appellant, on the 20th of May, 1901, by its third vice president and general manager, submitted to the president of the appellee company plans, etc., of the proposed crossing; and thereupon appellee petitioned the board of public works to "inquire into the necessity of such crossing, and the propriety of the proposed location, and of all matters pertaining to its construction and operation." On June 19, 1901, the board of public works entered its order, in which is the following: "And the board, having heard the evidence, and inquired into the necessity of such crossing, the propriety of the proposed location, and all matters pertaining to its construction and operation, doth order that the Southern Railway Company shall have the right to construct its works across the railroad of the Washington, Alexandria & Mt. Vernon Railway Company."

The order then specifies the locality at which the crossing was to be made, in accordance with the plans, specifications, etc., submitted for the consideration of the board, and then directs how the business of the two roads was to be conducted over the said crossing, etc. Upon the making of this order by the board of public works, appellant procured and tendered to the appellee a crossing frog, which it is claimed by the appellant was in exact accordance with the plans approved by the board, and requested appellee to install the same at the expense of appellant, but, appellee having failed to do so, appellant served notice upon it that, unless the crossing was installed by a given day, appellant would place the crossing in position; and appellee still having failed to install the crossing at the end of the day

named, and after its trains had stopped running that night, appellant, in accordance with the notice, and in exact accordance, it claims, with the plans and specifications approved by the board of public works, installed the crossing, reducing the outer rail of appellee's track from an elevation of $4\frac{1}{2}$ inches to $2\frac{1}{2}$ inches, and subsequently reduced, or proposed to reduce, the elevation of the rail to 1 inch. Thereupon appellee presented its bill to the judge of the circuit court of Fairfax county, setting out the above facts, and alleging, *inter alia*, that, at the point where appellant crossed its tracks, its line is built upon a curve having a radius of 453 feet, and an elevation of the outer rail of $4\frac{1}{2}$ inches; that appellant well knew that at the point of the proposed crossing the outer rail of appellee's track had theretofore been placed, and was then, at an elevation of $4\frac{1}{2}$ inches, with a view to the safe running of appellee's trains upon and around said curve; that appellee could not safely run its trains with the outer rail of its track at the crossing at 1 inch elevation, or even at an elevation of $2\frac{1}{2}$ inches, without a guard rail, which had not been furnished by appellant, as it should have been—and prayed for an injunction to restrain appellant, its officers, agents, etc., from interfering with the restoration of the elevation of the outer rail of appellee's track at the crossing back to $2\frac{1}{2}$ inches, or from changing or attempting to change that elevation so as to reduce it to less than $2\frac{1}{2}$ inches, which injunction was awarded.

Appellant demurred to and answered the bill; its answer denying that appellee could not safely operate its trains over the crossing in question with the outer rail of its track at an elevation of $2\frac{1}{2}$ inches, and alleging that it could safely operate them with an elevation of the outer rail of its track at 1 inch, especially with the use of a proper guard rail, and insisting upon its right to reduce the outer rail to 1 inch by virtue of the adjudication by the board of public works, conferring upon it the right and authority to construct a branch line or spur track across appellee's track.

Upon the hearing of the motion of appellant to dissolve the injunction, heard before the judge of the circuit court, on the bill and exhibits therewith, the demurrer and answer thereto, and affidavits filed on behalf of both parties, the first decree appealed from was entered August 31, 1901, which denied the motion to strike out certain affidavits, overruled the demurrer, and refused to dissolve the injunction—the learned judge of the circuit court being of opinion that while section 1094 of the Code of 1887, as amended, gave to the board of public works complete jurisdiction of all questions relating to railway crossings, including the question of the elevation of the appellee's track, and of any change to be made there-

in, raised by the pleadings in the cause, and that the court would be without jurisdiction to consider that question, when it had been properly brought to the attention of the board and had been passed upon by it, but that the pleadings and evidence in the cause showed that the question of the elevation to be given the outer rail of appellee's track at the crossing in question had not been brought to the attention of the board, and had not, therefore, been passed on by it, as required by the statute—and continued the injunction, that appellant might have an opportunity to proceed in the matter of changing the elevation of the outer rail of appellee's track at the crossing in question, as required by the statute; the decree then providing that when the board of public works, should its jurisdiction be invoked, had passed on the question, and the action of the board brought to the attention of the court, or the judge thereof in vacation, the injunction would be continued, dissolved, or modified in accordance with the finding of the board, etc.

Acquiescing in this decree, appellant on the 30th of September, 1901, served upon appellee a notice of the necessity for the proposed change of the elevation of the outer rail of its track from $2\frac{1}{2}$ inches to 1 inch, attaching to the notice copies of the plans and specifications for the change, etc., whereupon appellee filed with the board of public works on October 8, 1901, a petition praying that the board would inquire into the necessity of the proposed change in the elevation of its track, and all matters pertaining thereto, and that the board would suspend the work in making the proposed change until it could inquire into the necessity therefor, etc. The board took jurisdiction of the matters set forth in the petition, ordered all work on the proposed change of appellee's track suspended, and summoned the parties before it for a hearing, which was had on the 7th of November, 1901. At that hearing, notwithstanding the appellant had invoked the jurisdiction of the board of public works by its notice to appellee of September 30, 1901, under section 1094 of the Code of 1887, as amended, upon its motion the board dismissed the petition of appellee on the ground that the board was without jurisdiction to hear and determine the matters arising on the notice and the petition; in other words, the contention of appellant that by reason of the adjudication by the board on June 19, 1901, the matters arising on the notice and petition were res judicata, whereby the power and authority in the board to hear and determine these matters had terminated, was sustained. Whereupon appellant filed a supplemental answer to the bill in this cause, setting out the proceedings last mentioned, and other facts, and renewed its motion before the judge of the circuit court to dissolve the injunction theretofore awarded in the cause.

This motion was heard by the judge of the circuit court upon the pleadings and affidavits formerly considered, the supplemental answer of the appellant to the bill, and additional affidavits filed by both litigants, and the second decree appealed from entered in vacation November 7, 1901, which, so far as pertinent to the issues presented, is as follows:

"(2) The said motion to dissolve the injunction heretofore awarded is overruled, the judge being of the opinion, as stated in decree entered August 31, 1901, that the board of public works has complete and exclusive jurisdiction to determine the questions at issue as to elevation to be given outer rail of the complainant's track at the crossing mentioned in the proceedings, and that the said injunction should be continued until said board has determined that question. And when said board of public works has passed upon that question, under notice of defendant mentioned and described in the said supplemental answer of defendant, and the petition thereafter filed by complainant before said board, or under a new notice to be given by defendant under section 1094, in the event that, if such new notice shall invoke the jurisdiction of said board under section 1094 as amended, then the decree of this court will be made to conform to the finding of said board on such question, when it is made to appear to this court. In the event a new notice is given by defendant in pursuance of this decree, and under said section 1094, as amended, and the complainant does not invoke the jurisdiction of said board of public works under said section 1094, as amended, the injunction heretofore awarded will be dissolved, when this fact is made to appear to this court, or to the judge thereof."

The first assignment of error is the refusal of the judge below to dismiss the bill of appellee for the want of a proper affidavit thereto.

We are of opinion that there is no merit in this contention. The bill is signed in the name of the appellee, by its president, and is verified by his affidavit, in the following words: "That he is the president of the Washington, Alexandria & Mt. Vernon Railway Company; that he has read the foregoing bill of complaint, and that the allegations therein contained, of which he has knowledge, are true; and that all other matters therein stated he believes to be true."

Corporations, as was said by this court in *Fayette L. Co. v. L. & N. R. Co.*, 93 Va. 274, 24 S. E. 1016, "necessarily act by and through their agents," and it is difficult to perceive how the requirement that a bill for an injunction shall be verified by affidavit could have been more fully complied with than is done in this case. The provision of section 3282 of the Code of 1887 is that, "where an affidavit is required in support of any pleading, it shall be sufficient if the

affiant swears that he believed it to be true," and the requirement of section 3440 of the Code of 1887 is merely that the court or judge applied to for an injunction shall not award it unless satisfied by affidavit or otherwise of the plaintiff's equity.

"If made in good faith and reasonably sufficient, an affidavit should be upheld." 1 Enc. Pl. & Prac. 320, and authorities cited.

The affiant in this case meets every requirement of the statute, if, in fact, he does not go beyond, for, in addition to his oath that he had read the allegations of the bill, and, so far as not known to him personally, he believed them to be true, as to such as were known to him he swears positively that he knows them to be true. The affiant was an officer of the company and his position was such as necessarily gave him personal knowledge of some of the material allegations of the bill, and was clearly in a position to know whether or not other allegations therein, not within his personal knowledge, were worthy of belief. This was all sufficient to satisfy the judge below of the appellee's equity, and to authorize him to consider the case presented, and to award the injunction prayed for, if of opinion that it should be awarded.

The next contention of appellant is that the demurrer to the bill should have been sustained and the bill dismissed. This raises the question whether or not the matters set up in the bill are *res judicata*.

It is true that the bill shows on its face that the ground on which the injunction is asked arose out of the crossing of one railroad by another, pursuant to the adjudication of its right to do so by the board of public works, to which tribunal section 1094 of the Code of 1887, as amended, delegates the power to determine whether one railroad in this state shall be permitted to cross another; and it is also true that the adjudication of such a question by the board is final and conclusive as to any question adjudicated by it, or which it was the duty of either party interested in the proceedings before the board to have brought forward for adjudication. It is also true that *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. *Diamond State Iron Co. v. Rarig Co.*, 93 Va. 603, 25 S. E. 894, and authorities cited. But it cannot be applied to a matter not adjudicated in a former action, and which could not have been brought forward for adjudication upon the pleadings in the cause; nor to a matter arising after the former adjudication, even in a second suit between the parties to the former, or their privies if the causes of action are not the same. *C. & O. Ry. Co. v. Risson*,

Trustee, 99 Va. 18, 37 S. E. 320; *Tate v. Bank*, 96 Va. 765, 32 S. E. 476; 7 Rob. Pr. (new) 172.

Therefore, when it is said that *res judicata* applies "to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time," it is not meant that a judgment concludes parties as to a matter not covered by it and the facts necessary to uphold it. If the real merits of the second action have not been decided in the first, the prior judgment is no bar. *Kelly v. Board of Pub. Wks.*, 25 Grat. 760, and authorities cited, and authorities *supra*.

The object of the statute was to provide a tribunal and the necessary appliances for the prompt and final determination of questions and controversies which might grow out of one railroad's seeking to cross another, and consequently provided for the placing of plans and specifications, for such a proposed crossing, in the hands of the board of public works, in order to place it in a position to determine the propriety, or the impropriety, of the proposed crossing. It clothes the board with power to employ experts, hear evidence, and enter orders changing or modifying specifications; but the determination by the board that one railroad should have the right to cross another, and directing how the crossing was to be established, at whose costs, and the conduct of the business of the respective roads at the crossing, cannot be considered as taking away from the parties the right to litigate a question growing out of an entirely different state of facts, and giving rise to an entirely different controversy. Where the board of public works has taken jurisdiction of a controversy touching the right of one railroad to cross another, and adjudicated that question, there is no power in the courts to interfere with its order, by injunction or otherwise, to stay the proceedings or prosecution of the work in accordance with the plans and specifications considered by the board; and this would be so without statutory provision, upon the well-established general principle that where a board or individual is vested with judicial discretion to consider and decide any question, and such board or individual exercises the discretion, its act is final and conclusive; but neither this general principle, nor the statute, can be made to apply to a matter not brought before the tribunal for its adjudication, or in any manner passed on by it.

The bill in this cause, after setting out all of the proceedings before the board of public works when the right of appellant to cross appellee's line was adjudicated, and what was done by appellant in pursuance of that adjudication, then alleges that appellant, not contented with its version of what it had the right to do under the order of the board, had changed, or proposed to change, the track of appellee, so as not only to ob-

struct the conduct of its business, but to put in peril passengers transported upon its trains over its line—a matter that the public became at once vitally interested in. It is made to appear from the facts stated in the bill that the appellant, having received a judgment of the board, upon one condition of the pleadings and proofs before the board, and finding the judgment thus obtained, which was general in its terms, broad and comprehensive enough to cover a different state of facts, is now seeking to use it in a manner and for a purpose to which it was not in the beginning fitted.

We are of opinion that the bill sets out a case for equity jurisdiction, and that the court did not err in overruling the demurrer thereto.

The third and last contention of appellant is that, upon the merits of the case, the injunction should have been dissolved and the bill dismissed. It is claimed that the record establishes (1) that the board of public works has passed upon the elevation of appellee's track at the crossing in question, as one of the matters pertaining to the construction of the said crossing, and (2) that, if that was not so, it is a matter which the appellee could have raised before the board, and as to which it is concluded by the order of the board.

It is admitted, however, that there was no direct adjudication by the board as to the right of appellant to change the elevation of appellee's track at the crossing, the contention being that the adjudication of the right of appellant to cross the track of appellee at the point designated carries with it the right and authority to change the elevation of appellee's track at that point.

After reviewing the allegations of the bill, and the statements and admissions of the answers thereto, the learned judge below, in his written opinion, made a part of the record, well says:

"From these allegations of the bill and answers, and an examination of the plans and specifications filed therewith, and the affidavits, no doubt is left that the changing of complainant's track by defendant was not passed on by the board of public works, and no adjudication was invited thereon by either party, and that the necessity or desirability of changing the elevation of the track was only suggested when the defendant installed the crossing frog. If any doubt existed in this respect, it would be removed by an inspection of the notice given by the defendant to complainant on September 30, 1901, in which specific and accurate notice is given complainant of a desire to change complainant's track from $2\frac{1}{2}$ to 1 inch elevation. No such intimation as to the desire of defendant to change the elevation of complainant's track is given under the notice dated the 20th of May, 1901, and under which the proceedings were had before the

board of public works, and the order entered by it authorizing the crossing."

It should be added, to what was said by the learned judge below, that there was nothing, either in the notice given by appellant (defendant below) to appellee of its desire to cross the latter's track, or in the plans and specifications accompanying that notice, or in any of the proceedings before the board of public works, that indicated to appellee that it was the purpose of appellant to change the elevation of appellee's track at the crossing. Appellee had no reason to apprehend that such a change would be made, but had every reason to believe that the status quo as to the elevation of its track at the crossing would be maintained. Appellant admits in its answer that it knew that appellee's track at that point had some elevation, though it did not know it had an elevation of $4\frac{1}{2}$ inches. However, in installing the crossing, appellant did change appellee's track by reducing the elevation of its outer rail from $4\frac{1}{2}$ to $2\frac{1}{2}$ inches, and appellee acquiesced in this reduction; but when it became known to it that it was the purpose of appellant to still further reduce that elevation to 1 inch, it applied to a court of equity, not to stay the prosecution of the work of appellant in establishing the crossing pursuant to the adjudication by the board of public works, but to stay the hand of appellant in so changing the track of appellee as not only to obstruct the operation of its trains, but to put its passengers in peril, until the question whether or not appellant had the right to make the change was properly adjudicated. When this matter was brought before the board for adjudication, although it had been invited by appellant, by its notice to appellee of September 30, 1901, appellant interposed its objection to that adjudication, and secured the dismissal of the proceedings.

If the doctrine of estoppel is to be invoked under these circumstances, as appellant seeks to do, it may be well to inquire as to which party it should be applied. It would seem clear that as the record, including the plans and specifications, made up for and considered by the board of public works, is silent as to any change in the elevation of appellee's track, there is far more reason to contend that the judgment of the board, even if there was an implied adjudication upon this question, was in favor of the appellee and preserves the status quo, with respect to the elevation of its track, than that it was in favor of the appellant and is a warrant for all the changes it might wish to make in appellee's track. All of the facts appearing in the record, or from the plans, specifications, and blue prints, negative the idea that there was any judgment by the board of public works conferring upon appellant the right to change the elevation of appellee's track at all, and certainly none clothing it

with authority to continue to change that elevation at will, when, acting under what it conceived to be its authority, the elevation was only changed from $4\frac{1}{2}$ to $2\frac{1}{2}$ inches, thus recognizing the necessity for an elevation of appellee's track at the crossing. It is therefore, as has already been said, not to interfere with the prosecution of any work by appellant, authorized by the board of public works, that appellee invokes the protection of its rights in a court of equity, but to prevent an unauthorized interference with its line of railway and a safe operation of its trains thereon. Appellee, as abundantly appears from the record, occupying its own right of way, where it had been for years before appellant attempted to cross its track, was running a large number of fast trains each day to and from Mt. Vernon, carrying a great number of passengers, and doing this in competition with other agencies; and it was far more interested in the proper construction and operation of the crossing than the appellant, which built its branch track mainly for the purpose of accommodating the Alexandria Brick Company. The engineer who supervised the construction of appellee's line believed and swore, as did several other experts, equal in capacity to the affiants on the other side, and more numerous, to the danger incident to running trains over appellee's line at the curve, should the change of the elevation of the outer rail, as threatened by appellant, be reduced to one inch. Such being the record, we are of opinion that the judge below did not err in refusing to dissolve the injunction, and in requiring that proper proceedings be instituted to have the board of public works adjudicate the question at issue between the parties.

It will be observed that the decree of November 27, 1901, supra, merely continues the injunction until the question at issue has been adjudicated by the board of public works, and provides that, when the board shall pass upon that question, the order that the court will then make will conform to its adjudication; that is to say, if proper steps are not taken by the appellant to have the question adjudicated by the board of public works, as provided by the statute, the injunction will be perpetuated; and if such proceedings are taken and an adjudication of the question at issue made by the board, and that fact brought to the attention of the court, the injunction will be dissolved.

The power and authority theretofore conferred by section 1094, as amended, upon the board of public works to hear and determine all questions pertaining to the crossing of one railroad by another, is, by constitutional provision and legislative enactment, in pursuance of the Constitution, transferred to and conferred upon the State Corporation Commission, whereby an adjudication of the question at issue between the parties to this cause by that tribunal may be speedily ob-

tained upon a proper proceeding under the statute invoking its jurisdiction; therefore the decree appealed from will be affirmed.

(102 Va. 327)

JOHNSON v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. March 17, 1904.)

CRIMINAL LAW—VERDICT—FORGERY—UTTERING FORGED INSTRUMENT—INDICTMENT—SEPARATE OFFENSES.

1. When the verdict is silent as to any of the counts in the indictment, it operates an acquittal on those counts.

2. Forgery and uttering a forged instrument are, by section 3737, Code 1887, separate offenses.

3. Where separate offenses are charged by the different counts of an indictment, the jury may find the accused guilty upon each count, and ascertain the punishment separately, but the better practice is to find a general verdict for the two cognate offenses.

4. Other writings of the accused and of the party whose writing is claimed to have been forged, which are shown to be genuine, and enlarged photographs thereof, are admissible for the purpose of comparing, by expert testimony, the genuine handwritings with the handwriting of the alleged forged instrument.

5. Under section 3388, Code 1887, the jury may carry from the bar papers used in evidence.

6. An instruction should not be given where there is no evidence to support it.

7. Section 4025, Code 1887, as amended by Acts 1893-94, p. 223, c. 211, permitting the jury not to be kept together during a trial where the punishment cannot be confinement in the penitentiary for more than 10 years, does not apply where an accused is tried upon an indictment charging two separate offenses, the aggregate punishment of which can be confinement for more than 10 years, and in such case the jury must be kept together.

Error to Hustings Court of Portsmouth.

O. C. Johnson was convicted of forging and uttering a writing purporting to be the last will of his wife, and brings error. Reversed.

Bland & Hope and John W. Happer, for plaintiff in error. The Attorney General and John S. Eggleston, for the Commonwealth.

HARRISON, J. The accused was convicted of two offenses: (1) For forging and (2) for uttering a writing purporting to be the last will and testament of his deceased wife. In their verdict, the jury fixed the punishment at two years in the penitentiary for each offense.

The court is of opinion that there was no error in overruling the demurrer to the second and third counts of the indictment. If the first count was insufficient, as claimed—as to which we express no opinion—the failure to sustain the demurrer thereto resulted in no prejudice to the accused, as the jury only found him guilty upon the second and third counts. Nor was it necessary, when the jury found a verdict of guilty on the second and third counts, for the court to enter a judgment of acquittal upon the first count, for, when the verdict is silent as to any of

the counts in the indictment, it operates an acquittal on those counts. *Hawley v. Commonwealth*, 75 Va. 850.

The court is further of opinion that it was not error to overrule the prisoner's motion in arrest of judgment. The ground of this motion was that the two counts—one for forging and the other for uttering the will—constituted one and the same offense, and that the verdict of guilty under each, fixing a punishment for the offense charged in each count, was convicting the prisoner twice for the same offense. This position is not tenable. The second count charged the prisoner with forging the will. The third count charged him with uttering the same. The statute (section 3737, Code 1887) prescribes as the penalty for forgery not less than two nor more than ten years in the penitentiary. The same section prescribes the same punishment for uttering a forged paper, knowing it to be forged. The verdict of the jury was as follows: "We, the jury, find the prisoner, C. C. Johnson, guilty as charged in the second count of this indictment, and fix his punishment thereon at two years in the penitentiary; and we, the jury, further find the prisoner, C. C. Johnson, guilty as charged in the third count of this indictment, and fix his punishment thereon at two years in the penitentiary." The judgment of the court was in accordance with the verdict, fixing the term of imprisonment at two years for the offense charged in the second count, and at two years for the offense charged in the third count: the latter punishment to commence at the termination of the term of confinement ascertained for the offense charged in the second count.

It is well settled that forging and uttering are separate and distinct offenses. Indeed, the statute makes them separate and distinct. It is equally well settled that each of these offenses may be charged in separate counts of the same indictment. It is also true that the jury may find the prisoner guilty upon each count, and ascertain the punishment for each offense separately. *Wharton's Criminal Law* (8th Ed.) § 910; *Speers v. Commonwealth*, 17 Grat. 570.

While, in view of these authorities, we feel constrained to hold that in a case like this the jury may find the prisoner guilty upon each count, and ascertain the punishment separately, we are of opinion that the usual and better practice in such cases is to find a general verdict for the two cognate offenses charged.

The court is further of opinion that it was not error to admit as evidence other writings of the prisoner, proved to be genuine, and writings of his deceased wife, shown to be genuine, for the purpose of comparing by expert testimony the genuine handwritings with the handwriting of the alleged forged will. Nor was it error to admit enlarged photographs of these genuine writings for the purpose of facilitating such comparison.

Hanriot v. Sherwood, 82 Va. 1; *United States v. Ortiz*, 176 U. S. 422, 20 Sup. Ct. 466, 44 L. Ed. 529. Nor was it error for the jury to take the genuine papers, thus introduced, to their room. After the papers had become part of the evidence in the case, no reason is perceived why they should be excluded from the inspection of the jury. The Code of 1887 (section 3388) provides that "papers used in evidence, though not under seal, may be carried from the bar by the jury." See, also, *Hansbrough v. Stinnett*, 25 Grat. 495, 505.

The court is further of opinion that it was not error to reject the instruction offered by the prisoner, and set forth in his bill of exceptions No. 6. Without expressing any opinion as to the accuracy of this instruction, as an abstract proposition of law, it is sufficient to say that there is not a word of testimony in the record tending to sustain the theory propounded by it.

The remaining assignment of error to be disposed of calls in question the action of the court in failing to have the jury kept together during the progress of the trial. Section 4025 of the Code of 1887, as amended by Acts 1893-94, p. 223, c. 211, provides that, "In any case of felony, when the punishment cannot be death or confinement in the penitentiary for more than ten years, the jury shall not be kept together, unless the court shall otherwise direct." I am inclined to the view that the statute contemplated the prosecution of a single felony in one indictment, but, where there are two separate and distinct felonies charged in separate counts of the same indictment, neither of which is punishable by imprisonment exceeding 10 years, it was not intended that the jury should be kept together unless the court should so direct. In other words, the situation of the prisoner is the same that it would be if two indictments had been found, one for the forgery and the other for uttering, in neither of which cases could the punishment have exceeded 10 years of imprisonment, and in neither of which would it have been necessary to keep the jury together. I am unable to perceive why the rule should be otherwise where the two felonies are charged in separate counts of the same indictment, and the jury finds a verdict upon each count, and ascertains the punishment for each offense separately. The majority of the court are, however, of opinion that, although each felony is charged in a separate count of the same indictment, and the jury finds a verdict upon each count, and fixes the punishment for each offense separately, still the one indictment makes but one case, in which it is possible for the jury to find upon the two counts, taken together, a greater punishment than 10 years' imprisonment, and that the jury must therefore be kept together, the language of the statute being, "In any case of felony," etc.; that, otherwise, in a single case, the prisoner would be

subjected to the same mischief that the statute was intended to protect him against.

For the error, therefore, of not keeping the jury together during the progress of the trial, the judgment complained of must be reversed, the verdict of the jury set aside, and the cause remanded for a new trial.

(55 W. Va. 122)

PYLE et al. v. HENDERSON et al.

(Supreme Court of Appeals of West Virginia.
Feb. 23, 1904.)

**BILL IN EQUITY—PARTIES—CO-TENANTS—
LANDLORD.**

1. Where a trustee brings a suit in equity for the benefit of those he represents, the latter, ordinarily, are necessary parties to such suit.

2. In a controversy between two sets of lessees under two several leases, co-tenants interested under either one or both such leases should be made parties to a bill in equity filed to settle such controversy.

3. The lessor or landlord is a necessary party to a bill in chancery filed by subsequent lessees to enforce the forfeiture of, set aside, and annul a prior lease covering the same subject-matter. (Syllabus by the Court.)

Appeal from Circuit Court, Tyler County;
R. H. Freer, Judge.

Bill by C. E. Pyle and others against J. W. Henderson and others. Decree for plaintiffs, and defendants appeal. Reversed.

V. B. Archer, Wm. Beard, and F. D. Young, for appellants. T. P. Jacobs, W. N. Miller, and O. W. O. Hardman, for appellees.

DENT, J. C. E. Pyle and others filed their bill and their supplemental and amended bill in chancery, in the circuit court of Tyler county, against J. W. Henderson and others for the purpose of having declared forfeited and canceled, as a cloud on their title, a certain lease made by Thomas Bunfill and wife on the 3d day of February, 1897, to A. B. Campbell and J. W. Swann, and for the purpose of enjoining the defendants from interfering with plaintiffs in the enjoyment of the property included in the lease. On a hearing of the cause on bills, demurrer thereto for want of equity and proper parties, answers, general and special replications, depositions, and exhibits, the plaintiffs were decreed the full relief prayed for by them, and the defendants' lease was declared forfeited and canceled. From this decree defendants appeal.

The first question presented by the demurrer is the want of proper parties. The first objection under this head is that one of the plaintiffs sues as "W. S. Miller, Trustee," without naming the beneficiaries of the trust for which he is acting. If such Miller is acting in the capacity of trustee for others, and not in his individual capacity, such others are necessary parties, that they may be bound by the decree entered, and that the defendants, if successful, may not again be compelled to relitigate the same matters with the beneficiaries in such trust, who, not be-

ing parties to the suit, would not be bound by such decree.

The second objection is that the Single-decker heirs, who are entitled to the one-eighth of the one-ninth interest in the gas and oil under the plaintiffs' lease, but have no arrangement with the defendants, have such interest in the result of this litigation that they should be made parties. They certainly should be parties to this controversy, for their rights may be materially affected by the success of the defendants.

It is next objected that Thomas Bunfill, the lessor who executed the two leases in controversy, was not made either party plaintiff or defendant. He is certainly an indispensable party to this litigation, for his rights may be greatly affected thereby. He is interested in the rents and royalties under both leases if nothing more, while the facts disclosed by the pleadings and depositions bring forward prominently several questions of law for consideration, in the proper decision of which his interests are greatly involved. These facts show that his lease to the defendants covered the whole of the tract of land, but afterwards it was discovered that he only owned the seven-ninths undivided interest; that the lessees insisted that he should obtain for them, under the implied covenants of his lease, the other two-ninths undivided interests, and set about to help him to do so. After some time one-ninth was acquired of John Bunfill, which left the other one-ninth outstanding in the Single-decker minor children. Claiming that he had not sufficient, the lessor refused to secure this, and the lessees set about to do so to make their lease good, as they could not enjoy it under the decision of *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891, until they could do so. While they were engaged in this laudable undertaking for the benefit of the lessor, as well as for themselves, as it was to make good the implied covenants of his lease (*Knotts v. McGregor*, 47 W. Va. 566, 35 S. E. 899), the three months expired in which they were to put down the first well, and, according to the terms of the lease, \$15 in advance for each three months' delay thereafter became due, whereupon said Bunfill, without notifying the lessees, executed forthwith a new lease to the plaintiffs. As soon as the lessees found it out, they wanted to compromise the matter or pay the rent, but Bunfill and the plaintiffs would not listen to them. They then set up the claim that their lease was not forfeited, and that their lessor was not in condition to forfeit it. The plaintiffs file their bills to declare and enforce such forfeiture. The defendants file their answer, claiming that their lease is not forfeited, for the reason that their lessor, not having given them the enjoyment of their term, had no right to enforce forfeiture for nonpayment of rent until he did do so; that they had paid \$55 for the term of three

months, which they had been prevented from enjoying by reason of the failure of their lessor to comply with his covenants; and that it would be unconscionable to allow him to take advantage of his own default. This gives rise to two very important legal propositions: First, as to whether the lessor was in position to equitably enforce a forfeiture of his lease; and, second, whether a court of equity will declare and enforce the forfeiture of a lease in any case in which it would be proper to relieve against forfeiture.

In 1 *McAdam on Landlord and Tenant*, 852, it is said: "A court of equity may relieve a tenant from a forfeiture of the lease, if the forfeiture was through inadvertence, accident, or mistake, on such terms as may be just; but not where there is willful, voluntary, gross, or inexcusable neglect." And it will also relieve from forfeiture when caused by the neglect of the landlord. 18 Am. & Eng. Enc. Law (2d Ed.) 389. Equity will relieve from forfeiture under an oil lease for failure to pay rentals, when compensation for such rentals can be fully made. *South Penn Oil Co. v. Edgell*, 48 W. Va. 348, 37 S. E. 596, 86 Am. St. Rep. 43. In the case of *Hukill v. Guffey et al.*, 37 W. Va. 425, 16 S. E. 544, it was decided that: "The tract of land of thirty acres in controversy is situated in an oil field, at the time of the senior lease partially developed. The senior lessee, and those claiming under him, had for more than nine months failed to commence to bore for oil, and had failed to pay or deposit for the lessor the one dollar and thirty-three and one-third cents per month. Held, under the circumstances of the case, the senior lessee and those claiming under him are not entitled to be relieved against the forfeiture by paying such sum. The damages to be looked to are the damages resulting from the breach of the covenant to bore for oil, and not the failure to pay one dollar and thirty-three and one-third cents per month in lieu thereof; and the damages resulting from the failure to do the specific thing, viz., to bore for oil, not being susceptible of pecuniary measurement, and therefore compensable, the relief from such forfeiture is denied." From this decision Judge English dissented and filed a lengthy opinion. The lessees not having the right to bore for oil in the present case by reason of the failure of the landlord or lessor to comply with the implied covenants of his grant, damages for failure to bore for oil or gas is not in question. They could not bore, and hence they would not be liable for damages in not doing so.

One of the questions, then, for the court to decide, is whether the mere accidental oversight to pay, or misunderstanding about paying, a pecuniary rental at the very moment it was due, without willful neglect on the part of the lessees, should be relieved against in equity. In this question Thomas N. Bunfill is more deeply interested than any other person, and about which he is entitled to be

heard either as a party plaintiff or defendant. As to which, he must decide for himself.

For these reasons, the decree is reversed and annulled, and this cause is remanded, with leave to the plaintiffs to amend their bills and bring all parties in interest before the court.

(65 W. Va. 74)

STATE v. HERTZOG.

(Supreme Court of Appeals of West Virginia.
Feb. 23, 1904.)

MURDER—INSTRUCTIONS—BURDEN OF PROOF—EVIDENCE.

1. Upon the trial of H. for murder, the court gave to the jury the following instruction: "The court instructs the jury that a man is presumed to intend that which he does, or which is the immediate or necessary consequence of his act; and if the jury believe from the evidence that H., with a deadly weapon in his possession, without any or upon very slight provocation, gave to H. a mortal wound, the said H. is prima facie guilty of willful, deliberate, and premeditated killing; and the necessity rests upon H. of showing extenuating circumstances. As they appear from the case made by the state, H. is guilty of murder in the first degree." Held, that the giving of said instruction was error.

2. Where a statute establishes degrees of the crime of murder, and provides that all willful, deliberate, and premeditated killing shall be murder in the first degree, evidence that the accused was intoxicated at the time of the killing is competent for the consideration of the jury upon the question whether the accused was in such condition of mind as to be capable of deliberation and premeditation.

3. It is not error to refuse an instruction, not specially adapted to, nor based upon, the facts of the case which the evidence fairly tends to prove.

(Syllabus by the Court.)

Error to Circuit Court, Taylor County; John Homer Holt, Judge.

Grant G. Hertzog was convicted of murder, and brings error. Reversed.

J. G. St. Clair and C. P. Guard, for plaintiff in error. B. F. Bailey, Atty. Gen., for the State.

MILLER, J. The plaintiff in error, Grant G. Hertzog, was indicted by the grand jury of the circuit court of Taylor county, at a term of said court held on the 13th day of April, 1903, for the murder of John Russell. The indictment is in the form prescribed by section 2 of chapter 144 of the Code of 1899, and is sufficient on demurrer. *State v. Douglass*, 41 W. Va. 537, 23 S. E. 724; *State v. Dodds* (W. Va.) 46 S. E. 228. At the same term the defendant demurred to the indictment, and the demurrer was overruled. A jury was then impaneled, a trial of the defendant was had, and a verdict of guilty of murder in the first degree was found against the defendant, who was thereupon sentenced to be hanged by the neck until dead; and the time of his execution was fixed for the 3d day of July, 1903. A judge of this court

granted Hertzog a writ of error to said judgment.

During his trial the defendant excepted to various rulings of the court, and here assigns for error that he was prejudiced by certain instructions given to the jury by the court at the instance of the state, by the refusal of the court to give certain other instructions asked for by him, and because the court refused to set aside the verdict on the ground that the same was contrary to the law and the evidence. All the matters aforesaid complained of by the defendant are made parts of the record by proper bills of exception.

Both the defendant and the deceased at the time of the homicide resided at or near Simpson, a small mining town in Taylor county, and were employed at that place by the Grafton Coal & Coke Company—Russell as a coal miner, and Hertzog as the driver of a horse or mule in the same mines. Defendant and deceased had known each other for about three years, and had been friendly and associated much together during that time. Both of them were addicted to the use of intoxicating liquors. It is proved by several witnesses that Hertzog had been accustomed to drinking for a time long prior to the homicide, and that at times, when drinking, he did not seem to know his wife from any other person, or to understand what he was then doing. The homicide occurred on Sunday, February 1, 1903, about 4 or 5 o'clock p. m. It appears that Hertzog and Russell had been drinking together prior to that date, and that defendant had been drinking for two or three weeks next before that time. It is also shown that Hertzog and others had an eight-gallon keg of beer the night before the killing; that next morning there was about a half gallon of the beer left, which defendant drank. It is shown that he also drank whisky that morning; that about 10 o'clock on that morning Hertzog came into the small store or shop of V. L. Davis, at Simpson; that he saw Russell there, and hit him on the head with his hand; that they then scuffled a little. But this does not appear, from the circumstances, to have been anything more than the result of too much drink. Hertzog then took the train for Grafton, saying to Russell to meet him there on his return. It appears that Hertzog and others who went with him got whisky in Grafton; that he was under the influence of liquor at Grafton; that he and those with him came back to Simpson on the train about 3 p. m., bringing whisky with them; that he went to the home of his mother-in-law while at Grafton, and ate dinner, and took away with him, from there, a small breech-loading rifle belonging to him, for the purpose, as he said, of having Mr. Lilly, a gunsmith, to bore it out; that he afterwards saw Mr. Lilly, who said that he could not then do the work, but would fix the gun some other day; that it was then about train time; that defendant did not then have sufficient time to take the

gun back to the house of his mother-in-law before the train would leave Grafton for Simpson; and that he took the gun with him to Simpson. William Lilly, referred to, testified that he saw defendant in Grafton; that defendant had a target gun with him, the barrel thereof being from 10 to 12 inches long, with a little wire handle; that defendant wanted him to make it shoot "a 22 long, instead of a 22 short"; that he did not then fix the gun, but told Hertzog that he would fix it some day if Hertzog would bring it to him. Mrs. Weekley, the mother-in-law of defendant, testified that Hertzog had the gun at her house; that he, on the Sunday referred to, came there; was drinking at the time; took some dinner; that the gun was hanging up in the rack in the house; that defendant said, "I believe I will take my gun home with me, and get it fixed;" and that he took it away with him. On the return of said defendant to Simpson, he was met at the railroad platform by Russell and others. Defendant, Russell, and others then went down the railroad track together. Defendant had some whisky, and a Mr. Seamon had a quart. Defendant says that they drank it. After they drank this whisky, defendant and Russell started along the railroad track in the direction of their homes, accompanied by some other persons. They stopped some distance from the platform, and engaged at target shooting with the gun. Afterwards a witness saw them coming up along and near the track in a meadow, acting "just like us boys used to play leapfrog." This was in the meadow of C. C. Curry, who swears that he first heard Hertzog asking Russell to go home with him, but Russell did not want to go; "that they were down off the track in my meadow; that they had hold of each other like two boys, playing. * * * I heard Hertzog say, 'I'll shoot you.' * * * He released Russell, and went on the track, took up the gun, and cut away at Russell. Russell was down in the meadow, and Hertzog was on the track. He shot just as he took aim." Witness further says: "Russell never fell or hollowed. He just kept walking around and around, and Hertzog stood on the track. Then Hertzog laid the gun down, went down, and got hold of Russell." Witness says that, after some time, Hertzog said to Russell again, "I will shoot you;" that he got the gun the second time, and took up the track, and Mr. Russell walked up the meadow; and he (Hertzog) shot at him (Russell), and he never fell or hollowed again. When this shot was fired, the parties were about 50 feet apart. It was 15 or 20 minutes after the first shot. It is further shown that Hertzog reloaded his gun, and that Russell got upon the railroad track, and sat down there, where he sat for 15 or 20 minutes; that Hertzog in the meantime had come up to within 7 or 10 feet of Russell, and then said, "Damn you! I am going to kill you;" that Russell begged him not to do so, drew his hand above his

head, and attempted to get up, when Hertzog shot him again; and that Russell fell, and never moved. Witness says that Hertzog then put a load in his gun, laid it down on the track, walked up and took Russell by the collar, and pulled it open to see where he had shot him. It is shown that Hertzog, as soon as he realized the fact of the killing, and at other times soon thereafter, said that he had killed his best friend. There were several other persons near the place when the shooting occurred, who testified on the trial, and whose evidence differs in some respects from that of Curry, but not as to the main fact. The gun used by Hertzog appears to have been the one brought by him from Grafton on that day. Some of the witnesses say that, after the shooting, Hertzog impressed them as being drunk. Mrs. Hertzog says that he came home drunk that evening; and he swears that he remembered nothing after drinking with Russell and others near Simpson until the next morning, when he was in jail at Grafton. Dr. Ellis, who performed the autopsy on the remains of Russell, says that he found a furrowed wound on Russell's right leg, just above the knee, another in the groin on the left side, and another in the region of the chest, on the left side, where the collar bone couples onto the breast bone, and that the death of Russell was caused by the said gunshot wound. He found the bullet. It was about $20/100$ of an inch bullet. It is not necessary to give more of the evidence. No opinion is expressed as to what it proves. The above facts are stated in order that a fair understanding of the instructions given and refused by the court may be had.

The court, at the instance of the state, gave to the jury the following instructions:

"(1) The court instructs the jury that a man is presumed to intend that which he does, or which is the immediate or necessary consequence of his act; and if the jury believe from the evidence that Grant G. Hertzog, with a deadly weapon in his possession, without any or upon very slight provocation, gave to John Russell a mortal wound, the said Grant G. Hertzog is *prima facie* guilty of willful, deliberate, and premeditated killing; and the necessity rests upon Grant G. Hertzog of showing extenuating circumstances. As they appear from the case made by the state, Grant G. Hertzog is guilty of murder in the first degree.

"(2) The court instructs the jury that if they believe from the evidence that the prisoner, Grant G. Hertzog, willfully, maliciously, deliberately, and premeditatedly killed John Russell, the deceased, they should find the said Grant G. Hertzog guilty of murder in the first degree, although he was intoxicated at the time of the killing.

"(3) The court instructs the jury that Grant G. Hertzog, the prisoner at the bar, whether he be a habitual drinker or not, cannot voluntarily make himself so drunk as to become on that account irresponsible

for his conduct during such drunkenness. He may be perfectly unconscious of the killing of John Russell, and yet he is responsible. He may be incapable of express malice, but the court instructs the jury that the law implies malice in such a case from the weapon used, the absence of provocation, and other circumstances under which the act is done."

To the giving of said instructions, and each of them, the defendant excepted.

Instruction No. 1 is taken from point 11 of the syllabus in the case of *State v. Cain*, 20 W. Va. 681, but it omits a very material and essential part of the instruction in that case. The law is, as stated in that case, that "a man is presumed to intend that which he does, or which is the immediate or necessary consequence of his act; and if the prisoner, with a deadly weapon in his possession, without any or upon very slight provocation, gives to another a mortal wound, the prisoner is *prima facie* guilty of willful, deliberate, and premeditated killing, and the necessity rests upon him of showing extenuating circumstances, and, unless he proves such extenuating circumstances, or the circumstances appear from the case made by the state, he is guilty of murder in the first degree." It will be observed that the said instruction No. 1, after saying to the jury that the necessity rests on Grant G. Hertzog of showing extenuating circumstances, omits the words, "and unless he proves such extenuating circumstances, or the circumstances appear from the case made by the state," he is guilty of murder in the first degree. Murder by poison, lying in wait, imprisonment, starving, or any willful, deliberate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, robbery, or burglary, is murder of the first degree. All other murder is murder of the second degree. Code 1899, c. 144, § 1. In *State v. Cain*, *supra*, and in other cases herein cited, it is held that, where a homicide is proved, the presumption is that it is murder in the second degree. It is *prima facie* attended with malice, which enters into murder as one of its ingredients. If the state would elevate it to murder in the first degree, she must establish the characteristics of that crime; and, if the prisoner would reduce it to manslaughter, the burden of proof rests upon him. *State v. Welch*, 36 W. Va. 690, 15 S. E. 419; *State v. Dodds* (W. Va.) 46 S. E. 228, 231; *Hill's Case*, 2 Grat. 595. The distinctive element in willful, deliberate, and premeditated murder, not in murder of the second degree, is the specific intention to take life. Wherever, therefore, in a case of deliberate homicide, there is a specific intention to take life, the offense, if consummated, is murder in the first degree; but, if there be no specific intention to take life, it is murder in the second degree. The question whether a particular homicide is murder in the first or second degree is one of

fact for the jury. *Welch's Case*, supra. Instruction No. 1 is not only faulty by reason of the omission pointed out therein, but the court thereby instructs the jury that Grant G. Hertzog is guilty of murder in the first degree. We think the jury could not and did not understand the language of the instruction in any other sense. Fairly construed, the instruction has no other meaning. If it be proved that the defendant, with a deadly weapon in his possession, without any or upon slight provocation, gave to the deceased a mortal wound, the defendant is *prima facie* guilty of willful, deliberate, and premeditated murder, because a person is presumed to intend that which is the immediate or necessary consequence of his act. The killing by the defendant with a deadly weapon in his possession, without any or upon very slight provocation, being proved, the jury may presume or accept it as *prima facie* true that the act of the defendant was willful, deliberate, and premeditated, and therefore that the defendant had at the time the specific intention to take life; but this presumption is always rebuttable. As stated above, the degree of murder is always a question of fact to be found by the jury upon facts proved, and presumed from the other facts established in the case. The court therefore erred in giving instruction No. 1.

What has been said concerning the specific intent of the accused at the time of the homicide to take life is applicable to the said instructions Nos. 2 and 3. It is shown by the evidence that the defendant was at the time, and for some time previous to the homicide had been, under the influence of intoxicating liquors. *McClain on Crim. L.* vol. 1, § 161, says: "As has already been explained, some crimes consist not merely in the committing of a criminal act, and the criminal intent inferred therefrom, but, in whole or in part, in the specific intent with which the act is done; and in such cases it is a well-established doctrine that intoxication may be shown for the purpose of negating the existence of such specific intent, by showing that the accused was, at the time of committing the act charged, incapable of entertaining the intent which is relied on as constituting or increasing the criminality of such act." *Bishop's Crim. Law*, vol. 1, § 409, states: "We have seen that intoxication does not incapacitate one to commit the common-law murder or manslaughter, because, to constitute either, the specific intent to take life need not exist; general malevolence sufficing. But where murder is divided by statute into two degrees, and, to constitute it in the first degree, there must be the specific intent to take life, if, by reason of being too deeply intoxicated, the accused person could not have had, so did not have, this specific intent, the murder is not in the first degree." In *State v. Robinson*, 20 W. Va. 740, 43 Am. Rep. 799, Judge Johnson, who delivered the

opinion of the court, says: "After having carefully reviewed the authorities cited by the learned counsel for both the state and the prisoner, it seems to us that there is very little conflict to be found. The court, under such circumstances, must have steadily in view two objects—the safety of society and justice to the accused. We think we are fully authorized, under the authorities, to say that drunkenness is no excuse for crime. At common law the implied malice from his act would doom him to the scaffold, although he was too drunk when he committed the deed to harbor express malice. Now the only change made in the stringent rule of the common law is that where, under a statute, in order to constitute murder in the first degree, deliberation and premeditation are required, upon the question of whether there was on the part of the prisoner deliberation and premeditation, the jury may consider the fact that he was intoxicated at the time of the killing. The change goes no further. Upon the question of whether the prisoner is guilty of murder in the second degree or manslaughter, the jury are not permitted to consider the drunkenness of the prisoner at all. * * * A person who is intoxicated may yet be capable of deliberation and premeditation; and if the jury believe from all the evidence in the case that the prisoner willfully, maliciously, deliberately, and premeditatedly killed the deceased, they should find him guilty of murder in the first degree, although he was intoxicated at the time of the killing. * * * A person, whether he be an habitual drinker or not, cannot voluntarily make himself so drunk as to become on that account irresponsible for his conduct during such drunkenness. He may be perfectly unconscious of what he does, and yet he is responsible. He may be incapable of express malice, but the law implies malice in such a case from the nature of the instrument, and the absence of provocation, and other circumstances under which the act is done. * * * Where a statute establishes degrees of the crime of murder, and provides that 'all willful, deliberate and premeditated killing shall be murder in the first degree,' evidence that the accused was intoxicated at the time of the killing is competent for the consideration of the jury upon the question whether the accused was in such a condition of mind as to be capable of deliberation and premeditation."

Instructions Nos. 2 and 3 are good as abstract principles of law, and were applicable to the facts proved in *Robinson's Case*, supra; but, standing alone in this case, they, in effect, take from the consideration of the jury the evidence given in the case tending to prove the intoxication of the defendant at the time of, and shortly before, the homicide. It is the object and office of instructions to define for the jury, and to direct their attention to, the legal principles

which apply to and govern the facts proved or presumed in the case. The instructions should simply develop the rules of law governing the particular facts (all the facts, not a part only) which the evidence tends to establish; and they (the instructions) are to be interpreted and judged of, not in any abstract way, but with reference to those facts. *State v. Dodds*, supra.

The court should have also given to the jury, in connection with Nos. 2 and 3, an instruction saying that "where a statute establishes degrees of the crime of murder, and provides that all willful, deliberate, and premeditated killing shall be murder in the first degree, the evidence given on the trial tending to prove that the accused was intoxicated at the time of the killing is competent for the consideration of the jury upon the question whether the accused was in such a condition of mind as to be capable of deliberation and premeditation." Failing to do this, it was error in the court to give instructions Nos. 2 and 3.

The defendant asked the court to give to the jury the following instructions:

"(5) The court instructs the jury that if they believe from the evidence that the killing of John Russell by the defendant, Grant G. Hertzog, was the result of a sudden provocation or sudden quarrel, without malice prepense, then the killing is manslaughter."

"(10) The court instructs the jury that before they can find the defendant, Grant G. Hertzog, guilty of the murder of John Russell, they must believe from the evidence, beyond all reasonable doubt, that the said Hertzog was a man of sound sense at the time, and that he unlawfully killed the said Russell with malice aforethought."

But the court refused to give the said last-mentioned instructions, and each of them, to which action of the court the defendant excepted. There is no evidence in the record upon which said rejected instructions, or either of them, could be based. It is not error to refuse an instruction not specially adapted to, nor based upon, the facts of the case which the evidence fairly tends to prove. *State v. Belknap*, 39 W. Va. 427, 19 S. E. 507; *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668; *Hutchinson v. Parkersburg*, 25 W. Va. 226. The court did not err in refusing the proposed instructions.

After the verdict was rendered as aforesaid, the defendant moved the court to set aside the same, and to grant him a new trial, on the ground that said verdict was contrary to the law and the evidence, but the court overruled the motion, and the defendant again excepted. For the errors committed by the court, as hereinbefore pointed out, the last-mentioned motion should have been sustained; and, for the several reasons stated, the verdict of the jury is set aside and held for naught, the judgment of the court there-

on is reversed and annulled, and a new trial upon the indictment aforesaid is awarded to the defendant.

(55 W. Va. 114)

LORENTZ v. PINNELL.

(Supreme Court of Appeals of West Virginia.
Feb. 23, 1904.)

USURY—APPLICATION OF PAYMENTS—RECOVERY—MEASURE.

1. All contracts and assurances made directly or indirectly for the loan or forbearance of money or other thing at a greater rate of interest than 6 per cent., except where such greater rate is allowed by law, are void as to any excess of interest agreed to be paid above that rate.

2. When usurious payments of interest are made upon a debt, the excess of interest so paid above the legal rate shall be applied as partial payments on the principal at the date of such payments, respectively.

3. After usurious interest has been paid, the same may be recovered back, either by action at law for money had and received, or by suit in equity.

4. In such action or suit the measure of recovery is the residue after crediting all payments of usury as partial payments upon the principal.

(Syllabus by the Court.)

Appeal from Circuit Court, Upshur County; W. G. Bennett, Judge.

Bill by L. L. Lorentz against Celia A. Pinnell. Decree for plaintiff, and defendant appeals. Affirmed.

A. M. Poundstone and A. Edmiston, for appellant. Young & McWhorter, for appellee.

McWHORTER, J. On the 20th day of December, 1884, Perry S. Lorentz executed his note under seal to A. M. Lorentz for \$743, payable on or before the 1st day of February, 1885. On the 1st day of February, 1885, the payee in said note assigned the same for value to P. F. Pinnell. Indorsements of annual payments of interest were made upon said note without giving the amounts of the payments, showing that interest was paid thereon to February 1st of each year from 1886 to 1894, both inclusive; and on the 9th day of March, 1895, the said Lorentz made his note, payable one day after date, with interest from February 1, 1894, to Celia A. Pinnell, executrix of Philip F. Pinnell, for the same amount (\$743); specifying further: "This note is given in lieu of a bond made by me to A. M. Lorentz, dated the 20th day of December, 1884, calling for the payment of Seven Hundred and Forty-Three dollars on or before the 1st day of February, 1885, for value received in land, which bond was on the 1st day of February, 1885, for value received assigned and transferred by the said A. M. Lorentz to said Philip F. Pinnell the interest on which bond has been paid up to the 1st day of February, 1894." Indorsements were made on the last-named note without specifying the amount paid, showing payments of interest thereon from February 1, 1894, to the 1st of February of each year

up to February 1, 1900, all paid by said Perry S. Lorentz. And on the 30th day of January, 1901, Lafayette L. Lorentz paid the sum of \$799.47 to the agent and attorney for said Celia A. Pinnell, executrix, "it being the face of this note, and \$56.47 interest thereon from the 1st day of February, 1900, to the 12th day of January, 1901, the day to which interest was calculated." Lafayette L. Lorentz, administrator of Perry S. Lorentz, deceased, filed his bill in the circuit court of Upshur county in the fall of 1901 to recover back the usurious interest paid upon said notes, alleging that excessive and usurious interest had been charged and collected for each of the said years from 1885 until the final payment on January 30, 1901; that usurious interest was charged in said payments at the rate of 8 per cent. or 10 per cent.; and praying that the said Celia A. Pinnell, executrix, be required to answer the bill, disclosing under oath the rate of interest and amount of usury paid to the said P. F. Pinnell in his lifetime, and said executrix after the death of said Pinnell, upon said two notes, at each payment of interest as indorsed thereon, and as set forth in the bill, and that plaintiff have a decree against the defendant for the amount of the usurious interest so paid upon said notes, and the renewal thereof, from the date of the first payment of interest, together with legal interest upon the respective payments of usurious interest from the time they were so made, and for general relief, which bill was verified. The defendant filed her demurrer to the bill on the ground that a court of equity has no jurisdiction to hear and determine the matters alleged in the bill, because, if he had any demand, he had an adequate remedy at law to recover any usurious interest paid within five years prior to action brought therefor, and filed her answer, admitting that the several payments of interest on said note were at the rate of 8 per cent. per annum, making the sum of \$14.86 above the legal interest of 6 per cent. for each payment, and denied the right of plaintiff, in any event, to recover back any of such usurious interest paid to her by P. S. Lorentz prior to the 1st day of October, 1896, the same having been paid more than five years prior to the institution of this suit, and being barred by the statute of limitations, which defendant relied upon as if more formally pleaded, and denied that P. S. Lorentz was compelled to pay such usurious interest, and alleged that it was paid freely, and without any protest or objection. To which answer plaintiff replied generally. The court overruled the demurrer, and referred the cause to a commissioner of the court, with directions to ascertain and report the amount due plaintiff from the defendant as usury paid upon the debt described in the bill, and held that no part of the usurious interest admitted by the answer was barred by the statute of limitations, and directed the commissioner, in mak-

ing said settlement, and ascertaining the amount due the plaintiff, to treat the usurious interest paid from year to year as partial payments upon the debt described in the bill and answer, allowing interest at the rate of 6 per cent. upon the amount found to have been overpaid by the plaintiff, from the time of such payment. The commissioner made his report, ascertaining the amount due the plaintiff to be \$395.06, with interest thereon from the 18th day of October, 1902, as corrected by the court on exception to the report made by the defendant; the commissioner having erroneously based his calculations on the payments for the several years as having been made on the 1st day of February, when in fact they were made on other dates in the succeeding fall of the year. Defendant made other exceptions to the report, raising the question of the statute of limitations as raised by the pleadings, which exceptions were overruled, and the court entered decree for the said sum and the costs of suit, and awarded execution to be levied upon the assets of the estate of P. F. Pinnell in the hands of said executrix.

The questions here for consideration are as to the right of the plaintiff, as the personal representative of P. S. Lorentz, to bring this suit in equity, and whether the court erred in applying the several payments of usurious interest to the principal from the date of said several payments, dating back to the first payments of interest made on the original note.

It seems to be well settled that a debtor paying usurious interest has a right to recover it back in equity, as well as in law, after the same has been paid. See 2 Pom. Eq. Jur.; Clarkson's Adm'r v. Garland, 1 Leigh, 147; Grindler v. Nelson, 9 Gill, 299, 52 Am. Dec. 604; also Davis v. Demming, 12 W. Va. 246. Hogg's Eq. Prin. § 426, referring to section 7, c. 9, Code 1899, says: "Aside from this statute, a bill in equity may be filed for relief on account of money already paid on a usurious contract under the general principles of a court of equity; the measure of relief in such case being the excess paid above the principal and legal interest, with interest on such excess from the time of its payment"—and cites Davis v. Demming, supra; Moseley v. Brown, 76 Va. 419; Munford v. McVeigh's Adm'r, 92 Va. 446, 23 S. E. 857; and Norvell v. Hedrick, 21 W. Va. 529. In Spengler v. Snapp, 5 Leigh, 478, it is held: "Where the debtor seeks in equity an account of and decree for money already paid on usurious contract, the measure of relief is the excess paid above the principal and legal interest; and, if his payments exceed principal and legal interest, the surplus, with interest, shall be decreed to him."

It is insisted by counsel for appellant that, if a court of equity have concurrent jurisdiction with a court of law for the recovery back of usury which has been paid, the court of equity is equally bound by the statute of

limitations; citing *Wood on Lim.* § 58, and *Webb on Usury*, p. 532. True, a court of equity is bound by the statute of limitations, but, when the law applies usurious payments of interest as partial payments on the principal, no cause of action accrues for the recovery of usurious interest paid until the payments together exceed the principal and legal interest. *Campbell v. Sloan*, 62 Pa. 481, was a case where Campbell had borrowed money from Sloan on usurious interest, and gave a note with surety. He paid the usurious interest for some years, when the original note was taken up, and another given for the same amount, with a new surety; and it was held that the original taint of usury attached to all consecutive securities growing out of the original transaction, and none of them, however remote, could be free from it, if the descent could be traced; and it was there held that, "when the new security was taken, all that could have been recovered on the old was the sum actually loaned and lawful interest, less the usurious payments which had been made. These payments, as payments of interest, were avoided by the statute, and became payments on account of the principal." Under our statute (section 5, c. 96), usurious contracts are absolutely void as to any excess of interest agreed to be paid above the rate of 6 per cent. per annum. Hence any payment made and accepted in excess of the legal interest due, under our rule applying partial payments, must apply to the principal debt as of the time the payment is made. For the rule governing partial payments, see *Hurst's Adm'r v. Hite*, 20 W. Va. 183 (Syl., point 1); *Ward v. Ward*, 21 W. Va. 262 (Syl., point 3). The only contract existing between the parties is the note, with legal interest thereon; and, after satisfying the interest which has accrued upon the note to the time of payment, there is nothing left to which any further payment can possibly apply, except the principal of the debt which is past due. As said in *Turner v. Turner*, 80 Va. 379: "The creditor has no right to apply the money paid to him to the satisfaction of what does not, nor ever did, constitute any legal or equitable demand against the party making the payment." Citing *Chitty on Cont.* 1114 et seq. In *Musselman v. McElhenny*, 23 Ind. 4, 85 Am. Dec. 445, it is held: "If usurious interest is taken out in advance, it makes a case of want of consideration in a note covering the amount, to the extent of such interest." And: "When usurious interest is paid on a note after its execution, it amounts to a payment of so much principal, and, if the amount thus paid exceeds the principal, it may be recovered back." *Webb on Usury*, § 461; 2 Tuck. Com. Paper, 130. In *Zeigler v. Scott*, 10 Ga. 389, 54 Am. Dec. 395, it is held that, where a borrower pays the amount of a usurious debt to a lender, he can afterwards sue and recover back the usurious excess in an action for money had and received; and in

Farwell v. Meyer, 35 Ill. 40, it is said that, "although usurious interest voluntarily paid since the passage of the act of 1857 cannot be recovered back, still, so long as any part of the debt remains unpaid, the debtor may insist upon a deduction of the usury therefrom. The usury received is considered as having been extorted by means of the debt, and is to be applied in payment of the same." In *Threadgill v. Timberlake*, 2 Head, 395, the court laid down as a rule of equity to apply all usurious payments to the principal until it is paid, when the remainder can be recovered as so much money had and received.

Counsel for appellant rely upon the more recent Virginia cases (*Munford v. McVeigh's Adm'r*, 23 S. E. 857, and *Crabtree v. Building Association*, 95 Va. 676, 29 S. E. 741, 64 Am. St. Rep. 818), where it is held in the former case that "where usurious interest has been voluntarily paid, as interest, on a debt secured by deed of trust, equity, in a suit to enjoin sale under the debt, will not, after the year within which usurious interest may be recovered by law, apply any payments of usurious interest in reduction of the principal." And in the latter case it is held: "Where payments have been made upon a usurious contract, and the borrower himself applies the payment to the interest, or the lender so applies it with the assent of the borrower, the appropriation so made will not be disturbed, unless within one year thereafter a suit be instituted by the borrower for its recovery, or a suit be brought by the lender within that period, in which case the borrower may set it off against the demand for which he is sued." These decisions are based upon the statute of Virginia, which is essentially different from ours. The Virginia statute makes all contracts and assurances made directly or indirectly for the loan or forbearance of money or other thing at a greater rate of interest than the legal rate to be deemed for an illegal consideration as to the excess, while our statute makes such contracts or assurances absolutely void as to such excess. Section 2823, Code Va. 1887, provides how the excess of illegal interest may be recovered back by the person paying the same, by suit brought for that purpose within one year from its payment; and such suit may be brought even though the borrower has voluntarily paid the same, or so especially applied it. They also cite *Lynch v. Bank*, 22 W. Va. 564, 46 Am. Rep. 520. This was an action by Lynch against the national bank to recover the penalty for usurious interest alleged to have been paid by him, and received by the bank. It is there held (syllabus): "(2) When a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes. (3) An action for the recovery of the penalty prescribed by said section 5198 must be commenced within two years from the time the usurious trans-

action occurred. Each payment of such interest is a transaction, within the meaning of said section, and the prescribed limitation commences to run from that time, although the debt on which such interest was paid remains unpaid." I am unable to see where these authorities can help the case of the appellant. In *Lynch v. Bank* it is distinctly held that each payment of such interest is an independent transaction, within the meaning of the section 5198, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3493], and the statute of limitations begins to run from the date of each transaction. And the same is in no wise affected by our statute. Counsel for appellant contend that each payment of usurious interest of \$14.88 paid by P. S. Lorentz was a separate transaction, and the statute began to run from the date of each of such payments; but, as we have seen, such surplus of interest paid, under our statute and the rulings of this court, must be applied to the principal of the debt as of the date of the respective payments. As was said by Judge Brannon, with reference to payments of usurious interest, in *Reger v. O'Neal*, 33 W. Va., at page 166, 10 S. E. 377, 6 L. R. A. 427: "I think, with O'Neal's counsel, that the payments should be applied when paid, and operate to stop interest on the principal from that date."

Applying these principles to the payments made by appellee and his decedent, there is but one way to arrive at the amount to be recovered, and that is by the usual method of applying partial payments under our law as laid down by this court, and which seems to have been so done by the circuit court, whose decree must be affirmed.

BRANNON, J. (concurring). The court being divided in *Moore v. Johnson*, 34 W. Va. 672, 12 S. E. 918, I simply asserted that one voluntarily paying usury could recover it back, without giving authority. Examination now, I regret to say, brings me to the same conclusion. *Norvell v. Hedrick*, 21 W. Va. 523; *Davis v. Demming*, 12 W. Va. 246; *Zelgler v. Scott*, 54 Am. Dec. 395, note 400; *Spengler v. Snapp*, 5 Leigh, 478; *Munford v. McVeigh's Adm'r*, 92 Va. 446, 23 S. E. 857; *Bexar v. Robinson*, 22 Am. St. Rep. 36, and note; *Wheaton v. Hibbard*, 11 Am. Dec. 284. It is unjust that a voluntary payment should be recovered back. A statute should deny recovery, or section 8, c. 141, Code 1860, denying recovery after a year, should be reenacted. Our Code declares a contract void, beyond legal interest, and a payment of such interest is without consideration and against law. The contract being void, not merely voidable, there is nothing to warrant the payment. *Webb on Usury*, § 461. Section 8, c. 141, Code 1860, gave action to recover within one year usury paid. It was left out of the Code of 1863, and probably the Legislature thought that its repeal would deny any recovery; but, if so, it forgot that, in so

far as that section gave action to recover, it was only declaratory of common law, and, on its repeal, the common law remained, and gave it right of recovery. Common law allowed any rate of interest. It would not originate action for usury, but, the statute making the contract void and illegal, the common law steps in afterwards and gives recovery because the money is paid under a void contract. It occurred to me that as section 8, Code 1860, did not change, but only reaffirmed, the common law giving action, from its repeal we might infer that the Legislature intended to repeal the common law; but I fear we cannot thus hold a repeal of the common law by implication. The Legislature has not denied such a recovery. *Booth v. Com.*, 16 Grat. 529 (by Judge Moncure); *Moseley v. Brown*, 76 Va. 419; *State v. Mines*, 38 W. Va. 125, 18 S. E. 470. We can as well say that the thought was that the common law is sufficient, without the statute, as that it was the intent that the common-law rule should not continue. It is only inference in either case.

(55 W. Va. 108)

COHEN v. KING KNOB CLUB.

(Supreme Court of Appeals of West Virginia.
Feb. 23, 1904.)

SALE OF LIQUOR—BILL TO ENJOIN—SUFFICIENT—ABATEMENT OF NUISANCE.

1. Under section 18, c. 82, Code 1899, an allegation in a bill in equity charging that intoxicating liquors are sold and vended by the defendant at a certain described house, building, or place "contrary to law," is insufficient for uncertainty. It should further allege in what manner such liquors are sold and vended contrary to law—as, without having a state license therefor.

2. A corporation claiming to be a social and literary club, which requires no qualification for membership except the payment of an initiation fee of \$1, for which fee there is issued to the applicant a membership card and a coupon with 20 tickets attached, each "good for five cents for games and supplies," which tickets are received by the general manager of the club in exchange for drinks, one ticket for a glass of beer and two tickets for a drink of whisky, and the members are permitted to buy such coupons with 5, 10, or 20 tickets attached at 25 cents, 50 cents, and \$1 each, respectively, to be so exchanged for such drinks at such club, held to be a fraudulent device to evade the revenue laws of the state, and the house, building, or place where such sales are made will be held, taken, and deemed to be a common and public nuisance, and will be abated as such.

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County; John Homer Holt, Judge.

Bill by H. Cohen against the King Knob Club. Decree for plaintiff, and defendant appeals. Reversed.

Fred O. Blue and John Bassell, for appellant. H. E. Tyson, for appellee.

McWHORTER, J. A. N. Humphreys and four others obtained a charter from the Secretary of State, and organized a corporation by the name of "The King Knob Club," to

be located in the town of Berryburg, in Barbour county. Its objects, as set forth in its charter, are as follows: "For the promotion of sociability, the diffusion of useful knowledge and improvement of the relation of the members of the club and its visitors, as well as for benevolent purposes, and for entertainment and amusement for the members and invited guests, and for the maintaining of billiard and pool tables and games of the like; also card playing and other games for social amusement, and the establishment of a buffet, from which refreshments and drinks may be served for the express use of the club and its members and guests, and for other like amusements and entertainments; and for these purposes desire authority to purchase or lease, sell or convey, real estate or real property of the value of at least five thousand dollars, all of which property to be acquired for the sole use of the corporation and for the purposes aforesaid. The principal features of said club to be entertainments and amusements by card playing and the other games above mentioned, and the serving of refreshments and drinks to the members of said club, its guests and visitors. No such powers and privileges shall be exercised in violation of any law of the state of West Virginia." The corporation adopted by-laws providing that the membership should be limited to 750 persons. A person, to become a member, was required to pay \$1, which had to accompany his application for membership. For this \$1 he received a book or coupons with tickets attached. These coupons were 25 cents, 50 cents, and \$1, with tickets attached stamped or printed: "Club Room King Knob Club. Good for 5 cents for games and supplies. Not good if detached. No. ———." These tickets were to be used for buying drinks or other supplies—one ticket, five cents, for a glass of beer; two tickets for a drink of whisky. The corporation employed a general manager at \$75 per month to keep the club in order and to issue drinks to the club members. It rented a house of five rooms, including a cold-storage room, for which it paid, or was to pay, \$3,000 per annum; subrenting one of the rooms for a barber shop at \$2 per month. The general manager paid \$1.50 per month for another room. The house used by the club for its headquarters is by the evidence variously estimated to be worth from \$250 to \$1,000, and is located within some 25 feet of the business house of H. Cohen, who is engaged in the mercantile business. The club commenced business in the summer of 1902. On the 27th day of September of that year H. Cohen presented his bill in equity to the judge of the circuit court of Barbour county, alleging that the defendant corporation had been guilty, and was then guilty, of selling and vending in said building so occupied by it intoxicating liquors contrary to law, and that by reason of the sale of such intoxicating liquors in said building it had become

and was a common nuisance, under section 18, c. 32, Code 1899, and praying that the same might be abated or closed up as a place for the sale of such liquors contrary to law, and for an injunction against said defendant corporation to restrain and abate such nuisance, and for general relief; upon which the judge granted an injunction as prayed for. Defendant filed its demurrer and answer denying that it was selling intoxicating liquors contrary to law. Depositions were taken and filed for plaintiff and defendant. On the 10th day of October, 1902, the cause was submitted to the court upon the bill and the answer and general replication and upon the depositions taken in the cause, and the court perpetuated the injunction, and gave judgment for costs against the defendant, from which decree the defendant appealed, and says that it was error for the court below to enter the decree of October 10, 1902, in the cause for plaintiff and making perpetual the injunction awarded the plaintiff. Appellant does not argue in its brief the question of demurrer, but says: "We see no reason why such club should have such right to sell or offer to sell, etc., without a license; but the question is, in this case, has the defendant sold or offered to sell to its members? We submit, not"—thus relying upon its defense upon the merits of the case.

State v. Boggess, 36 W. Va. 713, 15 S. E. 423, Syl., point 3: "It is generally sufficient in an indictment to allege a statutory offense in the language of the statute." Section 18, c. 32, Code 1899, provides: "All houses, buildings and places of every description where intoxicating liquors are sold or vended contrary to law shall be held, taken and deemed to be common and public nuisances, and courts of equity shall have jurisdiction by injunction to restrain and abate any such nuisance upon bill filed by any citizen or by the prosecuting attorney of any county in the name of the state of West Virginia, and they may also be abated as such upon conviction of the owner or keeper thereof as hereinafter provided." Under said section 18 an allegation that a person is selling or vending intoxicating liquors contrary to law is equivalent to saying that he is so doing without having a state license therefor. Under section 16 of the same chapter, providing for the sale of spirituous liquors under a state license, it is not made an offense for the vender to sell such drinks "to any person who is intoxicated at the time, or who is in the habit of drinking to intoxication, when he knows or has reason to believe such person is a minor, or of unsound mind, or is intoxicated, or is in the habit of drinking to intoxication, or if he permit any person to drink to intoxication on any premises under his control, or shall sell or give any intoxicating drink to any one on Sunday," except as to persons who have obtained license to sell. Any other person, not having a state license, simply sells contrary to law, whether

he sells to a minor, or person of unsound mind, or intoxicated person, or on Sunday. An allegation in a bill to abate a nuisance, charging that the defendant is guilty of selling and vending, at the house, building, or place in the bill described, intoxicating liquors contrary to law, in the language of the statute, is, in my view of the case, sufficient on demurrer; and in this opinion Judge DENT concurs. If the allegation of the bill be true that the defendant was vending and selling intoxicating liquors contrary to law, its defense would be the possession of a license, and it is incumbent upon it to prove that defense. *State v. Horner*, 52 W. Va. 373, 43 S. E. 89. However, a majority of the court are of the opinion that the allegation should be more specific, and allege in what manner or in what respect such selling and vending was contrary to law—as, doing so without a state license therefor. Hence the demurrer should have been sustained, and the court are unanimously of the opinion that, the plaintiff having made a good case on the proofs, the injunction should not be dissolved, but the plaintiff should be permitted to amend his bill in the particular indicated, and the injunction be perpetuated.

It is insisted by the defendant that technically there was no sale, giving Bishop's definition of sale, "to transfer the ownership for a valuable consideration," and Benjamin on Sales, "the transfer of the absolute or general property in a thing for a price in money." In order to evade the law, the defendant sold the coupons with the tickets attached, and received the price thereof in money. Then the purchaser of the coupon would go to the general manager, the vendor of the drinks, and deliver to him two tickets from a coupon for a drink of whisky, or one ticket for a glass of beer; the price of the coupons and tickets being in the till of the defendant in advance of the sale of the whisky. Is this not as much an evasion of the law as to arrange with a keeper of a "speak-easy" to place the bottle of whisky behind a certain stump, then the purchaser go and take up the bottle, and leave the price of it in money in its place? There are many schemes and devices for evading the law, and the defendant has adopted one which is clearly a mere fraudulent device to evade the revenue laws. This charter was taken out by five persons, among other things, "for the promotion of sociability," and "the diffusion of useful knowledge," and "for benevolent purposes," and "the serving of refreshments and drinks to the members of said club, its guests and visitors"; and, as appears from the testimony in the case, the object of "serving drinks" was the "principal feature" of the "principal features of said club." It made very extensive provisions in the way of numbers of membership, sufficient to include all men in the vicinity of its location who would probably be induced by its very liberal terms to be-

come members of the club. Ordinarily, clubs organized for social purposes and mental improvement are somewhat exclusive, and the initiation fee and dues go into the common treasury, to meet the social expenses of the club, and members do not in any way receive back the fees and dues paid, except in social enjoyment; but here we have a club which has an initiation fee of \$1, but in return the applicant for membership receives a coupon with tickets which will insure him 10 drinks of whisky or 20 glasses of beer. There is another striking difference between the ordinary social club and the "King Knob Club." In the former, persons applying for membership are required to have a certain standard of social standing and moral character, and are voted in by the unanimous or fixed majority of all the members voting on the application of the candidate; but in the case of the "King Knob Club" the only qualification required of the applicant is to pay the \$1, and receive his tickets for the drinks; and these coupons and tickets can be purchased from the general manager or bar-keeper by the members in unlimited quantities. There is no restriction even as to location or residence of proposed members. A traveler passing, or any other person, can call upon the secretary and president at the headquarters of the club, pay his dollar, get his card of membership, and with his coupon and tickets furnished him in return for the \$1 "initiation fee" repair to the bar of the club and receive his drinks in exchange for the tickets. In *State v. Shumate*, 44 W. Va. 490, 29 S. E. 1001, syllabus, it is held: "Under section 1, c. 82, Code 1899, it is unlawful for a literary and social club, without first obtaining a state license therefor, to sell, offer, or expose for sale, to its members, spirituous liquor, wine, porter, ale, or beer, or any drink of a like nature."

For the reasons herein stated the decree is reversed, and the demurrer to the bill sustained. The cause is remanded to the circuit court of Barbour county, with directions to take further proceedings therein as herein indicated.

BRANNON, J. (concurring). In *State v. Parkersburg Brewing Co.*, 45 S. E. 924, 53 W. Va. 591, this court held that an indictment under the same statute involved in this case was bad in merely saying that the defendant sold liquor contrary to law. The opinion by Judge Miller in that case gives very satisfactory reasons for our decision in it, and, as we think, furnishes a vindication of the position of the majority of the court in this case, though the present is a bill in chancery and that was an indictment. The very same act, under the same statute, constitutes the same offense—public nuisance. And for it the statute gives two remedies: the one by indictment, under which three penalties may be imposed—fine and imprisonment and abatement of the nuisance; the

other, abatement of the nuisance. And the penalty under the chancery jurisdiction is very severe, as it closes a man's business, deprives him of the use of his house for a certain purpose, and deprives him of a livelihood. We do not condemn the statute. We use these remarks about it only to show that the severity of the penalty calls for full, fair notice of the particular acts wherein the unlawful sale consists, because unlawful sale may be in many ways—sales without license, sales on Sunday, to infants, to habitual drunkards, and other ways. Fair notice of the act making the offense is required by principles of criminal pleading. Besides, when the very same act is made the ground of penalty both on indictment and bill, why require the specification in the one case and not in the other?

POFFENBARGER, P., and MILLER, J., concur in this opinion.

(56 W. Va. 84)

WILLIAMS v. BELMONT COAL & COKE CO.

(Supreme Court of Appeals of West Virginia.
Feb. 23, 1904.)

INJURY TO EMPLOYEES—NEGLIGENCE—DANGEROUS PREMISES—ENTRY BY INVITATION—ASSUMPTION OF RISK—MINORS—ORDINARY CARE.

1. One who enters upon the premises of another as a servant of the proprietor, for the purpose of performing labor thereon for the proprietor, whether in pursuance of a contract with the owner of the property, or as the servant of an independent contractor engaged in the performance of work thereon, is not a trespasser or a mere licensee. He is deemed to be upon the premises by invitation of the owner, who owes him the duty of keeping the premises in a reasonably safe condition.

2. A person so entering upon the premises of another, however, does so subject to the doctrine, "*Volenti non fit injuria*," and takes upon himself the risk of all dangers attendant thereon of which he has knowledge.

3. The principle of the assumption of known risks and dangers is applicable to minors, when there is specific and positive evidence showing that the risk in question was comprehended.

4. A dark tunnel, leading through a hill to a coal mine in another hill back of it, used by the owner of the mine for hauling coal from it, by means of an electric motor, and also by the miners in going to and returning from their work in the mine, with the knowledge and consent of the owner, and as the usual and customary way of ingress and egress, is a place in respect to which the owner of the mine owes to his employees the duty of ordinary care for their safety when so using it.

5. A boy 15½ years old, and of at least ordinary intelligence, who had worked with his father in such mine, and had passed through such tunnel in going to and returning from his work on several successive days, and started alone through such tunnel after having been warned by the father to be careful, and, while passing through it, was run over and killed by the motor, must be deemed to have assumed the risk attendant upon such palpably dangerous undertaking.

6. A minor who enters the employ of another assumes the risks of all such apparent dangers

as he is capable of comprehending and avoiding, and, in a suit against his employer because of his death by reason of the alleged negligence of his employer, it must be shown that his death was occasioned by negligence on the part of the employer, other than such apparent danger.

7. Points 3, 4, and 5 of syllabus in *Ketterman v. Railroad Co.*, 37 S. E. 683, 48 W. Va. 606, approved and applied.

8. If an exception for allowing or refusing to allow a question to be answered by a witness fails to give the answer of the witness, or what is expected to be proved by him, the appellate court cannot determine the relevancy, admissibility, or value of the answer, and for that reason the exception will not be considered by it. (Syllabus by the Court.)

Error to Circuit Court, Kanawha County: F. A. Guthrie, Judge.

Action by Elizabeth Williams, administratrix, against the Belmont Coal & Coke Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Payne & Payne, A. B. Littlepage, and L. D. Vickers, for plaintiff in error. Brown, Jackson & Knight, for defendant in error.

MILLER, J. Eugene Williams was killed in a tunnel adjacent to and connected with the defendant's coal mines. Elizabeth Williams, his executrix, brought her action in the circuit court of Kanawha county to recover \$10,000 damages for the alleged negligence of the defendant, which, as she claims, resulted in the death of decedent, her son. Upon the trial of the case in the circuit court, the defendant, without introducing any testimony, demurred to the plaintiff's evidence. The court sustained the demurrer, and rendered judgment for the defendant. To that judgment a writ of error was awarded. The plaintiff insists, as the principal ground of error, that the trial court should have submitted the evidence to the jury impaneled in the case.

The declaration contains two counts. The first, among other things, states that on the 22d day of January, 1900, the day on which the deceased was killed, the said Eugene Williams was engaged to work for his father, Augustus Williams, who was then and there employed by said defendant as a coal miner at its coal mines. This count then alleges as follows: "The plaintiff avers that on the day and year last aforesaid, while the said Eugene Williams was rightfully and lawfully in the said entry to the mines of the said defendant, and on the defendant's said railroad which passes through said entry, the said defendant, by its servants, so carelessly, negligently, and improperly conducted themselves in and about the management, control, and direction of the motor, cars, and carriages so used on said railroad that the same, by and through the fault, carelessness, negligence, and improper conduct of the servants of said defendant, then and there about three hundred feet from the drift mouth of said entry, with great force and violence, were driven and struck against the said Eugene Williams, whereby he, the

¶ 3. See *Master and Servant*, vol. 24, Cent. Dig. §§ 601, 602.

said Eugene Williams, was cut into pieces and killed." The second count, without averring any employment of the father by the company, charges that the defendant "was the owner of a certain railroad, to wit, a railroad extending from its tippie at its mines in the said county of Kanawha on, to, and through its main entry to its mines, and of certain motors, engines, railroad cars, and carriages operated under the care and management of certain servants of said defendant; nevertheless, the said defendant, by its said servants, so carelessly, negligently, and improperly behaved and conducted itself in and about the management, control, and direction of said railroad, motors, engines, cars, and carriages, that the same, by and through the default, carelessness, negligence, and improper conduct of the said servants of the said defendant, then and there, at the county of Kanawha aforesaid, with great force and violence, were driven and struck against the said Eugene Williams, by means whereof he, the said Eugene Williams, was then and there, at the county of Kanawha aforesaid, knocked down and killed."

The evidence discloses that the mines and other works of the defendant were separated by what is called "Dry Branch"; that the company's coal tippie is on the Kanawha river; that between the river and Dry Branch there is a mountain, which in the record is designated as the "front mountain"; that beyond Dry Branch is another mountain, in which are the company's coal mines; that from the mouth of the mines there is a trestle across Dry Branch; thence a tunnel through the front mountain to the coal tippie, and also to the river; and that about 600 feet from the Dry Branch entrance of the tunnel, toward the river, the tunnel forks, the left-hand branch turning into another chamber, and going to the coal tippie, and the other branch, continuing to the river entrance, a distance from the Dry Branch entrance of about 2,800 feet. From the mouth of the mines, across the trestle, through the tunnel, to the tippie, the company had its haulage track, over which it carried its coal in cars, as it was taken from its mines. The coal cars were drawn by an electric motor, which would take out a number of loaded cars from the trestle, through the tunnel to the tippie, and return with another train of empties. The latter would then be left on the trestle, and a train of loaded cars made up for the motor, the trestle being used for that purpose. It required about a half an hour to make up a load on the trestle, and about the same length of time for the motor to then make a round trip to the tippie. At the Dry Branch entrance to the tunnel there was a trapdoor, which at the time of the death of Williams was in charge of a boy. What his duties were, are not stated in the evidence. It is also shown that the miners would go through this tunnel from the river to the mines in the morning, and

return through it in the evening, on their way home after the close of their day's work; but it is also proved that their passage through the tunnel was not necessary to enable them to reach the mines, as there was a passway across the mountain from the river to Dry Branch. It appears that at certain places in the tunnel it was dangerous for footmen to meet the motor, but that a person could go through with safety, either by waiting on the Dry Branch side until the motor started into the tunnel with loaded cars, or by learning from the trapdoor boy how long the motor had been gone, so as to determine whether there was sufficient time for the person to travel the 600 feet to the point where the motor track turned off to the tippie; that, if the miner or other person found himself in the tunnel where there was not sufficient room for the motor to pass, he could have the motor stop by a signal with the hand to the motorman; and that the miners, in passing through the tunnel, always carried their mine lamps with them, on their caps. It is further proved that the deceased worked for and with his father in the mines in the rear mountain, beyond Dry Branch, six days before he was killed; that, in going to and from his work, he passed with his father through the tunnel each morning and evening; that, about 3 o'clock in the afternoon of the day on which he was killed, he quit work, and started out of the mines to go to the place where he and his father stayed, his father at the time telling him to be careful; that, after leaving the mines and crossing the trestle, he went in at the trapdoor, and started along the entry through the front mountain, over the motor track; that he was struck by the motor and killed about 300 feet from the trapdoor, and about halfway between the trapdoor and the point where the motor track turns to the left into the other entry, going to the tippie; that, if the boy had not been struck, the motor would have reached the trapdoor, and passed through it, in about 1½ minutes thereafter. It would seem, therefore, that the boy passed through the trapdoor into the tunnel within a few minutes before the time when the motor was due. It is also proved that the motor was about 3½ feet in height; that ordinarily it carried a headlight, which had before that time been broken; that the company had procured another, which did not burn well, and for that reason it had been taken off by the motorman, and the company had sent for another; that the headlight, when on the motor, did not light the track more than 30 feet in front; that at the time of the killing of the boy the motor was not carrying a headlight, for the reason stated, but the motorman, who, in his seat on the motor, could see over the top of it, carried a large torchlight on his head, which could be seen a distance of 200 yards; that the motor did not carry a bell or other instrument for alarm, but, by the singing of the trolley

wire, the motor could be heard coming for a distance of 1,000 feet; that the wheels of the motor and of the cars, and the noise caused by the bumping of the cars against each other, could be heard a distance of from 400 to 500 feet; that no miner's light was seen ahead of the motor by the persons in charge thereof, to indicate that any one was passing along the tunnel; that the motor was going on a down grade at a speed of from 10 to 12 miles per hour, with a train of 10 empty coal cars attached thereto, and could not have been stopped under 100 feet; that the boy was not seen on the track, and was not discovered until after he was killed. No person testifies how or in what position he was when struck. The motor was thrown from the track, and the boy, when found, was under it. It is further shown that the tunnel at the time was not lighted by lamps or otherwise, and that there were two electric wires running through the same. It is proved by the father of the boy that he and the boy were doing a "double turn" (the work of two miners); that in the afternoon of the day of his death, about 3 o'clock, the boy said to his father that he would go out of the mines to provide something for them to eat, and that the father said, "All right; be careful;" that the boy was 15 years and 6 months old, obedient, and industrious; and that father and son were doing about as much as the work of two men. The father also testified that the boy was not stupid; that "he was about as understanding a boy as I had ever seen or had. I have got two more, and he was about the most intelligent boy I ever had." The uncle of the deceased also swore that the boy was considered bright, and fully up to the average. It is also shown that, had the boy waited outside of the trapdoor until the motor returned, made up its load, and started back to the tippie, and had then followed it, he could have passed through the tunnel with perfect safety.

The sole question in the case, as presented by the record, is whether the defendant is guilty of negligence, as alleged. Its plea is, "Not guilty." The evidence proves that Eugene Williams was killed on defendant's premises, used by it as a part of its works for the mining and removal of its coal; that when killed he had left the mines where he had been that day engaged with his father in digging coal, and was then passing through the tunnel on his way to his lodging place, having finished his day's work for the company; that he was working for his father, and under his care and direction; was performing a miner's work; and that he was intelligent, and fully up to the average in mental capacity. There is no suggestion that he was not in the full possession and enjoyment of all of his senses. He had worked six days in the mines with his father, going and returning through the tunnel each morning and evening, to and from his work. De-

ceased was not obliged to pass through the tunnel to reach his work, or to return therefrom. He used the tunnel for his own convenience. He was in no way connected with the work of hauling the coal from the trestle to the tippie. His presence in the tunnel at the time of his death was voluntary on his part. He was under no obligation or duty to the company to be there. No officer or employé of the company had invited or requested him to go there. Neither does it appear that the company ever objected to deceased or any other person going through the tunnel, although it must have known that its employés were making such use of the tunnel. It is stated by the father that on one occasion he saw the motor in the tunnel. It could have been seen, and, no doubt, was observed by the deceased, that the tunnel was not lighted, and that the motor carried neither headlight nor bell. If not so observed in the tunnel, ample opportunity was afforded to see this while the motor remained each trip on the trestle, where it made up its trains. The deceased could have learned, approximately, the location of the motor, when he entered the tunnel through the trapdoor, had he made inquiry of the boy who was in charge of the trapdoor or entrance. It is shown that at the time of the death of the boy he was unseen, and his presence unknown, by the motorman. No claim is made that either father or son was ignorant as to the character of the tunnel, the existence of the trolley track, the trolley wires, the motor, or the method of operating the same. Neither is it claimed that the death of young Williams was the result of wanton, willful, or gross negligence of the company or its employés. The caution of the father to his son indicates that he knew of and appreciated the danger. What, then, were the legal responsibilities and liabilities, if any, of the defendant to the deceased, under the circumstances of this case? As a matter of course, there can be no negligence when there is no breach of duty. It must appear, therefore, not only that the defendant owed a duty, but also that he did not perform it. *Sher. & Redf. Neg. vol. 1, § 15.* Negligence is the doing of something which, under the circumstances, a reasonable person would not do, or the omission to do something, in the discharge of a legal duty, which, under the circumstances, a reasonable person would do, and which act of commission or omission, as a natural consequence directly following, produces damages to another. *Washington v. B. & O. R. Co., 17 W. Va. 190.*

There would seem to be some question as to whether the deceased was, in the strict sense, in the service of the defendant company, after he had quit his work in the mine for the day, and had started on his journey to his lodging place, beyond the front mountain. It is certain that he was not then engaged in any part of the work for which he was employed by the company while he was

in the tunnel where he was killed; but it may be said that he was yet in the service of the defendant as a coal miner or digger, not having severed his relation with the company. In the case of *McGuirk v. Shattuck*, 160 Mass. 47, 35 N. E. 110, 39 Am. St. Rep. 454, in which plaintiff sued the defendants for injuries received by her on her way from her home to her work, she being in the employ of defendants as a laundress, and at the time riding in defendants' wagon, the court there said: "The plaintiff must be regarded as having been in the service of the defendants at the time of the accident. Whether the transportation of the plaintiff was actually gratuitous, as it seems to have been, or whether it was in pursuance of such an understanding between the parties that it may be deemed to have been a part of the contract, in either case it was incident to the service which the plaintiff was to perform, and closely connected with it." However this may be, in the view taken by us of the case that question is not very material.

As hereinbefore stated, the passage of the boy through the tunnel was not a part of his labor for defendant, nor necessarily connected therewith, as he had other means of reaching the mine. Not being directed by his employer to go there, his use of that route was of his own choice, and for his own convenience.

If, however, it can be said that at the time of his death the boy was engaged in the work of his employer, it would not, under the facts and circumstances, materially change the result of the case. A minor, like an adult, assumes the obvious risks of injury from the condition of the business in which he engages; and those are obvious risks which a person of the plaintiff's apparent age, intelligence, and capacity would discover and appreciate by the exercise of ordinary care. *Dresser on Employer's Liability*, § 96. As to the knowledge which a minor in fact possesses, and as to the presumption that he will use reasonable care to inform himself, he stands in no better condition than an adult. *Id.* See cases there cited. Ray on *Neg. of Imp. Duties*, 18, says that where the owner or occupier of land, in the prosecution of his own purposes or business, or of a purpose or business in which there is a common interest, invites another, either expressly or impliedly, to come upon the premises, he cannot with impunity expose him to unreasonable or concealed dangers—as, for example, from an open trap in a passageway. The duty in this case is founded upon the plainest principles of justice. The keeper of a public place of business is bound to keep his premises, and the passageways to and from them, in safe condition, and use ordinary care to avoid accidents or injury to those properly entering upon his premises on business. But this rule only applies to such parts of the building as are a part of, or used to gain access to, or constitute a pas-

sageway to and from, the business portion of the building, and not to such parts of the building as are used for the private purposes of the owner, unless the party injured has been induced by invitation or allurement of the owner, express or implied, to enter therein. In *Sweeny v. Old Colony & Newport Ry. Co.*, 10 Allen (Mass.) 368, 372, 87 Am. Dec. 644, it is said: "In order to maintain an action for an injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff, which the defendant has left undischarged or unfulfilled. This is the basis on which the cause of action rests. There can be no fault or negligence or breach of duty where there is no act or service or contract which a party is bound to perform or fulfill. All the cases in the books in which a party is sought to be charged on the ground that he has caused a way or other place to be incumbered, or suffered it to be in a dangerous condition, whereby accident and injury have been occasioned to another, turn on the principle that negligence consists in doing or omitting to do an act, by which a legal duty or obligation has been violated. Thus a trespasser who comes on the land of another without right cannot maintain an action if he runs against a barrier or falls into an excavation there situated. The owner of the land is not bound to protect or provide safeguards for wrongdoers. So a licensee, who enters on premises by permission only, without any enticement, allurement, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either expressly invited to enter or induced to come upon them by the purpose for which the premises are appropriated and occupied, or by some preparation or adaptation of the place for use by customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter thereon."

The duty of keeping premises in a safe condition, even as against a mere licensee, may prove determinative of liability, where affirmative negligence in the management of the property or business of the owner would be likely to subject persons exercising the privilege theretofore permitted and enjoyed to great danger. But to charge a defendant with negligence on the ground that he has caused a place to be or remain in an unsafe and dangerous condition, whereby accident and injury have resulted to another, he must have done or omitted to do an act by which a legal duty or imposed obligation has been violated. Ray, *Neg. of Imp. Duties*, 20, 21;

Beck v. Carter, 68 N. Y. 283, 23 Am. Rep. 175; *Barry v. N. Y. C. & H. R. Co.*, 92 N. Y. 290, 44 Am. Rep. 377; *Trask v. Shotwell*, 41 Minn. 68, 42 N. W. 699; *Pierce v. Whitcomb*, 48 Vt. 127, 21 Am. Rep. 120. Where there is no nuisance, but a person comes upon the land without invitation, and simply as a bare licensee, and the occupier or owner of the property passively acquiesces in this, if an injury is sustained by reason of a mere defect in the premises the occupier is not liable, for he has not been guilty of any neglect of any duty imposed upon him as such licensor, as the licensee has taken all the risk upon himself, except as against the affirmative neglect of the occupier of the premises. A mere passive acquiescence on the part of the owner or occupant in the use of real property by others does not involve him in any liability to them for its unfitness for use. 10 Allen, supra, 368, 385; *Gillis v. Pennsylvania R. Co.*, 59 Pa. 129, 98 Am. Dec. 317. A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner or person in possession to provide against the danger of accident. 10 Allen, supra, 373; *Orogon v. Schiele*, 53 Conn. 186, 1 Atl. 899, 5 Atl. 673, 55 Am. Rep. 88. Where a person has license to go upon the grounds or the inclosure of another, he takes the premises as he finds them, and accepts whatever peril he incurs in the use of such license. Ray, supra, 25; *Ind., B. & W. R. Co. v. Barnhart*, 115 Ind. 399, 16 N. E. 121. The extent of the liability of the occupier of the land to the person whom he has licensed to come upon that land depends on whether the licensee comes on the land for a purpose in which he and the licensor have a joint interest, or from which the licensor derives a profit, and upon his invitation, express or implied, or whether he comes for his own purposes only, in which last case he is called a "licensee." And where the person coming on the land does so for his own purposes, he is a bare licensee, and he must take the premises in the condition in which they are. *Addison on Torts*, vol. 1, 320, 322; *Cooley on Torts*, 358. It must be remembered that the deceased went into the tunnel for his own purpose and convenience, without invitation from defendant. The company had no interest whatever in the route selected or mode of travel adopted by the decedent in going to and returning from his work in the mines. The company derived no profit whatever from the travel of the boy through the tunnel.

Plaintiff in error cites many decisions to convince us that the trial court erred in refusing to submit the evidence to the jury. The rule in such case is so well established in this state that it is not open to further controversy. In *Butcher v. W. Va. & P. R. Co.*, 37 W. Va. 180, 16 S. E. 457, 18 L. R. A. 519, it is held: "Where negligence is the ground of the action, it rests upon the plain-

tiff to trace the fault for his injury to the defendant, and for this purpose he must show the circumstances under which the injury occurred, and if, from these circumstances so proven by the plaintiff, it appears that the fault was mutual, or, in other words, that contributory negligence is fairly imputable to him, he has, by proving the circumstances, disproved his right to recover, and on the plaintiff's evidence alone the jury should find for the defendant." *Gerity's Adm'x v. Haley*, 29 W. Va. 98, 11 S. E. 901. In *Ketterman v. Dry Fork Railroad Co.*, 48 W. Va. 606, 37 S. E. 683, it is held: "Though questions of negligence and contributory negligence are ordinarily questions of fact to be passed upon by the jury, yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict in opposition to it, it may withdraw the case from the consideration of the jury and direct a verdict. When, in actions for negligence, the facts are undisputed, and such that all reasonable minds must draw the same conclusion from them, it is the duty of the judge to say, if asked, as a matter of law, whether or not they make a case of actionable negligence. In such cases, however, when the facts are in dispute, it is the duty of the judge to submit them to the jury. In actions for negligence, the courts have abrogated the doctrine that a mere scintilla of evidence from which there might be a surmise of negligence is sufficient to carry a case to the jury, and have adopted the more reasonable rule that there is a preliminary question which the judge must decide, if asked—whether, granting to the testimony all the probative force to which it is entitled, a jury can properly and justifiably infer negligence from the facts proved, for, while negligence is usually an inference from facts, it must be proved, and competent and sufficient evidence is as much required to prove it as to prove any other fact." We therefore conclude, as a matter of law, that the facts proved do not make out a case of actionable negligence against the defendant.

But plaintiff in error further complains that the court also erred in refusing to permit the plaintiff to prove the declarations of the motorman and brakeman as to the cause of the injury, made within a few minutes after the accident occurred. *Augustus Williams*, the father of the boy, was asked by plaintiff's counsel: "Did you have any conversation, when you were there to see about your dead boy, with the motorman, or any one connected with the running of that train; and, if so, tell the jury what it was?" This question was objected to by the defendant, and was not answered. But at the close of the evidence of this witness, "plaintiff offered to prove by the witness the declarations of the motorman and brakeman as to the cause of the accident, within a few minutes after the accident occurred, to which the defendant objected, which objection be-

ing sustained, the plaintiff excepted." It does not appear what specific declarations the plaintiff could have proved or expected to prove by the witness. In *Sesler v. Coal Co.*, 51 W. Va. 318, 41 S. E. 216, it is held: "When a question is put to a witness, and the court refuses to allow it to be answered, if the question does not plainly itself import that the answer will prove a fact material, it must appear by a bill of exceptions what was proposed and expected to be proven; else there is no error apparent. If a question objected to is answered, the answer must be shown; else there is no error apparent." *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575; *Union Central Co. v. Pollard*, 94 Va. 148, 26 S. E. 421, 36 L. R. A. 271, 64 Am. St. Rep. 715. If the exception for allowing or refusing to allow a question to be answered by a witness falls to give the answer of the witness, or what is expected to be proved by him, the appellate court cannot determine the relevancy, admissibility, or value of the answer, and the exception will not be considered. *Kay v. Glade Creek Ry. Co.*, 47 W. Va. 467, 478, 35 S. E. 973; *Williams*, after stating what occurred when his boy left him in the mines, says: "And then, in about twenty minutes, or probably longer, twenty-five or half an hour (I couldn't tell you exactly, the length of time), * * * a boy came in the room [mine] and said: 'Mr. Williams, your boy got run over;' and I just dropped everything and went out, * * * and I had to go from one mountain to the other mountain; * * * and, when I got to the place, I seen the motor was off the track, but I didn't know anything about the boy being under there." If statements or declarations were made to the witness by the motorman and brakeman, or by either of them, as to the cause of the accident, such statements could be admitted as evidence only because they were parts of the *res gestæ*. 2 Jones on Ev. § 348, says: "Whether a statement or act is or is not a part of the *res gestæ* depends wholly upon the facts of each case, and it is therefore difficult, if not impossible, to frame any satisfactory definition of the term '*res gestæ*.' But there are certain well-recognized tests or rules which may be applied in determining whether a given statement or act is to be rejected as hearsay, or admitted as part of the *res gestæ*. One of these is that declarations are not admissible if they amount to no more than a mere narrative of a past occurrence. Thus, when the holder of a check went into a bank, and, when he came out, said he had demanded payment, the declaration was held inadmissible. So, where one was fatally injured by a railway train made statements half an hour after the occurrence, the statements were held no part of the *res gestæ*; and, in an action against a township for injuries caused by a defective bridge, statements made by the plaintiff as to the cause and circumstances of the injury were held in-

admissible. The rule has often been declared that the declarations must be contemporaneous with the facts which they illustrate, and many cases might be cited as examples of such rulings. Thus, in a case which has excited much discussion, and which has been regarded as an extreme case, it was held that a statement made by a person immediately after the act, while running out of the room in which her throat had been cut, was incompetent; and in many other cases it has been held that declarations, immediately or a few minutes after the event sought to be explained, could not be received. In these and many similar cases which might be cited the declarations were not so clearly contemporaneous with the transaction in issue as to characterize or explain it. They were mere narratives of transactions wholly completed. These declarations depended for their truth wholly upon the accuracy and reliability of the declarant and the witness, and were not corroborated by any event or fact then transpiring by means of which their truth could be tested." Wharton's Crim. Ev. § 262, says: "*Res gestæ* are events speaking for themselves through instinctive words and acts of participants, not the words and acts of participants when narrating the events. What is done or said by participants under immediate spur of a transaction becomes, thus, part of the transaction, because it is then the transaction that speaks." To be part of the *res gestæ*, the declaration must have been made at the time of the act done, so that the act and the declaration obviously constitute but one transaction. *Western Boatmen's Ass'n v. Kribben*, 48 Mo. 37; 1 Green. Ev. 138; 1 Phill. Ev. 150, 436; *Story Ag.* 150, 152. Therefore any declarations of the motorman or brakeman which might have been given by the witness in response to said question would have been improper, because clearly not constituting a part of the *res gestæ*. The court did not err in sustaining the objection and refusing to allow the witness to answer.

We find no error in the judgment of the circuit court. It must be affirmed.

NOTE BY POFFENBARGER, P. (concurring). The opinion prepared by Judge MILLER proceeds upon the theory that the boy was either a trespasser or a mere licensee, to whom the defendant company owed no duty other than that of refraining from willful injury to him. In that view I do not concur. It does not appear that there was a contract between the company and the boy, but the evidence tends to show that the contractual relation between the father and the company extended to the boy, whose service was to be rendered to the company on behalf of the father. If this did not make him an employé of the company, his relation corresponded to that of a servant of an independent contractor, to whom the owner of the premises owes the duty of providing safe

premises, but not safe appliances, unless he is bound by the contract to furnish them. As the boy was permitted to work in the mine under the father's contract of employment, he was clearly not a trespasser or a mere licensee. He was there by the invitation of the company. It owed him at least as high a duty as is due from a proprietor to the servants of an independent contractor. "In almost every such case there is the further implication that if the contractor brings third persons, his own employés, his partners or assistants, to assist him in executing the contract, such persons are presumably upon the premises by the invitation of the owners, and he owes to them the same measure of care, to the end of promoting their safety, that he owes to the contractor himself; and this, although no contractual relation exists between the proprietor and them. Therefore; where the owner of a building caused a stage to be erected for use by one who had contracted with him to supply the building with fire extinguishing apparatus, and the staging was constructed in a negligent manner, in consequence of which an employé of the contractor was killed, the owner was liable for the death of the employé, although no contractual relation existed between them." 1 Thomp. Com. Neg. § 979.

The tunnel in which the boy was killed, whether part of the mine or not, was so connected with the employment as to impose upon the company a duty to its employés in respect thereto. It was the only convenient way provided for going to and returning from the work. It was used for that purpose, whether built for it or not. It does not appear that any of the miners used the path over the hill, and it does appear that the miners generally went to and from work through the tunnel. It was the usual and ordinary way of ingress and egress. "It is one of the fundamental duties incumbent upon the mine owner to furnish suitable and safe means of ingress and egress for those whom he has employed to labor in his mine." White on Mines & Mining Remedies, § 395. A manufacturing company is liable to an employé for injuries sustained by reason of a defective stairway or approach to the building in which he works. *Fitzgerald v. Paper Co.*, 155 Mass. 155, 29 N. E. 464, 31 Am. St. Rep. 537. In that case, Knowlton, J., speaking of the defendant corporation, said: "It was its duty to provide on its premises a reasonably safe passageway for the use of its employés in going to and from their work." Persons who go upon the premises of another as invited guests, or upon business with, or to perform a service for, him, as in the cases of patrons of a store or custom mill, passengers of a railroad company, and laborers and servants of an independent contractor, may hold the owner to the duty of such reasonable care; but persons who go upon the premises of another

for their own pleasure, without invitation, or upon business of their own, in which the owner is not concerned or has no interest whatever, are mere licensees, if the owner knows of and acquiesces in such use. Otherwise they are trespassers.

I concur in the decision, however. The facts bring the case within the doctrine, "*Volenti non fit injuria*." The deceased knew the dangerous character of the place. He was of sufficient age and intelligence to comprehend the danger, for it was so apparent as to leave no room for doubt. He assumed not only the risk incident to the employment, but also the risk attendant upon the particular journey through that dark tunnel, in which he knew the motor ran. The doctrine applies to a minor as well as to adults, if it be shown that he knew the danger. "This principle has been applied in favor of the master in cases where the injury was caused by the negligence of a fellow servant; by permanent, visible conditions of the plant; by the common operations incident to the performance of his duties; by a defect in an appliance, where the existence of that defect does not imply negligence on the master's part." Labatt on Master & Servant, § 291. This author says the rule above stated differs from the corresponding rule applicable to an adult in one important respect, but does not state any other, although he discusses the question at considerable length, referring to many authorities. The point of difference is thus stated: "In the case of an adult, the servant's liability to recover for injuries resulting from ordinary risks is declared in terms which are indicative of the fact that his comprehension of those risks is presumed, in the absence of evidence which justifies the opposite conclusion. In the case of a minor, on the other hand, the defense of an assumption of ordinary risks is viewed as one which is merely conditional upon the production of specific and positive evidence going to show that the risk in question was, as a matter of fact, comprehended. In short, where a minor is concerned, ordinary risks are, for evidential purposes, always treated at the outset of the inquiry as extraordinary, and the burden of establishing the servant's comprehension of the particular risk is cast upon the employer." The plaintiff shows by her own case that the deceased had for six days been passing through this dark tunnel, and that he was a boy of more than ordinary intelligence. He must have known that it was dark and dangerous, and on leaving his father he was instructed to be careful. In the absence of proof by the plaintiff of the facts precluding recovery, the defendant would be compelled to show them, if it would defeat recovery, but they appear here as a part of the plaintiff's own case.

DENT and McWHORTER, JJ., concur in the views herein expressed.

(55 W. Va. 101)

ARBOGAST v. MYLIUS.

(Supreme Court of Appeals of West Virginia.
Feb. 23, 1904.)

ASSUMPSIT—MONEY HAD AND RECEIVED—CONTRACT—RESCISSION.

1. M., on behalf of himself and P., joint owners of a tract of land, by contract under seal, but which contract was not authorized by P., sold the same to A., receiving from A. on account of the cash payment \$250 and \$50, and A. also paid out for surveying the land for M. \$255. Afterwards, at the suggestion and request of M., the contract was mutually orally rescinded; M. agreeing to repay to A. the said three sums so paid by A., with interest. M., acting upon such oral rescission, resold the land to other parties. *Held*, that A. could recover in assumpsit from M. the money so paid by him.

2. While the general rule is that a contract must be discharged in the same form as that in which it was made, yet the rule does not apply where a parol contract rescinding or modifying a contract under seal has been acted upon, so that it would be inequitable to hold the parties to their original contract.

(Syllabus by the Court.)

Error from Circuit Court, Randolph County; John Homer Holt, Judge.

Action by John C. Arbogast against Charles E. Mylius. Judgment for plaintiff, and defendant brings error. Affirmed.

W. B. Maxwell and Strader & Strader, for plaintiff in error. J. L. Wamsley, for defendant in error.

McWHORTER, J. This is an action of assumpsit brought by John C. Arbogast against Charles E. Mylius in the circuit court of Randolph county, averring that defendant was indebted to plaintiff in the sum of \$1,000 for money before that time paid and expended by the plaintiff for the use of defendant at his request, and in the like sum for money found to be due from the defendant to the plaintiff on account then and there stated between them. With his declaration, plaintiff filed an account against the defendant, consisting of three items:

Cash	\$250
Amount advanced by B. B. Butcher.....	50
Amount paid for surveying.....	265
Total	\$565

The defendant entered a plea of nonassumpsit, and filed a special plea in writing, to which the plaintiff replied generally; the special plea being to the effect that plaintiff ought not to recover in the action, because he says that the several supposed promises and undertakings in the declaration mentioned, if any such were made, were each of them made by the defendant jointly with one James Pickens, who was still living, and not by plaintiff alone; that James Pickens was not named in the writ and declaration. By agreement and consent of the parties, both issues presented by the pleadings were tried at the same time by the same jury, and any proper evidence offered upon either issue was to be heard by the jury. A jury was impaneled and the case tried on the

27th of January, 1903. After the plaintiff had introduced all his evidence, the defendant demurred to the plaintiff's evidence, in which the plaintiff joined. The jury found for the plaintiff a conditional judgment for \$844.60, which is conceded to be the amount of the three items, with interest, and the correct amount of judgment in case the court did not err in overruling the demurrer. The court overruled the demurrer, and entered up judgment for said amount, with costs. The defendant obtained from one of the judges of this court a writ of error and supersedeas, and, for error, says the evidence shows that James Pickens was a joint and equal owner with defendant in the contract of June 19, 1903, whereby a tract of land was sold by defendant and Pickens to plaintiff, and, if plaintiff had any right to recover, it was against both, and, Pickens not having been a party defendant, the case should have been abated upon the issue taken upon the plea of nonjoinder; that the evidence shows that plaintiff still holds the contract of June 19, 1903; that he produced it on the trial, and had never surrendered it, and it was such a contract as could be specifically enforced by complying with the terms thereof; that none of the evidence offered by the plaintiff was germane under either of the counts in the declaration, and that in no event should defendant be charged with the expense of B. M. Yeager in making the survey, because, under the contract, plaintiff was to pay that; and that certainly defendant should not be charged with Pickens' one-half of the expense of the surveyor, Mollohon, because they are jointly liable to pay their said part of the expense. The contract under which defendant claims Pickens is jointly liable with himself is a written contract made June 19, 1903, between James Pickens and C. E. Mylius, of the one part, and John C. Arbogast, of the other part, which is a contract of sale of a tract of about 2,000 acres of land, at \$6 per acre, by Pickens and Mylius, in consideration of \$250 paid to, and the receipt acknowledged by, Mylius; one-third of the purchase money, less said \$250 cash payment, to be paid when the deed provided for in the contract was made and delivered, and one-third in one and the other one-third in two years from the delivery of the deed. Then follows a general description of the land. "Said land to be surveyed, surface measure, by B. M. Yeager and Bernard L. Mollohon, the former to be paid by said Arbogast and the latter by said parties of the first part. Surveying to be done as soon as practicable and deed of general warranty made in accordance therewith." The deferred payments to draw interest, and notes to be executed when deed was delivered, and vendor's lien to be retained for the payment thereof. The contract was signed by Charles E. Mylius and "James Pickens, per C. E. Mylius," and J. C. Arbogast, by E. Hutton. The defendant took

the deposition of Pickens, in which he repudiates this contract. He says in his testimony, "As far as the contract is concerned, I never saw the contract, and knowed nothing about there being a contract in writing." States that some time in the latter part of the summer or fall of 1893 Elihu Hutton came to witness' house, and Hutton proposed to buy his one-half interest in the lands which he supposed were the same mentioned in the contract. Hutton wanted him to go into a written contract that his partner had accepted witness' terms, but witness refused to go into a contract of any kind in writing, "but told him if they would pay the money, and sign the notes for the unpaid purchase money or deferred payments, payable in gold or its equivalent, that he would deed them the land." B. L. Butcher, a witness for plaintiff, says that he and Arbogast were at the court in the fall of 1897, waiting for this case to be reached on the docket; that they were impatient to get away, and went to Mylius, in the old courthouse, with a view of settling the case, and, after talking the matter over, he agreed to all the statements witness made to him. He agreed that he was to return the money that Mr. Arbogast had advanced him. Witness said to him, "What is the use to law about a case we have agreed upon?" "He said John had sued him, and he didn't know whether he would ever pay him or not." Butcher was asked: "What money was mentioned that was to be refunded to Mr. Arbogast at the May term of this court, in May, 1894, under the agreement in which the contract was to be rescinded?" A. I don't know. There was only three items. The \$250 cash at the time, and the \$50. I was present when the two payments had been made, and we both knew of the surveying expenses. I am sure Mr. Mylius knew, and perhaps told me." That Mylius agreed to refund the three items—the \$250, the \$50, and the surveying amount. "Mr. Mylius intended to have the land surveyed before that, whether we took it or not." That he wanted to pay the money back, to avoid litigation and get back the title to his property. "I think at the time we had the conversation with him the contract was misplaced. No one seemed to know where it was. We thought Major Harding had it. It was mislaid for some time." When asked: "Did Mr. Pickens ever approve this contract?" A. I think he refused this contract, and refused to sign it." That Mr. Pickens disapproved the contract. Col. Elihu Hutton, a witness for plaintiff, says he signed the contract for Mr. Arbogast, and Mr. Mylius signed it for himself and Mr. Pickens; that in 1894 Mr. Mylius, Mr. Butcher, and witness went over this business, and Mr. Mylius said he was willing to refund their money if they would give him back his property. "Q. Do you know whether they arrived at an agreement at that time? A. They did, as between Mr. Butcher, myself, and Mr. My-

lius. Q. State whether you had any communication from Mr. Pickens, or any conversation in relation to this contract to which Mr. Mylius had signed Mr. Pickens' name? A. I did. I saw Mr. Mylius and Mr. Pickens; and Mr. Pickens said he wouldn't sign the contract, but he would comply with the conditions of it—if he was paid up in gold he would make a deed for it." He said Pickens didn't repudiate the contract, but he would not sign it. On cross-examination, witness stated that he and Mylius had gone to see Pickens immediately after the preparation of the contract; that they wanted his sanction in the matter. They showed him the contract, and he said if it was complied with it would be satisfactory with him, except the gold part. He wanted it to be paid in gold. Maj. Harding testified that he wrote the contract; that, after it was written, some of the parties took it away. Later some of them claimed that he had it, but he had made a search of his papers, and it was not there, and he did not recollect when he next saw it. It could not be found when this suit was brought. Was not present when the rescinding of the contract was had in May, 1894. B. M. Yeager testified that he aided Mr. B. Mollohon in the surveying under the contract in the fall of 1893; that they received payment for their work from Mr. Arbogast—he thought, about \$250; that his receipt was in the papers. The receipt filed in the case, signed by B. Mollohon and B. M. Yeager, is for \$255.66. He said on one or two occasions Mr. Mylius had asked him if he could not go and survey the land. "He said Mr. Pickens had been making a great many sales, and he did not know what land he had left." That was before they did the work—he thought, in the spring of 1893. On cross-examination witness says he never promised to go until he got a letter from Mr. Arbogast, that he had bought the land, and that it was at his request that he did the work. Plaintiff, Arbogast, testified that in May, 1894, Mr. Mylius met him in Weston. They went to Buckhannon together, and had a conversation. Mylius "said he had been over to Beverly, and had arranged with Butcher to pay back all the money paid out on this contract, if we would release him; and I told him if it was satisfactory with Butcher it would be all right with me." Witness says in October, 1897, at the old courthouse at Beverly, Mr. Butcher and he had a conversation with Mylius, and made an attempt to get the matter settled without going any further with the suit. They talked the matter over, and they asked Mylius if he didn't agree to pay back the money they had advanced, "and he said he had agreed to do these things, and he said I had brought the suit, and, if he could get out of paying it, he would." That "he admitted he was to pay back all the money we had paid out on the land—the \$250, the \$50, and the \$255.66. These items were all named by me on the

train at Buckhannon, and he agreed to pay all back." Witness stated that, as to delivering the contract to Mr. Mylius, he never saw the contract, but no one seemed to know where it was. At the time the arrangement was made, it was thought that Col. Hutton had it, and then they thought Maj. Harding had it, and finally they came to the conclusion that Mr. Mylius had it. That he didn't know where the contract was found. That Mr. Mylius told him on the train that he had a chance to sell the land for more money, and, if they held him to the contract, he would have to bring suit, and that, if they would release him from the contract, he would pay back all the money. Witness stated that he had complied with the contract as far as he knew how, in releasing Mylius; that no writing of release had ever been asked for, but that he had always been ready and willing, and was yet, to make such writing. There was never anything said about a writing of any kind to release him. Plaintiff testifies that in the conversation on the train, going to Buckhannon, he had surrendered all his rights, and never considered that he had any rights there afterwards, and that Mylius should take the land and do as he pleased with it, under the consideration that he pay back this money, and that Mylius had told him afterwards, in 1897 or 1898, that he had made sale of the land for \$10 per acre.

The dealings seem to have been between Arbogast and Mylius, and from the evidence introduced by Mylius himself, James Pickens, the only witness introduced by the defendant, says he never executed the contract, and it is not shown that he authorized defendant to sign his name to it, and the defendant does not go upon the witness stand to testify that he was authorized to make the contract. It is clearly shown that the defendant agreed to pay back all the money that had been paid—the three items mentioned in the account—in consideration of his release from said contract. He was so released orally by Arbogast, and the defendant acted upon such release, and resold the land at a very much higher price, as stated by himself to Arbogast, than it was sold under the contract so released. While "the general rule is that a contract must be discharged in the same form as that in which it was made," yet there are exceptions to said rule. "By the weight of authority, in this country, at least, the rule does not apply where a parol contract rescinding or modifying a contract under seal has been acted upon, so that it would be inequitable to hold the parties to their original contract." Clark on Contracts, 617. It is claimed by plaintiff in error that the contract in the case at bar, not being surrendered, could be by Arbogast specifically enforced. The contract having been rescinded by mutual consent, and Mylius having in good faith acted under that rescission by a resale of the property, Arbogast would be

estopped from the specific enforcement of it. The oral rescission of the contract was made at the suggestion and request of defendant, Mylius, and he did not ask for a writing releasing him, but accepted the oral release and acted upon it; and, the plaintiff having in good faith released the defendant, the defendant, by reason of his promise and agreement, became personally liable for the repayment of the money advanced to Mylius, and paid out on account of the surveying. Plaintiff in error says he should not, in any event, be required to pay Pickens' part of the cost of surveying, yet, in securing the release, he was acting for himself, and the release by Arbogast was a good consideration for his promise and agreement to pay back all the money paid by Arbogast, who had no further interest in the land, and derived no benefit from the survey made of the same.

The plaintiff, having done everything that was required of him by the defendant to release him from his contract, and expressed himself ready and willing to do anything further that might be necessary, showed himself entitled to recover in this case on the common counts in assumpsit; and the court did not err in overruling the demurrer to the evidence, and the judgment is affirmed.

(55 W. Va. 134)

PARKER v. NATIONAL MUT. BLDG. & LOAN ASS'N.

(Supreme Court of Appeals of West Virginia.
Feb. 23, 1904.)

**TRIAL—INSTRUCTIONS—SUBMISSION OF ISSUES
—REAL ESTATE AGENT—COMMISSIONS.**

1. An instruction embodying an abstract proposition of law, without in any way connecting it with the evidence or indicating what facts the jury must find from the evidence, in order to make it applicable to the case, ought not to be given; and, if the court can see that such an instruction has confused or misled the jury, the judgment resulting from the verdict will be reversed.

2. An instruction, though correct in law, should be refused unless there is a basis for it in the evidence, and it is the province of the court to determine whether there is a foundation in the evidence for any particular instruction.

3. Where the plaintiff, in an action at law, fails to introduce any evidence at all to prove a fact essential to his recovery, it is error for the court to give an instruction which submits to the jury the question of the existence of such fact.

4. Under a special contract between an owner of real estate and an agent for the sale thereof, on commission, at a price agreed upon, the agent cannot recover his commission without proving that he has actually made a sale at the price stipulated, unless it appear that his principal has wrongfully prevented the making of a sale at such price, which would have been made but for his interference, or has waived the strict performance of the contract.

(Syllabus by the Court.)

Error to Circuit Court, Summers County;
J. M. McWhorter, Judge.

Action by C. L. Parker against the National Mutual Building & Loan Association. Judgment for plaintiff. Defendant brings error. Reversed.

R. F. Dunlap, for plaintiff in error. Miller & Read, for defendant in error.

POFFENBARGER, P. The National Mutual Building & Loan Association of New York complains of a judgment of the circuit court of Summers county in a civil action instituted against it by C. L. Parker before a justice of the peace, from whose judgment an appeal was taken.

The first question presented is whether the court erred in refusing to dismiss the action because of defective process in the justice's court. The defendant being a nonresident having property in the county in the form of money due to it, accruing from rents on property and other sources, an attachment was sued out at the commencement of the action, and served on a number of persons as garnishees. The original summons was returned unexecuted, which made it necessary to issue and have posted a second summons, returnable in not less than one nor more than two months after its date, as provided in section 202 of chapter 50 of the Code of 1899. The transcript of the justice's docket and said second summons shows that it was made returnable on the 21st day of July, 1901, but an affidavit found in the record states that it was in fact returnable on the 20th day of July, and that afterwards, on the 29th day of July, the justice altered the return day of the summons and date thereof in his transcript, so as to read July 21st, instead of July 20th. On said 20th day of July the defendant appeared by its attorney, and was granted a continuance until the 27th day of July, when another continuance was had, by agreement of counsel, until July 29th, on which day the parties again appeared, and the transcript says the defendant appeared specially for the purpose of moving the court to quash the summons, and also the attachment and affidavit, which motion was overruled, and a trial was had, resulting in a judgment in favor of the plaintiff for \$132.50. The ground of the objection to said summons is that the day on which it appears now to have been made returnable—July 21, 1901—was Sunday. The ground of the first motion in the circuit court to dismiss was that said second summons was void because returnable on Sunday, and that the justice had no jurisdiction to grant a continuance allowed on the 20th day of July, 1901. After it was overruled, the defendant was permitted to file said affidavit, showing that its attorneys had not discovered that the second summons was intended to have been made returnable July 21st, instead of July 20th, until after the trial commenced and all the evidence had been introduced and the case heard, and that then it offered to prove that the return day was Sunday, July 21st, instead of July 20th, and moved to dismiss the action, and that then the justice, after overruling the motion to dismiss, altered the return day of the summons as stated. Having

done this, the defendant renewed its motion to dismiss the action and the proceedings had therein upon the same grounds as before, and this motion was overruled. An exception was taken to the action of the court in overruling these motions.

The obvious purpose of filing the affidavit was to weaken the effect of the general appearance made by the defendant on the 20th and 27th days of July, which is generally held to operate a waiver of irregularities in the process and invalidity of the return of service. *Thorn v. Thorn*, 47 W. Va. 4, 34 S. E. 759; *Layne v. Railroad Co.*, 35 W. Va. 433, 14 S. E. 123. The latter case holds that an appeal from the judgment of a justice of the peace gives the circuit court jurisdiction of the person of the appellant, and works a waiver of all irregularities in the proceedings before the justice. Unless the defect in the process amounts to more than an irregularity, the court was clearly right in overruling the motion. An action may be commenced before a justice of the peace without any summons, if the parties appear and agree to try the matters in difference between them. This is a liberality in practice which does not obtain in other courts, and upon it might be founded an argument that a justice may acquire jurisdiction upon a void summons if it serves the purpose of bringing the defendant in. That, however, would not be a voluntary appearance and submission of the case by agreement. But this question need not be decided, for the summons commencing the action—the first summons—was good. The second summons, though insufficient and void, was only a step in the action after commencement, and therefore an irregularity in the proceeding. By appearing to the action generally, therefore, the defendant, under the decisions referred to, waived the defect.

Nor, if the motions can be said to have gone so far as to ask that the attachment be quashed, did the court err in overruling them. They were to dismiss, on the grounds stated, the action and all proceedings had therein. This second summons corresponds, in the justice's court, to an order of publication in the circuit court. It is posted to give notice of the pendency of the action and seizure of the property. It is process against the person of the defendant, though necessary to the regularity of the attachment proceeding. The object of the notice is to enable the defendant to appear and plead, as well to the affidavit of attachment as to the merits of the claim or demand. *Wade on Notice*, § 1144. It is process to bring in the defendant, but is not in every sense original process, for jurisdiction of the res is acquired on the first summons with the attachment. Failure to issue or post the second is a means by which it may be lost, but it is an irregularity as clearly cured by a general appearance as want of service or a defective return. It is not a substitute for the first summons and

affidavit, giving jurisdiction, but a subsequent step made necessary by want of service of the first summons, and stands in lieu of service as to the property seized. Appearance to the action, therefore, is an appearance for the purpose of the attachment, and it is so held by the courts. *Andrews v. Mundy*, 36 W. Va. 22, 14 S. E. 414. Had there been a special appearance in the first instance, the case would have presented a different aspect, and would be governed by a different rule. Whether, under the principle announced in *Brown v. Gorsuch*, 50 W. Va. 514, 40 S. E. 376, the second summons might have been reissued, it is unnecessary to determine. This must not be taken to mean that by such general appearance the defendant waives all defects in the attachment. He is in the same situation as if service of the summons had been made upon him—no better and no worse.

Exceptions were also taken to the action of the court in admitting certain evidence, and giving certain instructions, over the objection of the defendant. To ascertain whether there is any error in these rulings, it becomes necessary to show the nature of the demand and the amount and character of the evidence. The claim is for commission on the purchase money of a house and lot in the town of Hinton, known in this case as the "Peck property," sold by the defendant to E. C. Lowe for the sum of \$2,650. Parker claims to have acted as the agent of the defendant in effecting said sale, upon the agreement of the defendant to pay him a commission of 5 per cent. The evidence offered by him in support of his claim is, in substance, as follows: He testified that at the time of the sale he was, and had been for six or seven years, an agent of the association, having authority to collect dues, interest, premiums, and rents, and make repairs upon, and sell, property purchased by the defendant at foreclosure sales, receiving as compensation 2 per cent. for his collection of dues, interest, and premiums, and 5 per cent. on expenditures, repairs, collection of rents, and sales. He had sold three pieces of property, and received a commission of 5 per cent. on the purchase money. In addition to certain letters from Sutherland and Gibson, successive secretaries of the building association, purporting to confer upon him authority to sell certain pieces of real estate, including the Peck property, on a commission of 5 per cent., which were admitted in evidence, he testified to a verbal contract between him and Gibson, in which Gibson said, in response to an inquiry from the witness as to how he was to be paid for looking after the property of the association, "It is our rule that our agents get 5 per cent. on repairs and 5 per cent. in case of sale, and you will be well paid, as you will get 5 per cent. on expenditures for repairs and 5 per cent. on sale of the property when sold." Lowe had come to the witness and asked him if he had the

property in charge, and, upon being informed that he did, submitted a proposition to purchase at \$2,200 or \$2,250, which the witness had sent to the association without disclosing the name of the person proposing to buy, and which was rejected. Later, he submitted the proposition of James H. Miller to purchase at \$2,500, which was also rejected. Being asked on cross-examination whether the association had not given him only leave to submit propositions, he said: "They always, when speaking of the sale of the property, would come at me with that 'cock and bull story' about so much net to the association, and so much commissions, in case I made the sale at a stated price." Some of the letters introduced are evidently intended to show the general employment of the plaintiff by the association as agent to collect dues, interest, premiums, and rents, and look after the property and make repairs as ordered. Portions of others of them relate to sales of property. One bearing date March 18, 1898, contains the following: "In case we can arrange it would you like to have these properties under your control for rental and sale? If so, what commission would you charge for looking after properties against trespasses, duly protect it, rental and collection? Also your commission in case of sale. Upon full information concerning the above we will further advise." Another, dated May 18, 1898, evidently referring to a piece of property other than the Peck property, says: "We hope you will make such efforts for a sale of this and other properties as to which we have written you today. How soon do you think we ought to be able to sell this property and at about what price." Another, dated November 22, 1898, says: "You wrote us a short time ago that you thought you had a customer for the Peck property. What progress are you making and is there any prospect of the sale of this and other properties during the present winter. We will entertain any reasonable offer made for the Hughes and Gores properties, and you can submit such offers as you may receive, or for the Peck property, but you might just as well inform any prospective purchaser of the latter property that we will not sacrifice it." Another, dated October 23, 1899, contains this: "We also note that you are trying to dispose of the Peck property; that you think you have a man that will make a proposition sometime during the present week and will submit his proposition as soon as he makes it. Try and collect the rent before the property is sold, for we will have a poor chance of doing so after it is sold. You must remember that we have paid out through you a very large amount of money to put this property in good condition, and you also know that we ought to have the rents to pay at least on the amounts disbursed. We hope you will push for it without delay." One, bearing date May 7, 1900, says: "We are very anx-

ious indeed to dispose of the Peck property and are at a loss to understand why this fine property does not sell when it is so admirably located on your court house square." One, dated June 8, 1900, says: "We are in no hurry to dispose of the Peck property and we are determined to get our price before we let it go. We enclose an addressed stamped envelope and will thank you to give this letter prompt attention." Another, dated September 18, 1900, says: "We remember the location of the property very well, and it seems very singular to us that you are unable to get a customer for it that would let us out whole. You have our figures and they certainly are not unreasonable and if any of the real estate speculators in Hinton think we are going to sacrifice this property, they are very much mistaken. We wish you would make an effort to find a customer." One, dated November 18, 1900, says: "In view of the prosperous condition in West Virginia, don't you think the time has come when this property ought to be sold. We have laid out upon it since it came into our possession \$635 in repairs, a very large sum of money, and we are willing to sell the property as you know for \$4,000 cash, and allow a commission of 5 per cent for the sale and if we are getting the full rentals out of this property it would amount to considerable more than 10 per cent gross on the price we ask for it. * * * And we have laid out for permanent improvements \$634, bringing the total cost of the property to almost \$4,000. It is unnecessary for the writer to remind you that this property is first-class in all respects and we are astonished at the prospects of a 5 per cent commission that you cannot interest some capitalist in its purchase. We would prefer, of course, to get all cash for the property, but we would be willing to sell it on the same basis, \$2,000 cash, and the balance in two annual payments of \$1,000, with interest at 6 per cent, the purchaser to assume the State taxes for 1900, we having already paid the city taxes. Please take this matter up and endeavor to do something with it and report, and oblige." The last, dated December 28, 1902, says: "In view of the prosperous condition of the State of West Virginia, the great demand for coal and the good prices being paid therefor, isn't it possible for you to interest some capitalist in Hinton in the Peck property? Certainly there is no better property in your town than that facing the Court House square. The very fact of the new Court house being erected, the ground laid out and walled in should of itself very largely enhance the value of all the lots along that street, and it does seem as if the Peck property should fall into the hands of some man of means, if not for immediate improvement to be held as an investment. Hinton is so peculiarly situated geographically that you have only a few streets, the future value of the land on which is assured, and we certainly think that the Peck

property is most desirably located in that respect. There is a good commission in the sale for you and it would pay you to give the matter some attention. We are much obliged to you for your letter."

The evidence for the defendant consists of the deposition of William Gibson, its secretary, together with certain letters filed with it as exhibits, and the evidence of E. C. Lowe, the purchaser of the property. Gibson says Parker had charge of the Peck property for the purpose of collecting rents and making disbursements for the repairs, under instructions from the association, and "general authority that if he should make a sale, at figures which were approved by the association, that he would receive a commission for his services." He denies that Parker ever induced or recommended Lowe as a purchaser, and that he, as secretary of the association, had any knowledge that there had been any negotiations between Parker and Lowe. Some of the letters filed with Gibson's deposition relate to the property in question, but form no part of the correspondence between Parker and the association. Gibson had other parties attempting to sell the property. He files a copy of a letter from Parker, dated April 17, 1898, in which he says he is willing to take charge of the Peck property and do the best he can for 5 per cent. on collection and sales, should there be any. Another is dated February 8, 1901, in which he says he has a proposition of \$2,000 cash for the property, but does not advise its acceptance. Then follows a copy of a letter from Gibson to Parker, dated February 18, 1901, which, after referring to the Miller offer of \$2,500, the appraised value of the property and the amount loaned on it, says: "We will sell the property for \$3000 spot cash net to the Association you to add your commission to that figure, the amount \$3000 to be remitted to this office by draft on New York and on receipt of such sum we will forward a deed for the property. Or we will sell for \$3500, \$2000 of which is to be cash and the balance \$1500 payable in one year from date of sale, with interest at 6 percent and will pay you from this price your commission of 5 per cent for selling, will give the deed and take a trust deed to secure the balance of the purchase price. The buyer under either proposition to pay the taxes for 1901." On February 28, 1901, Gibson wrote again, declining the \$2,500 cash proposition, and repeating the price and terms given in the letter of February 18th. Lowe testifies that Parker did not induce him to buy the property. On the contrary, he went to Parker and made an offer of \$2,000, which Parker promised to submit to the association, and, after waiting five or six weeks for a reply, and calling upon Parker several times for it, without avail, he submitted his proposition direct to the association and began negotiations for the property, which resulted in its purchase.

The defendant objected to the introduction of the letters filed by Parker, on the ground that they are irrelevant. This position is untenable, for the reason that some of the letters bear directly on the question of the employment of the plaintiff to sell the property, and the others show his general employment by the association, under which he had duties to perform respecting the very property sold. It is not improper to show their relation to one another and to the subject-matter of the contract. Some of the letters bear more directly upon the issue than the others, but none of them can be said to be wholly irrelevant.

On the other side, it is urged that the letters filed with Gibson's deposition are inadmissible, because they are not identified nor expressly made parts of the deposition. And the deposition itself is said not to be in the record, because not identified and made part of the bill of exceptions. This objection falls also, for the deposition is described in the bill of exceptions by its date, the notary before whom taken, the place where taken, and the name of the witness. Turning to the deposition printed in another portion of the record, it is found to correspond with the description as fully as if it had been referred to as the deposition marked "B," or in any other manner. The letters annexed to it were called for by the plaintiff on cross-examination of the witness. In response to his demand, Gibson promised to produce and file with his deposition all the correspondence relating to the sale of the property, and the notary attached the letters to the deposition by brass fasteners, and wrote on a sheet of paper attached to them, "Exhibits produced by the witness William Gibson," and then signed his name to the inscription. All these letters, when examined, proved to be just such letters as were called for. It is unnecessary, however, to say whether they are sufficiently identified, for no objection to their introduction was made at the trial. There is an objection to them indorsed on the back of the deposition, under date of July 26, 1901, but the record nowhere shows that the introduction of any of them was objected to at the trial. If a party can object to the use of a paper brought into a deposition at his own instance, and in the form determined by himself, he has not done it in this instance, for his failure to object at the trial is a waiver. A bill of exceptions says the exhibits filed with the deposition were introduced on behalf of the defendant. Whether sufficiently identified or not, they were introduced along with the deposition, in the presence of the plaintiff and his attorneys, without objection, so far as the record shows, and, under principles too well known to require citation of authority for it, the objection interposed now comes too late.

Bill of exceptions No. 4 contains all the instructions in the record. The argument and references in the bill of exceptions seem to

proceed upon the theory of two instructions. Whether given as one or as two is unimportant. The matter is set out in the bill of exceptions as follows: "The court instructs the jury that where an agent is employed to sell real estate for his principal, if the agent was the procuring cause of the sale of said real estate the agent is entitled to his commissions, without regard to the extent of his exertions, and although the contract commenced by said agent was consummated by the principal himself, or through the intervention of another. And the court further instructs the jury that where a broker or agent employed to negotiate a sale procures a customer for the sale of the said property on the terms proposed by the owner, and the principal takes the further proceedings out of the hands of the broker and completes the sale himself, the agent is nevertheless entitled to his commissions, and the principal cannot deprive him of his rights to compensation by a discharge before the sale is consummated; and this is true where the principal completes the contract with the customer, presented by the broker, on different terms from those stipulated to the broker." The legal propositions stated by these instructions are no doubt correct, but they are purely abstract. They make no reference whatever to the evidence, nor do they submit to the jury the finding from the evidence of the facts giving rise to the law enunciated in them. One of them says: "Where a broker or agent employed to negotiate a sale procures a customer for the sale of said property on the terms proposed by the owner, and the principal takes the further proceedings out of the hands of the broker," etc., the broker is entitled to his commission. Had the court given this instruction in the concrete instead of the abstract form, it would have said: "If the jury believe from the evidence that the defendant employed the plaintiff to sell the property mentioned in the evidence at a certain price, and agreed to pay him, in case he made such sale, a commission, and, in pursuance thereof, the plaintiff procured a customer for the sale of the property on the terms fixed by the defendant, and the defendant prevented him from making the sale by interfering and consummating the sale himself with the customer, they should find for the plaintiff." This would have directed the minds of the jury to the facts necessary to be ascertained by them in order to reach a proper conclusion. An instruction for the defendant embodying the same proposition of law might have been given, and in it the jury would have been told, in substance, that if the plaintiff, acting under such contract of employment, failed to procure such a purchaser, they should find for the defendant. Instructions should apply the law to the facts in the case. "It is not the proper course for the judge to lay down the general principles of law applicable to a case and leave the jury to apply them, but it is his duty to in-

form them what the law is as applicable to the facts of the case. An instruction, however pertinent and applicable it may be, is abstract unless it be made to apply, in express terms, either to the attitude of the parties or to the very facts in issue." *Blashfield on Instr.* § 92. "It is not the province of the judge to impress any particular view of the facts upon the jury, but it is his province to make his charge so directly applicable to the facts as to enable the jury to render a correct verdict. To leave as little room as possible for them to make mistakes in applying the law to the facts, which they may be very liable to do when they have only general abstract propositions given to them in charge, there ought, if possible, to be no room for misunderstanding the charge or its application, and to this end it ought to be specific and direct." *East Tennessee, V. & G. R. Co. v. Toppins*, 10 Lea (Tenn.) 64. "Courts should apply the principles to the facts in evidence, stating the facts hypothetically." *Blashfield on Instr.* § 92. Whether the legal proposition should have been in both forms, or only one of them, depends upon whether or not, looking at the evidence introduced, the court could say there was room or ground for either of the two conclusions presented, dependent upon an issue of fact to be determined by the jury. If there is no evidence whatever upon which one of the conclusions may stand, there is no reason for giving an instruction embodying the hypothesis upon which it is based, nor can the court do so except at the risk of confusing and misleading the jury. The statement of the principle, without any application of it to the facts, or direction to the jury as to what facts they should look for in the evidence, is even more likely to mislead, for the reason that, in the effort to apply it, they are called upon by the court to wrestle with both the law and the facts, and form for themselves the hypothesis upon which the conclusion depends, and it leaves room for the jury to form two, where there may be no evidence whatever to support one of them. That is exactly what has occurred here. No evidence of the performance of the contract proved was before the jury. The instructions raised and presented to the jury a question which had no root or foundation in the evidence. Hence it could perform no function except to mislead the jury.

The evidence plainly shows that the plaintiff's contract for commission on the sale of the property was upon condition that he should sell it, or procure a purchaser for it, at a price in excess of \$3,000. He admits in his own testimony that he was always confronted with the proposition of a certain amount net to the association, or for a commission to be paid to him upon a sale at a stated price. He utterly fails to introduce any evidence tending to show any promise on the part of the association to pay him a commission under any other circumstances, and also to show any agreement to pay a commis-

sion upon the sale of the property at a price less than, or even so small as, \$3,000. It appears that the association finally concluded to sell, and did sell, the property for a less sum, but there is not a word of evidence to the effect that it ever promised to pay a commission upon a sale for a smaller amount. It may have been a hard contract, and the plaintiff may have entered into it under a misapprehension of the law, but that cannot relieve him from the terms of his contract. In order to recover, he is bound to show compliance with it. This he has utterly failed to do, so far as the evidence shows, for he does not pretend to show that he procured a purchaser for the property, or made a sale of it, or could have made a sale of it, at a price which, under his contract, would have entitled him to commission. Hence the evidence in the case was such as to afford no room for two conclusions. There is but one side to the case, and, upon that side alone, an instruction should have been given; for there is but one conclusion at which a jury could arrive, without wholly disregarding the evidence. "An instruction, though correct in law, should be refused unless there is a basis for it in the facts of the case, and the evidence or the pleadings make the instruction pertinent; and it is the province of the court to determine whether there is a foundation in the evidence for any particular instruction." *Blashfield on Instr.* § 83. In this state of the case, the character of the instructions left it open to the jury to find either way. While not bound to give any instruction unless requested, it was the duty of the court not to give an instruction of such character as would tend to confuse and mislead the jury. Assuming that the jury understood these instructions to have been given for the plaintiff, it is clear that they were bound to do one of two things, namely, render a proper verdict for the defendant contrary to the instructions, or an improper verdict for the plaintiff in conformity with their view of what the instructions meant. They adopted the latter course, and rendered a verdict wholly inconsistent with the evidence. Upon the evidence, no instruction could properly stand, except one expressly or substantially directing a verdict for the defendant, for there was no evidence to sustain any other finding.

It is no doubt competent for an owner of property and an agent for the sale thereof to make a contract whereby the agent shall have his commission upon the sale, regardless of the price. Where there is a mere employment of a broker to make sale upon commission, without any limitation as to price, he would likely be entitled to his commission upon any sale made to a purchaser procured by him. But to sustain a recovery of the commission under such circumstances, there must be some evidence tending to show that such a contract was made. Where a special contract for commission, dependent upon a sale at a given price, is made, the agent or

broker is bound to as strict a compliance with that contract as any other person who enters into a covenant or agreement to do or perform something as a condition precedent to his right of recovery. In cases of this kind, the agent must find a purchaser, who is ready and willing to buy at the price and upon the terms proposed by the owner, before he can exact his commission. If he does this, and then the owner prevents the sale by the agent by interfering and making the sale himself to the purchaser procured by the agent, at the same or even a less price, the agent may recover his commission. But he must comply with the conditions of his contract by procuring a purchaser who is willing and ready to pay the price. Having done that, he has fulfilled his contract, whether the sale is actually made or not, provided the failure is the result of the wrongful act of the principal. This is the law laid down in *Reynolds v. Tompkins*, 23 W. Va. 229, and it is sustained by the authorities generally. *McFarland v. Lillard*, 2 Ind. App. 160, 28 N. E. 229, 40 Am. St. Rep. 234; *Gellat v. Ridge*, 117 Mo. 553, 23 S. W. 882, 38 Am. St. Rep. 683; *Kost v. Reilly*, 62 Conn. 57, 24 Atl. 519; *Peet v. Sherwood*, 47 Minn. 347, 50 N. W. 241 929; *Fraser v. Wyckoff*, 63 N. Y. 445; *Charlton v. Wood*, 11 Helsk. (Tenn.) 19. Allen, Judge, in *Fraser v. Wyckoff*, states the law applicable to this case when he says: "The right to recover in this action rests upon an allegation of performance, and not upon a waiver or prevention of performance by the defendant. The proof comes entirely short of establishing either a performance or an excuse for not performing. The agreement with the broker was very explicit as to the character and terms of the sale to be accomplished as a condition to the earning of commission. The sale was to be absolute, for a specified sum to be paid to the defendant. The compensation was to be earned when a customer should be obtained who would pay the price named. There is no pretense that such a purchaser has been found, or that such a sale has been made." It is true that the defendant did sell to a man who had previously submitted a proposition to the plaintiff, and this circumstance, no doubt, led the court to give the instructions above quoted, and overrule the motion to set aside the verdict, inadvertently assuming that the evidence brought the case within the principle announced in *Reynolds v. Tompkins*. But there is no evidence tending to show that the purchaser would have paid a price sufficiently large to enable the plaintiff to make his commission on the sale. The plaintiff himself does not testify to any such possibility, much less a probability, and there is no circumstance disclosed by the evidence from which the jury could have inferred that the plaintiff had found, in the person of Lowe or any one else, a man who would pay such a price for the property.

On account of the misleading character of
46 S.E.—52

the instructions given, and the want of sufficient evidence to support the verdict, the judgment must be reversed, the verdict set aside, a new trial granted, and the case remanded.

(55 W. Va. 149)

HARPER v. MIDDLE STATES LOAN,
BLDG. & CONST. CO.

(Supreme Court of Appeals of West Virginia.
Feb. 23, 1904.)

USURY—WHO MAY SET UP—RECOVERY OF USURY PAID—COMMON LAW NOT REPEALED—BUILDING AND LOAN ASSOCIATIONS—CONTRACT.

1. The defense of usury is personal to the debtor, and while he lives no other person can interpose it, except with his consent and concurrence.

2. A purchaser of real estate charged with a usurious debt cannot defend against the usury unless the debtor unites with him in the defense, or his acquiescence in and consent to such defense appears in the record.

3. The common-law right of action for the recovery of usurious interest paid in violation of a statute declaring a contract for the payment of such interest void has not been repealed in this state, and such recovery may be had after the debt and all usurious interest thereon have been fully paid.

4. When a statute that is declaratory of the common law is repealed, the common law is not thereby repealed, and it remains in force.

5. Such parts of the common law as are not displaced by existing statutes, and have not been expressly repealed, are still in effect.

6. As nothing in the statutes of this state relating to the subjects of interest and usury forbids an action by the debtor, after having fully paid his usurious debt, to recover back the unlawful interest so paid, the common-law right of action therefor still exists.

7. A building and loan association contract, requiring the payment of a fixed monthly premium on the loan for an indefinite period of time, is usurious.

8. Where, under such a contract, after applying all sums paid by the borrower as partial payments on the debt, and allowing interest on the principal sum at the legal rate, it appears that more than the full amount of the debt, with legal interest, has been paid, there may be a decree for the excess, if ground therefor has been laid in the pleadings in the cause.

(Syllabus by the Court.)

Appeal from Circuit Court, Tucker County;
John Homer Holt, Judge.

Bill by Riley Harper against the Middle States Loan, Building & Construction Company. Decree for plaintiff, and defendant appeals. Affirmed.

C. O. Strieby, for appellant. Wagner & Helronimus, for appellee.

POFFENBARGER, P. In February, 1894, Mary A. Lawrence borrowed from the Middle States Loan, Building & Construction Company, of Hagerstown, Md., \$500, on stock subscribed for by her in said company in December, 1892, and, as security for said loan, gave a deed of trust upon a certain lot in the town of Davis. In September, 1895, she conveyed this lot to Sallie E. Harper, by deed with special warranty, in which

deed the consideration for the conveyance and contract of purchase are stated as follows: "One Thousand Dollars (\$1,000.00), to be paid as follows, to wit: The party of the second part is to pay to the Middle States Loan, Building & Construction Co. of Hagerstown, Md., the sum of about Five hundred Dollars, or the balance due said Company and said party of the second part is to deliver to party of the first part her note which party of the second part now holds of Three Hundred & Forty-Eight Dollars now amounting to \$389.00 and the residue \$211.00 cash in hand paid the receipt whereof is hereby acknowledged." In November, 1900, Sallie E. Harper and her husband conveyed the property by deed with special warranty, in consideration of the sum of \$1,000, to Riley Harper. The dues, interest, and premium seem to have been paid by Mrs. Lawrence and Mrs. Harper until some time early in the year 1900; and then Riley Harper, assuming that the contract with the building association is usurious, because made in violation of the statutes of this state governing building and loan associations, and that the settlement ought to be upon the basis of an ordinary loan, treating the payments of dues, interest, and premium as partial payments on the debt, refused to make further payments, claimed that the loan had been more than repaid, brought a suit in equity to enforce a settlement and recover the amount overpaid, and sued out an attachment against the building association. Thereupon the building association advertised the property for sale under the deed of trust, and Harper brought an other suit, supplemental in its nature, to enjoin the sale. An injunction was awarded on the 27th day of April, 1901, and at the June term, following, the building association appeared and demurred to the bill, and moved to quash the attachment. The motion was sustained, the demurrer was overruled, the building association filed its answer, and the cause was referred to a commissioner to take, state, and report an account showing the amount due upon the theory of the validity of the contract, and also the amount due assuming the contract to be usurious. Upon the return of the report, showing that, treating the contract as usurious and expunging the usury, there was due the plaintiff the sum of \$109.58, as having been overpaid, the court overruled the exception of the building association to the report of the commissioner in respect to this finding, and entered a decree against said association for said sum, and ordered it to execute a release of the deed of trust. From this decree an appeal has been taken.

As the bill alleged that Sallie E. Harper, to whom the lot had been conveyed by Mrs. Lawrence, "assumed the balance due said defendant loan, building, and construction company on said loan of \$500, as part of the consideration therefor," and exhibited the deed

by which said conveyance was made, which fully sustained this allegation, the demurrer should have been sustained, the injunction dissolved, and the bill dismissed, if nothing further appeared in the record. While there is some conflict in the authorities as to whether usury may be set up by the purchaser of property upon which a usurious debt is secured, it is everywhere held that one who, in purchasing the property charged with such debt, assumes the payment of the debt, cannot make the defense of usury; and, of course, a person claiming under him is in no better condition. *Smith v. McMillan*, 46 W. Va. 577, 33 S. E. 283; *Shufelt v. Shufelt*, 9 Paige, 137, 37 Am. Dec. 381; *Post v. Dart*, 8 Paige, 639; *Sands v. Church*, 6 N. Y. 347; *Morris v. Floyd*, 5 Barb. 130; *Snyder v. Construction Co.*, 52 W. Va. 655, 44 S. E. 250; *Bank v. Warehouse Co.*, 49 N. Y. 642. In many states, as shown by authorities cited in *Lee v. Feamster*, 21 W. Va. 108, 45 Am. Rep. 549, and *Snyder v. Construction Co.*, 52 W. Va. 655, 44 S. E. 250, one who purchases property charged with a usurious debt, without assuming the payment of the debt, or acquires a lien upon the property so charged, may resist the usury therein. But the law in this state is to the contrary. *Lee v. Feamster* expressly so holds. Point 2 of the syllabus reads as follows: "Where a creditor is secured by a second deed of trust on the same property, he has but the equity of redemption, and cannot plead usury against a creditor secured under the first trust deed." Holding the equity of redemption, a second trust deed creditor stands in the shoes of the debtor as to the prior lien. He can pay it off in order to make his own debt good. The equity of redemption is pledged to the payment of the second debt. The subsequent creditor takes under his deed of trust all the beneficial interests of the grantor as security for his debt. But he is not allowed to plead usury in the prior debt, for the reason that the plea of usury is held by this court to be a personal privilege of the debtor, which no other person can assert while he lives. Hence, if it could be said that Mrs. Harper took the property subject to the building association debt, and did not assume the payment thereof, she could not resist payment of that debt on the ground of usury. "The great weight of authority conclusively shows that the policy of the Legislature in adopting statutes of usury was the protection of borrowers against the oppressive exactions of lenders; and it does not tend to the promotion of that policy that other persons than the victims of the usury, or persons standing in legal privity with them, should have the benefit of such statutes; and therefore it has been the general current of decisions that the plea of usury is a defense personal to the borrower, and a stranger cannot avail himself of it." *Johnson, J.*, in *Lee v. Feamster*. The reference in the foregoing quotation to "persons standing in legal privity with" the victims of the

usury does not relate to persons succeeding to the property by purchase. This is made clear by what is said in a preceding part of the opinion, where the plea of usury is compared with, and treated as analogous to, the plea of the statute of limitations, which cannot be set up by any person other than the debtor while he lives, but may be set up after his death by his personal representative. Persons standing in legal privity, therefore, are persons who succeed to the rights of the debtor by virtue of law, and not by contract. The definitions and classifications of privies show a distinction between succession by contract and succession by law, and the use of the word "legal" clearly indicates that the latter kind of succession is referred to in the above quotation. 23 Am. & Eng. Enc. Law (2d Ed.) 101; *Stacy v. Thrasher*, 6 How. 44, 59, 12 L. Ed. 337. Where a person takes a second deed of trust on property, there is privity by contract between him and the debtor, but not privity by virtue of law by descent. *Lee v. Feamster* expressly decides that such privity by contract does not give the right to plead usury. That decision is based upon the Virginia decisions. *Spengler v. Snapp*, 5 Leigh, 478; *Crenshaw's Adm'r v. Clark*, Id. 68. It is approved and followed in *Smith v. McMillan*, 46 W. Va. 577, 33 S. E. 283. There is an expression of opinion, but not a decision, to the contrary, in *Snyder v. Construction Co.*, 52 W. Va. 655, 44 S. E. 250—the result of a misinterpretation of *Lee v. Feamster*. The point did not necessarily arise in that case, and the decision turned wholly upon other grounds. Hence the expression of opinion is obiter, but it is here disapproved, lest it might mislead.

In 27 Am. & Eng. Enc. Law, 952, what purports to be the rule supported by the weight of authority is stated as follows: "The grantee of the mortgagor's equity of redemption, merely, pays therefor only what the equity is supposed to be worth, on the basis that the mortgage is valid; and, if he were to be allowed to defeat it for usury between the mortgagor and mortgagee, he would thereby acquire a much more valuable estate than he bargained for. The rule, accordingly, is that such purchaser must abide by his contract, and submit to the enforcement of the mortgage. This rule applies with additional force in cases where the purchaser takes his deed expressly subject to the mortgage, and deducts the amount thereof from the agreed purchase price. It also applies with even greater force in cases where the deed contains an 'assumption clause,' whereby the purchaser covenants and agrees to pay the mortgage, as a part of the purchase price."

But the general rule prohibiting a stranger to the usurious contract from availing himself of the defense of usury is subject to the qualification that he may plead it for the benefit of the original debtor, or perhaps with his consent. *Berdan v. Sedgwick*, 44 N. Y.

626; *Stayton v. Riddle*, 114 Pa. 464, 7 Atl. 72. The reason generally given for holding the plea of usury to be a personal right of the debtor is that he may prefer not to set it up, because of a desire to avoid litigation, or of his pride of character, or of his conscientious sense of justice. *Tyler*, U.S. 403. Of course, this reason falls when the debtor gives his consent, and the rule goes down with it. Thus, in *Nebraska*, where the defense is held to be strictly personal to the debtor, a purchaser of an equity of redemption was allowed the benefit of it in a suit to foreclose a mortgage, in which the mortgagor was made a defendant, and set up the charge of usury in the debt. *Male v. Wink*, 61 Neb. 748, 86 N. W. 472. A similar case is that of *Faison v. Grandy*, 128 N. C. 438, 38 S. E. 897, 83 Am. St. Rep. 693. This decision also is by a court which rigidly restricts the defense to the debtor. In *Building Association v. Walker*, 59 Neb. 456, 81 N. W. 308, and *Building Association v. Blan*, 59 Neb. 458, 81 N. W. 308, and *Building Association v. Sellars*, 19 Tex. Civ. App. 201, 46 S. W. 370, the same proposition is substantially asserted and applied.

Here *Mrs. Lawrence*, the original debtor, as well as *Mrs. Harper*, filed a separate answer, which, to say the least, gives consent to the claim of the plaintiff. At the hearing they filed a joint and separate answer in the nature of an amended and supplemental answer, averring an assignment of the usury in the debt to the plaintiff, and praying that it be expunged from the debt and decreed to him. This, under the principles above referred to, undoubtedly gave him the right to have the usury eliminated from the debt. By this, *Mrs. Lawrence*, the original debtor, was benefited, for, in the event of a deficiency, she would have been liable to the building association for the balance due. *Male v. Wink*, 61 Neb. 748, 86 N. W. 472.

The plaintiff had a clear right to an adjudication that the debt was fully paid, and to a release of the deed of trust. In addition to this, the court gave him a decree for the excess, as usurious interest paid. In *Moore v. Johnson*, 34 W. Va. 672, 12 S. E. 918, this court divided equally on the question whether, after an usurious debt has been fully paid, the excess paid above the principal sum and legal interest thereon can be recovered. That is the only case in which the question has been presented to this court since the Code of 1868, which contained substantially the present statute governing interest and usury, went into effect. In *Davis v. Demming*, 12 W. Va. 246, it was expressly decided that usurious interest paid could be recovered in a court of equity, and that the measure of relief in such case was the excess paid above the principal and legal interest, with interest on such excess from the time of its payment. The usurious interest sued for in that case, however, was paid when the statute as found in the Code of 1860, c. 141, was in force, the

eight section of which expressly provided that such interest might be recovered in a suit brought within one year from the date of the payment thereof. Radical changes were made in the statute by the revision of 1868. Prior thereto, usury in a contract forfeited both principal and interest. If the defendant sustained his plea of usury, the plaintiff recovered nothing. If a borrower exhibited a bill in equity against the lender to purge the debt of usury, the lender was permitted to recover only his principal, without interest, and was compelled to pay the cost of the suit. Under the Code of 1868, c. 96, and the present statute, the defendant in an action at law can only have relief from the excess above the principal and legal interest, and the right to credit as payments on the debt any sums paid by him as usurious interest. If a borrower exhibits his bill against the lender for the purpose of expunging the usury, the lender is permitted to recover the principal and legal interest, but no costs. Section 8 of chapter 141 of the Code of 1860, giving a right of action for the recovery of usury paid within one year, was omitted from the Code of 1868. The present statute, instead of declaring all contracts for the loan or forbearance of money or other thing at a greater rate than 6 per cent. shall be void, as did section 5 of chapter 141 of the Code of 1860, says they shall be void as to any excess of interest agreed to be paid above that rate, and no further. Whether the Legislature, in relieving the money lender from the harshness of the former law, and omitting the section giving the right to recover back usurious interest paid, after final settlement and payment of the debt, intended that thereafter there should be no such recovery, and, if so, whether, construing the statute according to the rules laid down by the courts, it expressed and recorded that intention, are the questions presented. The only plausible argument seems to be that the statutory provisions on the subjects of interest and usury in the Code of 1860 constituted all the substantive law on those subjects, and were intended to cover them fully, displacing the common law and all prior statutes, and that the cutting out of section 8, giving the right of recovery, and amending other sections, was but a revision of the statutory provisions covering the subjects, which negated any intent to revive the common-law right of action for the recovery of usury. But the Court of Appeals of Virginia, in *Moseley v. Brown*, 76 Va. 419, passing upon almost the exact question, held the contrary. *Burkes, J.*, speaking for the court, said: "The same act [Acts 1874, p. 134, c. 122] repeals section 10, c. 137, Code 1873. That section [10] gave to the person paying the right to recover the excess beyond lawful interest paid in any case. It is argued from the repeal of this section, and the altered phraseology of section 5, that the intention of the Legislature was to take away all remedy for the restitution of usurious

interest after payment. We do not think this is a just inference. In 1849, when the section had its origin, the borrower, as before stated, had his remedy at common law; and the object of the statute, as it seems to us, was to limit the enforcement of the remedy to one year, and also allow a recovery against the party with whom the contract was made, or to whom the assurance was given, although the payment of the usurious excess had been made to his indorsee or assignee. See note, Report of Revisers, 714. The effect, therefore, of the repeal of the section, was to completely restore the common-law remedy, as between the borrower and lender, unless the inference of the intent thus to restore is repelled by the change in the language in section 5."

The section repealed was declaratory of the common law. Where a statute repeals the common law, and is then itself repealed, the common law is revived; and the authorities say that, if a statute that is declaratory of the common law is repealed, the common law more clearly remains in force, for the reason that the statute is an affirmation of it. "That a common-law qualification may have once been prescribed by the statute, also, which has been repealed, does not destroy the common-law qualifications. Such a statute would be only in affirmation of the common law. But if it were repugnant thereto, the repeal of it would, of course, restore the common law." *Moncure, J.*, in *Booth v. Commonwealth*, 16 Grat. 519. That case further decides that the Virginia statute corresponding to section 10 of chapter 13 of our Code of 1899, saying that, when a law which has repealed another is itself repealed, the former shall not be revived without express words for the purpose, applies only to the statute law, and does not affect the common law. On the subject of revival of common law, see, also, *Insurance Co. v. Barley's Adm'r*, 16 Grat. 363; *Nickels v. Kane's Adm'r*, 82 Va. 312; *Rose v. Brown*, 11 W. Va. 122, 142. *State v. Mines*, 38 W. Va. 125, 18 S. E. 470—holding that section 10 of chapter 13 of the Code of 1899 does not apply to a statute repealing the common law, but only to a statute repealing statutes. Where the common law on a given subject has not been expressly repealed or displaced or altered by any statute, it remains in force. *Mathewson v. Phoenix Iron Foundry (C. C.)* 20 Fed. 281, and authorities above cited. Nothing in our statute laws negatives the common-law right of action to recover back unlawful interest paid. Hence it clearly exists.

That there is a right of action by the common law for usury paid admits of no doubt. It has long been considered, in law, that in usurious transactions the borrower acts somewhat under duress; that he is not altogether a free agent in the business; in the language of some of the books, that he is the slave of the lender. We quote from the opinion of Judge Strong in *Philanthropic Building As-*

association v. McKnight, 35 Pa. 472: "That the payment of usurious interest is not a voluntary payment in any such sense as to entitle the receiver to retain the sum paid above legal interest is too well settled to admit of doubt. The money is paid under the constraint of a formal, though illegal, contract. That contract itself was obtained by oppression, by taking advantage of the necessities of the borrower, and, of consequence, so was the usurious interest paid under it. The early disposition of the English courts was to deny the right of a party paying such interest to recover back any portion of the money paid, for the reason that both parties were deemed to be in *pari delicto*, so that the maxim, '*Volenti non fit injuria*,' would apply. 1 Salk. 22. The authority of this decision, however, was soon questioned. Lord Mansfield denied that the case had been declared a thousand times. Cowper, 199. At a late date, distinction was taken between transactions under statutes enacted on grounds of general policy, where each party violating the law is held to be in equal fault, and transactions under the usury laws, enacted to protect weak and needy men from being defrauded and oppressed. To the latter the law does afford relief. It regards the lender on usury as an oppressor, and the borrower as the injured and oppressed. Browning v. Morris, Cowp. 790; Briggs v. Thompson, 20 Johns. 294; Thomas v. Shoemaker, 6 Watts & S. 183. And in none of the cases do we discover that any other evidence of duress or oppression has been held to be necessary, than such as is involved in the act itself of taking the money under the usurious contract. The principle of the statutes of usury seems to be that the lender is the wrongdoer, and that the borrower is his victim." Moseley v. Brown, 76 Va. 419, 425.

The present Virginia statute prescribing the rate of interest does not make the contract void in express terms, as does section 5 of chapter 96 of our Code of 1899. It says all contracts and assurances for the loan or forbearance of money or other thing at a greater rate of interest than 6 per cent. "shall be deemed to be for an illegal consideration as to the excess beyond the principal amount loaned or forborne." Code Va. 1887, § 2818. Our statute says they "shall be void as to any excess of interest agreed to be paid above that rate and no further." Under many of the decisions, the Virginia statute would be construed as giving no right of recovery, because it does not make the contract void to any extent, but only unenforceable, in consequence of which the usurer does not take that which is forbidden by law. But our statute declares the contract void as to the excess, and statutes which do that are generally construed as prohibiting the taking of the excess, and thereby laying the ground for an action to recover it back. The difference seems to be material, for the

revisers of 1849, in their report, recommended that the statute be made to declare that the contract, as to the excess, should be deemed to be for an illegal consideration, and not void; giving their reason for it as follows: "It will be perceived that by the present chapter we propose, in accordance with the English statute of 5 & 6 Will. IV, c. 41, § 1, instead of making the contract void, to declare that it shall, as to the excess, be deemed to be for an illegal consideration. If an illegal contract be executed or performed, and both parties are in *pari delicto*, the general rule is that no action lies to recover back money paid under it. Chitty on Contracts, 499. By the section to which this note is appended, we propose to allow a recovery back." The note was appended to a different section expressly giving a right of action for the excess, without which, in the opinion of the revisers, no recovery could be had if the contract, as to the excess, was one standing on an illegal consideration.

It is urged that the contract is not usurious, but that position is untenable. The deed of trust recites that the bond to secure the payment of which it was executed is "conditioned for the payment of interest on said loan in gold at the rate of six per cent. per annum, payable in equal monthly installments, in advance, on the last Saturday of each and every month hereafter; and in like manner and at like times, a certain monthly premium and certain monthly dues on certain shares of stock of said company now owned by the above bounden until said stock becomes fully paid and of the value of one hundred dollars per share as prescribed by said Articles of Association." The bond itself exhibited with the answer of the building association says the loan was made on five shares of the stock, and the dues on the other five shares represent the premium, and that "the said interest, dues and premiums, amounting in the aggregate to the sum of Eight and $\frac{50}{100}$ Dollars, per month, which said last-named sum shall be payable on the last Saturday of each and every month, until the maturity of the shares of the stock of the said Company, subscribed for by said obligor, and in accordance with the By-laws of said Company." It is shown that the premium was to be paid for an indefinite period of time, and, under the principles announced in Floyd v. Loan & Investment Co., 49 W. Va. 327, 38 S. E. 653, Gray v. Building Association, 48 W. Va. 164, 37 S. E. 533, 54 L. R. A. 217, and other recent West Virginia cases, this makes the contract usurious. It is useless to repeat the reasoning of these cases. Hence they are merely referred to here. It is insisted, however, that the by-laws of the association show that the premium is a fixed and definite premium, payable in installments. If the by-laws found in the record were those under which the contract was made, this position might possibly be sustained, but they are not. The

secretary of the association, whose deposition was taken, admitted this on cross-examination. He stated that the by-laws had been changed by amendment October 24, 1893, and that the copy filed with the answer as an exhibit is a copy of the by-laws as they stood after this amendment was made. The loan was made on the 13th day of February, 1894, one year and eight months before the by-laws were changed so as to read as they now do in this record. As they are not the by-laws under which the loan was made, we are without evidence of the character of the by-laws under which it was made. On that question the record is silent, and the only evidence concerning the nature of the premium is found in the deed of trust and the contract; and the provisions respecting it found there clearly indicate that the premium was a fixed sum, to be paid monthly for an indefinite period of time, namely, until the stock should mature.

For the reasons given, the decree complained of is affirmed.

(119 Ga. 690)

SOUTHERN RY. CO. v. PARRAMORE.

(Supreme Court of Georgia. March 4, 1904.)
CARRIERS—FREIGHT SHIPMENT—ACTION FOR DAMAGES—PLEADING.

1. A plaintiff cannot declare upon a special contract with a carrier, and then, by amendment, claim that he is not bound by the terms of such special contract, and add a new and distinct cause of action.

(Syllabus by the Court.)

Error from Superior Court, Fulton County;
J. H. Lumpkin, Judge.

Action by P. J. Parramore against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Dorsey, Brewster & Howell, Sanders McDaniel, and J. D. Bradwell, for plaintiff in error. J. Howell Green and Green & Preston, for defendant in error.

TURNER, J. P. J. Parramore brought a suit against the Southern Railway Company, alleging that on a certain day he "entered into a contract with said railway company, whereby it was to transport for petitioner five horses and four mules from Gainesville, Georgia, to Sandford, Florida, under the terms and conditions set out in said contract," a copy of which was attached to his petition as an exhibit. He further alleged that while the stock was in transit, and while in the yards of the company at Atlanta, the door of the car in which the stock was shipped came open, and one of the horses fell from the car, falling between it and a platform near which the car was standing, and receiving injuries from which it died. The plaintiff charged that these injuries to the horse were "due to the negligence of said railroad company, in that the car in which

said horses were shipped was defective, the door to said car not being securely fastened, there not being sufficient fastenings upon the same." The value of the horse was averred, and the plaintiff also alleged that by mistake of the agent of the company who made out said contract of shipment the initials of plaintiff's name were transposed, but that he was "the party to whom said live stock was shipped, was the owner of the same, and the party with whom said railroad company dealt, and that said transposition of initials was a mere clerical error." He accordingly prayed that this error be corrected, and that the contract declared on should be in this respect reformed. He also prayed that he might recover of the defendant company the alleged value of the horse, \$200.

The exhibit annexed to the petition purported to be a "live stock contract" between the Southern Railway Company and its connecting carriers, as parties of the first part, and "J. P. Parramore, party of the second part." It recited that the company had received the live stock to be transported in accordance with the terms of the agreement therein set out, and to be delivered to the consignee at Sandford, Fla. This paper further recited that, in consideration of a reduced rate of freight, therein named, the party of the second part covenanted and agreed that he had examined and found in good order and condition the car provided by the company for the transportation of said live stock, and had accepted the same, and agreed that it was suitable and sufficient for said purpose. There were various other stipulations and conditions set forth as constituting part of the agreement, but it is not essential, for the purposes of this opinion, that they should be set out at length. The original contract was, if the alleged copy of it be correct, signed in the presence of two witnesses by "W. A. Ramson, Agent for the Company," and by "J. H. Martin," his signature appearing in the space provided for that of the shipper, with no indication as to the capacity in which he signed.

The defendant demurred to the petition on the ground that the facts therein set forth and the exhibit attached thereto disclosed the making of a contract under the terms of which the company was not liable for the damages claimed. The court passed an order reciting that the demurrer was "sustained, with leave to plaintiff to amend in ten days." Within the time limited the plaintiff offered an amendment, the material allegations of which were, after certain portions of it had been eliminated by order of the court, substantially as follows: The "contract set out in plaintiff's original petition is nothing more than the bill of lading" issued by the company, and, "as the same was not signed by the plaintiff, or by any one authorized by him to sign it for him," none of the "statements in said bill of lading in favor of the defendant [could] be invoked by said de-

fendant." The recital in the bill of lading to the effect that the shipper had examined the car and found it in good condition and suitable for the transportation of the stock, was "not true, but, on the contrary, the car in which said live stock was shipped was in bad condition at the time that said live stock were loaded upon it in Gainesville, and at the time it was started from Gainesville with said live stock in it the defects" set forth in plaintiff's original petition then existing; and that, "in addition to the freight named in said bill of lading, plaintiff paid said defendant company the local rate on said live stock from Gainesville to Atlanta, which was by mistake omitted from said bill of lading, though collected from plaintiff by said railroad company, wherefore plaintiff prays that said bill of lading be further reformed by inserting said local freight." To the allowance of this amendment the defendant objected on the grounds (1) that the plaintiff thereby sought to introduce a new, additional, and independent cause of action, and (2) that the effect of such amendment, if allowed, would be to convert a suit upon contract into a suit in tort. These objections, which the defendant urged by way of demurrer to the proposed amendment, were overruled by the court, and the defendant excepted. In the original petition the plaintiff declared upon a contract, a copy of which he attached as an exhibit. The original of this document appears to have been a special contract of shipment containing the provisions and stipulations hereinbefore recited. The amendment proposed by the plaintiff disclosed a plain effort on his part to repudiate the special contract and entirely change the character of the action. It is true that the contract was signed by J. H. Martin, instead of by the plaintiff, Parramore; but the latter apparently accepted the reduced rate of freight and other benefits under it, and ratified and adopted it by suing upon it. It might be presumed that Martin had authority from the plaintiff to make the contract in his behalf from the manner in which he declared upon it in his original petition; but, according to a well-considered opinion of this court, it is not necessary to assume that Martin had express authority from the plaintiff to enter into a special contract whereby the defendant company limited the liability which would otherwise rest upon it as a common carrier. *Central Ry. Co. v. James*, 117 Ga. 832, 836, 45 S. E. 223. In that case it did not appear that the person who signed the contract disclosed to the company the name of his principal, as was done in this case. Yet in discussing this feature of the case the chief justice said (page 834, 117 Ga., and page 224, 45 S. E.): "Of course, where the owner of goods does not attend to their shipment in person, but procures another to act in his behalf, who does so without disclosing the name of his principal, the latter is bound by the terms of the contract which

his agent makes with the carrier to the same extent as though the contract was made by the principal in person, irrespective of the question whether the agent did or did not go outside of the authority with which he was vested. This is true for the all-sufficient reason that the principal cannot take advantage of the contract made in his behalf without fully ratifying the act of his agent and becoming bound thereby." We therefore think the amendment offered by the plaintiff in the present case was not allowable for the reason that he thereby sought to repudiate the contract upon which, in his original petition, he based his cause of action, and to substitute therefor an entirely new and distinct cause of action.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 687)

BOWEN v. WYETH.

(Supreme Court of Georgia. March 4, 1904.)
ORDERS—VACATING—DISCRETION OF COURT—REVIEW.

1. Courts of record retain full control over orders and judgments during the term at which they were made, and, in the exercise of a sound discretion, may revise or vacate the same.

2. Such discretion will not be controlled unless manifestly abused.

3. Where a general demurrer was sustained, and the plaintiff during the same term moved to reinstate, offering to amend so as to cure the alleged defects in the original petition, this court will not interfere with the judgment refusing to permit the reinstatement.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by C. H. Bowen against T. B. Wyeth. Judgment for defendant, and plaintiff brings error. Affirmed.

Bowen sued Wyeth for \$600, alleged to be due as salary and commissions for the sale of machines. The petition contained an allegation "that said defendant is the general agent of the American Arithmometer Company" for the South Atlantic states, and that "said defendant, as general agent of said company, employed petitioner to sell said machines" on the terms stated in the petition. The defendant demurred generally and specially. The bill of exceptions recites that after argument on the demurrer the judge stated he would render a decision later, and give the plaintiff 10 days in which to amend, if, in the opinion of the court, the petition was amendable, and the demurrer was sustained. On May 10th the court sustained the general demurrer. On May 11, 1903, the plaintiff moved that the defendant be required to show cause why the case should not be reinstated, and the petitioner be allowed to amend the petition by striking out the allegation that Wyeth made the contract as general agent, and such other amendments as the petitioner may offer, and

the court may think proper. To the petition were attached the proposed amendments. The motion came on to be heard May 22d at chambers. The court refused to allow the case to be reinstated. From the bill of exceptions, it appears that the demurrer was argued in term. It does not appear whether court had adjourned for the term on the day the motion to reinstate was made and the rule nisi granted.

O. E. & M. O. Horton and R. Arnold, for plaintiff in error. V. A. Batchelor, for defendant in error.

FISH, P. J. Courts have full control over their orders and judgments during the term at which they were rendered, and, in the exercise of their legal discretion, may revise or vacate the same. But such motions are addressed to the legal discretion of the court, which will not be controlled unless abused. *Aiken v. Wolfe*, 76 Ga. 816; *Holsenback v. Martin*, 28 Ga. 73. There is nothing in this case to take it out of the ordinary rule applicable to decisions on demurrer. The plaintiff had the right to except to the judgment sustaining the general demurrer. After it was decided that he had no cause of action, he had no right to amend, nor to a reinstatement of the case in order to permit him to amend.

Judgment affirmed. All the Justices concurring, except **SIMMONS, C. J.**, absent on account of sickness.

(119 Ga. 662)

GUTHRIE v. ATLANTIC COAST LINE R. CO.

(Supreme Court of Georgia. March 4, 1904.)
CONTRACT—ACTION FOR BREACH—PRIVITY—PLEADING.

1. Where suit was brought against two railroad companies for damages on account of an alleged breach of contract, and the petition failed to show any privity of contract between the plaintiff and one of the defendants, a demurrer filed by it was properly sustained.

(Syllabus by the Court.)

Error from City Court of Waycross; **J. O. Reynolds**, Judge.

Action by **S. H. Guthrie** against the Atlantic Coast Line Railroad Company. From a judgment for defendant, plaintiff brings error. Affirmed.

John T. Myers, for plaintiff in error. **Kay, Bennet & Conyers** and **Simon W. Hitch**, for defendant in error.

CANDLER, J. The plaintiff brought suit against the Savannah, Florida & Western Railway Company and the Atlantic Coast Line Railroad Company for alleged breach of a contract, a copy of which was attached to the petition. There was no service upon or appearance by the Savannah, Florida & Western Railway Company. The Atlantic Coast Line Railroad Company demurred to the peti-

tion both generally and specially, its demurrer was sustained, and the plaintiff excepted.

The contract for the alleged breach of which the plaintiff sued was made between him and the Savannah, Florida & Western Railway Company; but the petition alleged that the Atlantic Coast Line Railroad Company, operating the line of railroad, had assumed, in writing, the liabilities of the Savannah, Florida & Western Railway Company, and was liable on the contract in question. It was not alleged that there had been any merger or consolidation of the two companies, nor is there anything in the record to show any privity of contract between the plaintiff and the Atlantic Coast Line Railroad Company. We think, therefore, that the ruling in the case of *Hawkins v. Central R. Co.*, 118 Ga. —, 46 S. E. 82, is controlling, and that the court below did right in sustaining the demurrer. See, also, 7 Am. & Eng. Enc. L. (2d Ed.) 104.

Judgment affirmed. All the Justices concurring, except **SIMMONS, C. J.**, absent on account of sickness.

(119 Ga. 686)

GLOVER v. DIMMOCK et al.

(Supreme Court of Georgia. March 4, 1904.)

JUDGMENT—SETTING ASIDE—GROUNDS.

1. It is not a good reason to set aside a judgment that the party against whom it was rendered was prevented from attending the trial on account of the serious illness of her mother, and that the counsel retained by her had, prior to the rendition of the judgment, and without notifying her, caused their names to be erased from the docket, and stated that they did not represent her; it not appearing that she had dismissed them as her counsel, that she made any effort to have the trial postponed, or that she notified any one connected therewith of her inability to be present at the trial.

2. The allegations of the plaintiff's petition, even if true, disclose no reason for setting aside the judgment rendered against her, and the demurrer of the defendants was properly sustained.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; **J. H. Lumpkin**, Judge.

Action by **Laura Glover** against **W. R. Dimmock**, trustee, and others. Judgment for defendants, and plaintiff brings error. Affirmed.

R. O. Lovett and **W. W. Haden**, for plaintiff in error. **J. H. Porter**, for defendants in error.

CANDLER, J. This was a proceeding in the nature of an equitable petition to set aside a judgment. A demurrer to the petition was sustained. The plaintiff, in her bill of exceptions to this court, "for cause of error, says that she was not represented at the time of the rendition of the judgment sought to be set aside, and had a valid, legal excuse for her absence, as set out in her petition made to set aside the same." On this point the petition alleges that, at the time

of the rendition of the judgment against her, the petitioner was detained at home on account of the serious illness of her mother, who shortly afterwards died; that she had employed two attorneys to represent her; and that she afterwards learned that prior to the trial of the case both of her attorneys caused their names to be erased from the docket, stating that they no longer represented her. She also alleged that she had no notice that her attorneys, or either of them, intended to abandon her cause, and did not learn of it until long after the trial at which the judgment was rendered.

1. We are clear that these allegations were not sufficient to support an order setting aside the judgment. The action of plaintiff's counsel in causing their names to be erased from the docket, and stating that they no longer represented her, did not, ipso facto, terminate the relation of attorney and client between them and her. "An attorney cannot, alone and of himself, terminate the relation, to the injury of his client, although the client may end it at any time, without notice, and without showing any cause therefor." 3 Am. & Eng. Enc. L. (2d Ed.) 328, and cases cited in note. It is not made to appear that the plaintiff made any effort to notify any one connected with the case of her inability to be present at the trial, or that she took any steps to have the case postponed or continued. The petition sets up a good cause of action against the plaintiff's attorneys for their gross negligence and wanton abandonment of her interests, but it shows no cause for setting aside the judgment already rendered. *Phillips v. Taber*, 83 Ga. 565, 10 S. E. 270.

2. The case in which the judgment sought to be set aside was rendered arose on a petition for injunction filed by the plaintiff to restrain the sale of certain land under a power of sale in an instrument conveying the land to the defendants as security for a debt. It appears from the petition in the present case that the petition for injunction "alleged that petitioner was not indebted to [the defendants] the amount for which said land was being advertised; that there was usury in the contract on which said paper was founded, and the same was not a conveyance of title." It also appears that the defendants in their answer denied the allegations of usury, but averred their willingness to take a judgment for the amount which the plaintiff admitted to be due. They also prayed in their answer for a judgment for a special lien on the property in question, and the judgment sought to be set aside was framed on this answer. It does not appear from the present petition that in the original petition for injunction there was any prayer that the conveyance be set aside as void for usury. Indeed, it is presumable from the record that, if the plaintiff had been present at the trial and represented by attorneys, no different result could have

been reached. She admitted an indebtedness for a part of the sum claimed by the defendants, and they, in their turn, while denying usury, agreed to take what she admitted to be due. In the absence of a prayer to set aside as usurious the instrument, be it deed or mortgage, which gave a special lien on the land, it is difficult to understand what effect upon her rights the presence or absence of herself or her counsel could have had.

Judgment affirmed. All the Justices concur, except *SIMMONS*, C. J., absent on account of sickness.

(119 Ga. 702)

PERKINS v. CASTLEBERRY et al.

(Supreme Court of Georgia. March 4, 1904.)

EQUITY—REVIEW OF DECREE.

1. Under the uniform procedure act of 1887 (Laws 1887, p. 64), the superior court, on the equity side of it, has the same authority during the term to review its judgments as the courts of law had prior to the passage of that act.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; *J. H. Lumpkin*, Judge.

Action by John Perkins against Z. T. Castleberry and others. Decree for plaintiff. From an order granting a review of the decree, and directing a rehearing to the exceptions of the master, plaintiff brings error. Affirmed.

T. C. Battle and W. I. Heyward, for plaintiff in error. J. A. Anderson and Rosser & Brandon, for defendants in error.

TURNER, J. This was a suit in equity, which went to a master, and was disposed of by the judge below on the master's report and exceptions thereto. The questions involved being solely questions of law, there was no reference of the matters in dispute to a jury, and a decree was made by the trial judge. It appearing that by inadvertence he included in the decree a provision not authorized by the state of the pleadings, a motion was made by one of the defendants, during the term at which the decree was rendered, to review the decree, in order that it might be corrected. To this motion the plaintiff demurred on various grounds, the only one of which to be considered being as follows: "There is no provision in the Code and laws of Georgia that provides for a rehearing in an equity proceeding where said proceeding has been terminated by a final decree." After argument upon this demurrer, the court granted the prayer of the defendant that its decree be reviewed, and passed an order setting aside the decree, and directing a rehearing on the exceptions filed to the master's report. To this order the plaintiff duly excepted, and sued out a writ of error to this court.

It has always been held that courts of law can, during the term at which any of

their orders or judgments are rendered, correct or modify or alter such orders or judgments. This practice did not obtain in courts of equity. It was even held that a motion in arrest would not lie against a final decree in equity. *Hughes v. Hughes*, 72 Ga. 173. But the difference in matters of practice existing between courts of law and of equity was effectually obliterated by the uniform procedure act of 1887 (Acts 1887, p. 64). The effect of this act has been stated at length in prior decisions of this court. See *Manheim v. Clafin*, 81 Ga. 129, 134, 7 S. E. 284; *De Lacy v. Hurst*, 83 Ga. 223, 9 S. E. 1052; *Regenstein v. Tyler*, 84 Ga. 277, 10 S. E. 719; *Stapler v. Hardeman*, 91 Ga. 127, 16 S. E. 657; *Georgia Iron Co. v. Etowah Iron Co.*, 104 Ga. 395, 30 S. E. 878; *Brumby v. Harris*, 107 Ga. 259, 33 S. E. 49. Under this new practice, we think that any procedure whereby a court of law could formerly review its judgments is now appropriate in an equitable proceeding brought in the superior court. For instance, a motion in arrest of judgment may now be made in that court, irrespective of whether the judgment sought to be reviewed was rendered in an equitable proceeding or in one at common law.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 694)

BROOKE v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Georgia. March 4, 1904.)

TELEGRAPH COMPANIES—TELEGRAMS—ERROR IN TRANSMISSION.

1. Following the decisions of this court in *Western Union Tel. Co. v. Shotter*, 71 Ga. 700, and *Western Union Tel. Co. v. Flint River Lumber Co.*, 40 S. E. 815, 114 Ga. 576, 88 Am. St. Rep. 36, it is held that in the transmission of a telegraph message the telegraph company is the agent of the sender, to whom, and not to the company, the recipient must look for damages arising out of error in the transmission.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by G. W. Brooke against the Western Union Telegraph Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Smith, Hammond & Smith, for plaintiff in error. Dorsey, Brewster & Howell, for defendant in error.

CANDLER, J. This was an action for damages, brought against a telegraph company by the recipient of a message, which, it is alleged, was erroneously transmitted by the company. The plaintiff excepts to the sustaining of a general and special demurrer to his petition. The only question presented for our decision is whether or not we will grant the request of plaintiff's counsel to review and overrule the decisions of this

court in the cases of *Western Union Tel. Co. v. Shotter*, 71 Ga. 700, and *Western Union Tel. Co. v. Flint River Lumber Co.*, 114 Ga. 576, 40 S. E. 815, 88 Am. St. Rep. 36, which hold that in the transmission of a telegraphic message the telegraph company is the agent of the sender, who is bound by the terms of the message, and from which rulings it necessarily follows that the sendee must look to the sender, and not to the telegraph company, for any damages he may sustain by reason of the error in transmission. If these cases are to be followed, they are controlling of the case at bar. The *Flint River Lumber Co. Case* was based upon the decision in the *Shotter Case*, which, Mr. Justice Cobb declared, had been silently acquiesced in by the profession since its rendition, and had been the law of this state for nearly 20 years. "For that reason," he further added, "we would not feel justified in overruling the decision, even if a review of the case had been requested." The reasons given by Mr. Justice Cobb for refusing to overturn the principle of law referred to are even more applicable to-day, for the lapse of two years has rendered still stronger the application of the doctrine of stare decisis.

The cases of *Western Union Tel. Co. v. James*, 90 Ga. 254, 16 S. E. 83, and *Western Union Tel. Co. v. Waxelbaum*, 113 Ga. 1017, 39 S. E. 443, 56 L. R. A. 741, cited by counsel for the plaintiff, while containing language which would indicate a view contrary to that announced in the *Shotter* and *Flint River Lumber Co. Cases*, are at best only physical precedents, and make no ruling binding on this court which is in conflict with the position now taken. In the *James Case* the question decided was one of measure of damages; in the *Waxelbaum Case* it was one of compliance with the contract entered into by the telegraph company and the sender. In both, it is true, the action was maintained by the sendee of the message, but in neither was his right to maintain an action against the telegraph company raised.

Nor do we think the principle is altered by the fact, alleged in an amendment to the petition, that the defendant was the only telegraph company having an office in the town where the sender was when the message was sent, and that, in complying with the sendee's request to communicate by telegraph, the sender had no choice as to what company it would select to transmit his message. The question of agency is not affected by the fact that the principal may be restricted in his choice of an agent. If a man write me for information, requesting me to send my reply by a messenger boy, and there is only one messenger boy whose services I can obtain, that fact renders him none the less my agent when I have employed him for the service in question.

We recognize the force of the argument that, independently of any question of agency, a telegraph company owes a duty to the

public, for the neglect of which it should be held liable in damages. The General Assembly, however, has not seen fit to enact any legislation on the subject; and for the reasons already stated we do not feel justified in departing from a principle of law which has been recognized by this court for many years. For a full discussion of this subject, with criticisms of the Shotter Case, supra, see Joyce on Electric Law, §§ 903, 904.

Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 671)

PATE v. CITY OF ATLANTA.

(Supreme Court of Georgia. March 4, 1904.)

MUNICIPAL CORPORATIONS — DEFECTIVE STREET—CONTRIBUTORY NEGLIGENCE.

1. The plaintiff's evidence made out his case as laid, and it should have been left for the jury to determine whether his conduct leading up to his injuries was negligent.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Jesse Pate against the city of Atlanta. Judgment for defendant, and plaintiff brings error. Reversed.

Westmoreland Bros., for plaintiff in error. James L. Mayson and W. P. Hill, for defendant in error.

CANDLER, J. A careful reading of the evidence for the plaintiff in connection with his petition convinces us that the grant of a nonsuit was error. The suit was based on the alleged negligence of the defendant in leaving open a ditch across one of its streets at night without placing near it lights or other warning to prevent passers-by from falling into the excavation. The ditch had been dug for the purpose of laying a sewer pipe, and extended under and on both sides of a street car track in the middle of the street. According to the plaintiff's evidence, he was walking along the sidewalk in the vicinity, and before reaching the ditch, and without reference to it, he started to cross the street, when he was attracted by a crowd gathered around a horse which had fallen into the ditch. He stopped and went in among the crowd to see what was the matter. After gratifying his curiosity, he backed out of the crowd and crossed the street car track, where he himself fell into the ditch and was injured. He swore that the night was dark, that there were no lights to warn him of his danger, that he could not see that the ditch into which the horse had fallen extended under and across the street car track, and that there was nothing to put him on notice of that fact.

It will hardly be contended that it is negligent for a pedestrian, even on a dark night, to leave the sidewalk on which he is walking, for the purpose of crossing the street. Nor do we think it can be said, as a matter

of law, that it is negligent, under such circumstances, for one to stop in the middle of the street and ascertain the cause for the gathering of a crowd, or that one who sees a ditch on one side of a street in a crowded city at night is thereby put on notice that the ditch runs under and across a street car track to the other side of the track. Under the plaintiff's evidence, he was in the exercise of due care and prudence; and whether or not his conduct, under the circumstances, really amounted to negligence, should have been left to the jury.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 686)

BIGBY v. ATLANTA & W. P. R. CO.

(Supreme Court of Georgia. March 4, 1904.)

CORPORATIONS—MARRIED WOMAN—TRANSFER OF STOCK.

1. Although a corporation may, at the instance of a married woman, transfer to her husband shares of its capital stock which had been issued to her, but which she had, without an order of court, sold to him, yet the corporation cannot be held accountable to her therefor unless, at the time it made the transfer of the same, or before the stock got into the hands of an innocent purchaser, it had notice of the marital relation existing between her and the person to whom she directed the transfer to be made, and the resulting incapacity on her part to make such unauthorized sale to him.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by Elizabeth K. Bigby against the Atlanta & West Point Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Westmoreland Bros., for plaintiff in error. Dorsey, Brewster & Howell, for defendant in error.

TURNER, J. Elizabeth K. Bigby brought a suit against the Atlanta & West Point Railroad Company, alleging that she had been the owner of 100 shares of the capital stock of that corporation; that on the 5th day of June, 1898, she had undertaken to sell these shares of stock to her husband, John S. Bigby, without an order of court; and that the defendant company, acting under a power of attorney which she had given to one H. M. Abbott, had entered a transfer of the stock to her husband on its books, and issued a new certificate to him, which he afterwards sold and transferred in his own right to a person not cognizant of the circumstances under which he had come into possession of the same. The plaintiff further alleged that she had not, since her attempted sale of her stock to her husband, received any of the dividends thereon which had been declared by the company, and she characterized such sale and transfer of the stock to him as void, and prayed that she be decreed to be a stock-

holder of the company to the extent of said 100 shares; that the defendant be required to issue to her a new certificate therefor, or, in default thereof, that she have judgment against the defendant for the value of said shares of stock; and that the company should also be required to account to her for all dividends declared thereon since her attempted sale to her husband, besides interest, etc. To this petition the defendant demurred (1) because the allegations therein set forth did not authorize any recovery by the petitioner; and (2) because her cause of action, if any she had, was barred by the statute of limitations. The court below sustained the demurrer, and dismissed the case, and on exceptions to its judgment the case is brought to this court.

As an excuse for not pursuing the stock and recovering it from the present owner of it, the plaintiff averred in her declaration that her husband had sold and transferred the same to an innocent purchaser. If, now, it is proposed to hold the defendant corporation accountable for this stock, or its value, it would seem to be incumbent on the plaintiff to show at least that the defendant, before the stock went into the hands of such innocent purchaser, had notice of the marital relation existing between her and John S. Bigby. There is, in her petition, no averment that the defendant was cognizant, at the time it issued to him a new certificate and entered on its books a transfer to him of this stock, that for any reason he was not to be regarded as the legal owner of the same. Nor does the plaintiff allege that at any other time prior to his sale of the stock to an innocent purchaser the corporation had notice of the fact that she was the wife of the person to whom she had caused it to transfer her stock, or knowledge of any fact sufficient to put it upon inquiry as to the invalidity of her sale to him, which was made through her attorney in fact. This being so, we are of the opinion that the plaintiff was not, under the facts stated in her petition, entitled to any of the relief for which she prayed. We are unable to see how the defendant corporation could now be required to issue to her a certificate for the 100 shares of stock which she states are already held by a bona fide purchaser from her husband. But, be this as it may, the plaintiff is certainly not entitled to call on the defendant to account for these shares of stock, unless it occupied the position of a wrongdoer relatively to the transaction of which she complains. We therefore hold that the first ground of the demurrer afforded ample cause for dismissing the action. It is unnecessary to pass on the question raised by the second ground of the demurrer, wherein the defendant pleaded the statute of limitations by way of further defense.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 603)

BRACKIN v. CITY OF RAINBRIDGE

(Supreme Court of Georgia. March 2, 1904.)

MUNICIPAL CORPORATIONS—DEFECTIVE BRIDGE—PLEADING—AMENDMENT.

1. A petition against a municipal corporation alleged that the defendant constructed a bridge or culvert in one of its streets in a careless and negligent way, and, after having so constructed it, negligently permitted the planks to rot, and the bridge to get out of repair; and that "petitioner's horse, while being ridden carefully over said bridge, fell through said bridge," and was injured so badly that it had to be killed. An amendment was offered, alleging that "the said horse became frightened, and that the rider upon said horse was unable to manage him," but did succeed in turning the horse upon the bridge, and would have passed over the same in safety but for the rotten plank in the bridge near the middle of the street. *Held*, that the amendment did not set forth a new cause of action, and should have been allowed.

(Syllabus by the Court.)

Error from City Court of Bainbridge; B. B. Bower, Judge.

Action by G. B. Brackin against the city of Bainbridge. Judgment for defendant, and plaintiff brings error. Reversed.

Donalson & Fleming, for plaintiff in error. Hawes & Hawes and Albert H. Russell, for defendant in error.

COBB, J. Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 629)

BURT v. STOCKS COAL CO.

(Supreme Court of Georgia. March 8, 1904.)

EXEMPTIONS—TOOL OF TRADE.

1. A dentist's chair is not exempt from levy and sale as a "common tool of trade," nor as a chair suitable for the use of the family, under Civ. Code 1895, § 2868, para. 5, 8.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by the Stocks Coal Company against W. P. Burt. Judgment for plaintiff, and defendant brings error. Affirmed.

An execution in favor of the Stocks Coal Company against W. P. Burt, a dentist, was levied upon a dentist's chair, which was claimed as exempt both as a chair, and as a common tool of trade of himself, under the statutory or short homestead. Civ. Code 1895, § 2868, para. 5, 8. The schedule of exempted property included "1 dental chair (tool of trade), \$75.00, 1 lounge, 2 tables, 6 chairs, one carpet, and other office fixtures, wearing apparel, \$50.00," besides other property not material to the questions here involved. The property was found subject to the execution. The judge of the superior court refused to sustain the certiorari, and Dr. Burt excepted.

Lavender R. Ray, for plaintiff in error. W. H. Terrell, for defendant in error.

LAMAR, J. It is not necessary to determine whether Civ. Code 1895, § 2866, par. 8, was intended to make a distinction between trade and profession, for the phrase "common tools of trade," therein, has uniformly been construed to refer, not to tools in common use by the debtor, regardless of their value, but to those simple and inexpensive appliances used in his trade. *Lenoir v. Weeks*, 20 Ga. 596; *Kirksey v. Rowe*, 114 Ga. 893, 40 S. E. 990, 88 Am. St. Rep. 65. Nor does the dentist chair come within Civ. Code 1895, § 2866, par. 5, exempting "one table and set of chairs sufficient for the use of the family." Indeed, it was not so scheduled when the petition was filed. The chair may be set apart as exempt from levy and sale under Civ. Code 1895, § 2827, but not under section 2866.

Judgment affirmed. All the Justices concurring, except **SIMMONS, O. J.**, absent on account of sickness.

(119 Ga. 607)

BRYANT et al. v. ATLANTIC COAST LINE R. CO.

(Supreme Court of Georgia. March 3, 1904.)
ACTIONS BY ADMINISTRATOR—LANDS SOLD BY DECEDENT—CONTRACT—CONSTRUCTION—ACTION FOR PRICE—LIMITATIONS.

1. The cause of action for the purchase money of land sold by a deceased owner vests in his administrator, and not in his heirs at law.

2. The petition did not allege that there were no debts and no administration, nor attempt to set up facts which would authorize a suit by the heirs.

3. When an agreement is silent as to when a future act is to be begun or completed, the law implies that it shall be within a reasonable time.

4. Where it was alleged that title to land was in dispute, and it was sold with the understanding that the purchase money should not be due until such ownership had been determined, the statute did not begin to run in favor of the purchaser until after the lapse of a reasonable time within which the vendor could commence and prosecute proceedings to settle his title.

5. Where such contract was made in 1880, and the decree settling the title was signed in 1901, and after a special demurrer the petitioner failed to amend, or to allege that the suit to quiet the title had been instituted within a reasonable time after the making of the contract of sale, the trial judge properly sustained a demurrer on the ground that the cause of action was barred.

(Syllabus by the Court.)

Error from Superior Court, Charlton County; **T. A. Parker, Judge.**

Action by **J. W. Bryant** and others against the Atlantic Coast Line Railroad Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

The petition alleges that when the Waycross & Florida Railroad Company was constructed through Charlton county, in 1880, the title to a strip $2\frac{1}{2}$ miles in length and 200 feet in width was in dispute, Bryant and Buck both claiming title to this tract; that it was agreed with the officers of the railroad company that the track should be built,

and that, after the dispute was "settled, said railway company would then pay the successful party for the land taken and occupied for its line of road and right of way, * * * and obtain a deed thereto"; that at the April term, 1901, in a suit between said Buck and Bryant, the question was settled by a decree in favor of Bryant; and that thereupon the heirs of the said Bryant demanded of the Savannah, Florida & Western Railway Company pay for the land and right of way aforesaid, and for its use and occupation, and also for about four acres of earth outside of the right of way used by the company in building embankments, offering to make and execute a deed to the land, which was refused by the company; that the use and occupation has been worth \$1,000; and that the earth so taken was worth \$500, and the land and right of way was worth \$2,000. It was also alleged that the Waycross & Florida Railroad Company had been consolidated with the Savannah, Florida & Western Railway Company in 1884, and that the latter company had been consolidated with the Atlantic Coast Line, which became liable to pay plaintiff's claim. To meet a demurrer that the petition did not set forth that the contract was in writing, nor with whom or when it was made, the plaintiff alleged "that the contract, agreement, and understanding was had and made with said railroad companies, and with **H. S. Haines**, general manager, **R. G. Fleming**, superintendent, **Chisholm & Erwin**, general counsel, **S. T. Kingberry**, assistant general counsel, and others, officers and agents of said railroad companies, as now remembered, who, as the duly authorized representatives and agents of said railroad companies, were fully empowered so to act, which facts also should be definitely within the knowledge of defendants." The petition was demurred to generally, and specially on the grounds, among others, that there was no allegation when the suit between Buck and Bryant was filed, and that the cause of action was barred.

W. M. Olliff and **J. L. Sweat**, for plaintiffs in error. **Kay, Bennet & Conyers** and **Simon W. Hitch**, for defendant in error.

LAMAR, J. Some of the joint plaintiffs sued as heirs at law of Bryant, one of the parties to the contract by which the strip of land had been sold to the Florida & Waycross Railroad Company; the purchase price to be payable when it was settled who was entitled thereto. It was not averred that there was no administration on his estate, and there was no allegation that the estate owed no debts, and nothing to take the case out of the rule that a suit for the purchase money of land should be prosecuted by the administrator, and not by the heirs at law. Civ. Code 1895, § 3353; *Juhan v. Juhan*, 104 Ga. 255, 30 S. E. 779.

But not only was there want of proper parties plaintiff, but there was no right to

recover for use and occupation of land alleged to have been sold the defendant in 1880. In any event, the verdict could only have been for the purchase price, with interest. But the cause of action therefor was barred. Where an agreement is silent as to the time within which an act is to be begun or completed, the law implies that a reasonable time is to be allowed therefor. The sale was made in 1880, the purchase price being payable when the dispute as to the title was adjusted so as to determine to whom the money should be paid. No time was fixed as to when the question as to the title should be settled, and the vendors were therefore allowed a reasonable time within which to take steps to accomplish that result. Within that period the statute did not run. Immediately after the expiration of a reasonable time the statute did begin to run, and the cause of action was barred within four years thereafter. The fact that the defendant specially demurred because the petition failed to allege when the suit to quiet the title had been begun, and that the plaintiff did not amend or give such date, raised a conclusive presumption that the suit was not begun within a reasonable time after the contract of sale, in 1880. The decree was rendered in 1901, and, in orderly course of legal procedure, may have been based on a petition filed in 1900.

The suit to recover this purchase money was begun nearly a quarter of a century after the making of the parol contract of sale. In the meantime Bryant had died, the company with whom the contract was made had gone out of existence, and the land had been twice transferred to other purchasers. There are here present all of the elements on which the policy underlying the statute of limitations is based. The time between the making of the contract and the bringing of the suit to enforce the demand thereunder was so great as to raise a presumption that the debt had been paid, or to make it almost certain that the transaction had passed out of the memory of the witnesses, that the evidence in relation thereto had been lost, and that death had removed some of those who were familiar with the facts. The judge below was correct in holding that the action was barred. Civ. Code 1895, § 3768.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 604)

BRUNSWICK & W. R. CO. v. D. ROTHCHILD & CO.

(Supreme Court of Georgia. March 3, 1904.)

CARRIER—DELIVERY OF GOODS.

1. The obligation of a common carrier to deliver goods to the person to whom they have been consigned is fully discharged when it delivers them to the duly authorized agent of the consignee.

(Syllabus by the Court.)

Error from Superior Court, Worth County; W. N. Spence, Judge.

Action by D. Rothchild & Co. against the Brunswick & Western Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

D. H. Pope and Perry & Tipton, for plaintiff in error. Claude Payton, for defendant in error.

FISH, P. J. D. Rothchild & Co. brought an action of trover in the county court of Worth county for the recovery of a box of dry goods alleged to have been delivered to the railroad company for the purpose of being delivered by it to J. H. Ford at Ty Ty, Ga. The petition alleged that the defendant "did convert said property to its own use and benefit by neglecting to deliver to said Ford said personalty; also refusing to deliver said personalty to this petitioner, who is their bailor, after this petitioner had demanded said property, and before said bailor [?] had delivered said personalty to the consignee to the said J. H. Ford." The goods were alleged to be of the value of \$39.50, and upon the trial in the county court judgment was rendered in favor of the plaintiff for \$37.75 and interest. The defendant carried the case by certiorari to the superior court, the petition for certiorari alleging, among other things, that the judgment was contrary to law and the evidence, and without evidence to support it. Upon the hearing in the superior court the certiorari was overruled, whereupon the plaintiff in certiorari excepted.

Irrespective of the other questions made by the petition for certiorari, the certiorari should have been sustained upon the ground that the judgment was without evidence to support it. The evidence upon the question of the delivery of the goods to the consignee was as follows: J. H. Ford, introduced by the plaintiff, testified: "I know of the shipment of the goods. I never received them from the Brunswick & Western R. R. Co. They were not my goods. I never ordered them. My son, E. M. Ford, received them. He bought them, and he received them from the railroad company. He received them for me. When the goods arrived, Eugene came to me and informed me that the box of goods was there, marked to me, and got money to pay the freight on them, and said he was going to take them out. I never told him to nor not to. I knew he was going to get them. I never notified the agent not to deliver them to him. They were not put in my store. They were put in Eugene's store. I never got the benefit of them. Eugene did. Eugene is my son. He has been around my store for many years. He has authority to and does receipt for goods consigned to me, * * * and has been doing so for many years. I have always ratified his acts in this particular. The company always deliv-

ered to him for me when he called for my goods, and I approved it. They had done so for many years. It was our custom. * * * Never have given written orders to the railroad company to deliver any of my freight to E. M. Ford, my son Eugene. Did not tell them orally to deliver this box. Do not remember that I ever gave the company verbal authority to deliver any freight consigned to me. Do not say that I have not done so. They knew to do so, as it was my custom to have them do so." E. M. Ford testified: "J. H. Ford is my father. I have worked for him in and around his store for many years—some ten or twelve years. During all this time I have paid freight on his goods consigned to him, and have received for same, to the Brunswick & Western R. R. Co. Have also attended to shipping off his freight. I had authority from him to do so. It was not written authority. He just had me to do so; and it was the custom for me to receive and receipt for this freight, and the Brunswick & Western R. R. Co. knew I had the right to do so. I received this box of freight, consigned from David Rothchild & Co. to J. H. Ford, Ty Ty, Ga., on August 3, 1900. I received for myself. It was my goods. The railroad agent did not know I was receiving it for myself. I did not tell them so. I did not tell them they were my goods. * * * I had not been dealing in dry goods at that time, and do not do so now but little. I now work for my father when he wants me to, and was doing so when I received the box of goods in question from the railroad company." This witness further testified that at the time he got the goods he signed a receipt for them as follows: "J. H. Ford—E. M. F.," and this receipt was then introduced in evidence. It needs no argument to demonstrate that this evidence clearly showed a delivery by the defendant railroad company of the goods to the consignee, J. H. Ford, through his duly authorized agent, E. M. Ford. Upon such delivery the responsibility of the railroad company for a delivery of the goods to the consignee ceased. The evidence showed not only that E. M. Ford had a general authority from his father, J. H. Ford, to receive from the railroad company any freight consigned to him, but we think it also showed an implied special authority to receive this particular box of goods. J. H. Ford himself recognized this; for while he testified that he did not receive the goods, and that his son, E. M. Ford, did, yet in the same connection he testified that the latter received the goods from the railroad company for him. Of course, it made no difference who bought the goods from the consignors, or who claimed and appropriated them after they were delivered by the railroad company to the consignee. The question was to whom did the railroad company deliver them; and, as we have seen, the delivery was to J. H. Ford, the person to

whom the plaintiffs had consigned them. It is needless to cite cases to show that the long and unbroken course of dealing between the railroad company and J. H. Ford in reference to the delivery of goods consigned to the latter authorized the railroad company to regard and accept E. M. Ford as the duly authorized agent of J. H. Ford to receive the delivery of these goods, when J. H. Ford did not deny, but, on the contrary, acknowledged, this. The evidence demanded a judgment in favor of the defendant, and the judge of the superior court erred in overruling the certiorari.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 616)

SMITH v. WALKER & IZLAR.

(Supreme Court of Georgia. March 3, 1904.)

GARNISHMENT—WAGES OF ENGINEER.

1. This case is controlled by the decision of this court in *Sanner v. Shivers*, 76 Ga. 335, wherein it was held that the "monthly wages of a locomotive engineer in the employment of a railroad corporation are not subject to the process of garnishment in this state." As a finding in favor of the prevailing party below was demanded by the evidence, the trial court erred in setting aside the verdict of the jury.

(Syllabus by the Court.)

Error from City Court of Waycross; J. C. Reynolds, Judge.

Action by J. M. Smith against Walker & Izlar. From an order setting aside a verdict in favor of Smith, he brings error. Reversed.

Leon A. Wilson, for plaintiff in error. J. Walter Bennett, for defendants in error.

TURNER, J. Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 622)

FUGAZZI, LOVELACE & CO. v. TOMLINSON.

(Supreme Court of Georgia. March 3, 1904.)

ERROR—JURISDICTION—GRANT OF NEW TRIAL.

1. Until there has been in the trial court a judgment finally disposing of a case, this court is without jurisdiction to entertain a complaint that error was committed by the trial judge in striking, on demurrer, portions of the defendant's answer. *Turner v. Camp*, 36 S. E. 76, 110 Ga. 631; *Harvey v. Bowles*, 37 S. E. 364, 112 Ga. 421; *Berryman v. Haden*, 38 S. E. 53, 112 Ga. 752; *Ray v. Anderson*, 43 S. E. 408, 117 Ga. 136.

2. As has heretofore been repeatedly announced, the first grant of a new trial will not be disturbed by this court unless it affirmatively appears that the evidence demanded the verdict returned by the jury.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action between Fugazzi, Lovelace & Co. and Mrs. Walter Tomlinson. From the judg-

ment Fugazzi, Lovelace & Co. bring error. Affirmed.

E. V. Carter and J. L. Mayson, for plaintiff in error. Westmoreland Bros. and Abbott & Goree, for defendant in error.

TURNER, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 627)

RAGSDALE, HARPER & WEATHERS v. SOUTHERN RY. CO.

(Supreme Court of Georgia. March 8, 1904.)

CARRIERS—INJURY TO STOCK—RELEASE OF CLAIMS.

1. For a sufficient consideration the shipper relieved the carrier of injuries to the live stock caused by viciousness of the animals or defects in the car, which had been examined by the shipper.

2. All the evidence tended to show that the animal had been injured in consequence of one of the risks expressly assumed by the shipper, and the court did not err in granting a nonsuit.

(Syllabus by the Court.)

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Action by Ragsdale, Harper & Weathers against the Southern Railway Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

J. F. Golightly, for plaintiffs in error. Dorsey, Brewster & Howell, Sanders McDaniel, and J. D. Bradwell, for defendant in error.

LAMAR, J. The plaintiffs' stock was shipped under a special contract like that referred to in *Williams v. Central Ry. Co.*, 117 Ga. 830, 43 S. E. 980, and *Central Ry. Co. v. James*, 117 Ga. 832, 45 S. E. 223. The case is controlled by the principle announced in those decisions. The shipper, in consideration of a lower freight rate, stipulated that he would examine the car in which the stock were to be shipped; that he would have some one to accompany the stock, and take charge thereof; and that he would relieve the company of damages caused by defects in the car, or occasioned by the viciousness of the animals. The suggestion that a slat had been broken by the jamming together of the cars was not sustained by the evidence, one of the plaintiffs testifying that he did not know how it had been caused; that it "might have been by a kick." There was no proof of any "jamming," and no explanation as to how the coming together of cars would break one slat and leave no other sign. All the circumstances indicated that it was caused by the kick of one of the mules,

and against the consequent injury the company was relieved. Neither was there evidence to sustain the theory that the animals had been removed from the car No. N. E. 10,118 and placed in No. N. E. 10,178. The waybills offered by the plaintiffs indicated that the number of the car inserted in the bill of lading was a clerical mistake, and that the animals were received in Atlanta in the car in which they had been shipped from Memphis. At any rate, it was incumbent on the plaintiffs to make out the case. The suit was on the theory that the mules were shipped in No. 10,178. There was no suggestion in the pleadings or evidence that they had been changed from one car to another, and no proof of negligence on the part of the company. All the evidence indicated that the injury had been occasioned by a defect in the car or viciousness in the mules, from both of which the shipper, for a sufficient consideration, had expressly released the carrier. Civ. Code 1895, § 2276.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 617)

C. H. PERKINS CO. v. SHEWMAKE & MURPHEY.

(Supreme Court of Georgia. March 8, 1904.)

PETITION—DESIGNATION OF PARTIES—AMENDMENT.

1. A suit against the "C. H. Perkins Company" is not void, these words importing a corporation. *Mattox v. State*, 41 S. E. 620, 115 Ga. 212, 219; *Adas Yeshurun Society v. Fish*, 43 S. E. 716, 117 Ga. 345; *Holcombe v. Cable Co.*, 46 S. E. 671, 119 Ga. —.

2. A petition in such a suit may be amended by alleging that the company is a partnership composed of named individuals. *Smith v. Columbia Jewelry Co.*, 40 S. E. 735, 114 Ga. 691.

3. A petition in a suit against the "C. H. Perkins Company, a corporation," is amendable by striking the words "a corporation," and making an allegation that the company is a partnership composed of named individuals. See *Anglo-American Packing Co. v. Turner Casing Co. (Kan.)* 8 Pac. 403; *Prairie Lodge v. Smith*, 58 Miss. 301.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Shewmake & Murphey against the C. H. Perkins Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

C. D. Maddox and J. Howell Green, for plaintiff in error. E. V. Carter, for defendants in error.

COBB, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 572)

BROWN v. STATE.

(Supreme Court of Georgia. March 8, 1904.)

CRIMINAL LAW—TRIAL—REMARKS OF JUDGE—HARMLESS ERROR—EVIDENCE.

1. A trial judge cannot express or intimate an opinion as to what has been proved, but Civ. Code 1895, § 4334, does not prevent him from referring to the testimony in deciding a point raised in the progress of the cause.

2. Unless in its nature manifestly prejudicial, or the assignment of error shows wherein it was harmful, the admission of irrelevant testimony will not be sufficient ground for the grant of a new trial.

3. The court having instructed the witness that she might answer the question or not, as she saw fit, it was not error to permit the state to prove by her that she was the defendant's paramour. Civ. Code 1895, § 5289.

4. Where one litigant offers in evidence an admission, in a conversation or document, of a fact disadvantageous to the other, he thereby makes admissible all such other parts of the conversation or document as may tend to explain or qualify the part first introduced in evidence.

5. But matters in such conversations or documents otherwise irrelevant, and wholly disconnected with the part first offered, are not thereby made admissible.

6. A careful examination of the record disclosing no error in the admission or exclusion of evidence, and there being no assignment upon the court's charge or refusal to charge, and the evidence being sufficient to sustain the verdict, which was approved by the trial judge, the judgment is affirmed.

(Syllabus by the Court.)

Error from Superior Court, Jefferson County: E. D. Evans, Judge.

Pete Brown was convicted of murder, and brings error. Affirmed.

James K. Hines and Cain & Hardeman, for plaintiff in error. B. T. Rawlings, Sol. Gen.; and Jno. C. Hart, Atty. Gen., for the State.

LAMAR, J. On December 24, 1902, in Jefferson county, E. L. O. Gay was first robbed, then murdered, and the storehouse in which his dead body lay was destroyed by fire. Ganus, Walker, Brown, and Timmons were jointly indicted for the murder. Walker was found guilty, and the judgment affirmed by this court. See *Walker v. State*, 118 Ga. 757, 45 S. E. 608, 621. In that case it was ruled that whether Timmons was an accomplice or not was a matter to be determined by the jury. The evidence in the present case is substantially the same as that on the prosecution of Walker, and the new evidence is merely contradictory of that then offered by the state. Timmons testified that he knew nothing of any criminal design on the part of the other three when they went into the store and left him at the door. Indeed, the evidence is silent as to whether any conspiracy had been formed between the three before they reached the store, or whether the sight of the money and the opportunity for robbery gave birth to the design which was immediately consummated. But, be that as

it may, the testimony of Timmons was sufficient to establish that he was not an accomplice, and also to prove the commission of the offense charged. Timmons testified that Gay was hit with a hammer by Walker, and there was evidence to determine whether, after the fire, the hammer was found under the place where it was ordinarily kept, or in a part of the burned building indicating that it had been moved from its usual position. The motion for a new trial recites that the defendant moved to rule out the testimony of I. J. Gay on this subject, as his knowledge was derived from what others told him. The court ruled that he would leave that for the jury to determine, and immediately instructed them that, "if they found that Mr. Gay's recollection was dependent on hearsay, they must not consider it; that he understood Gay to say that, if he picked up the hammer, it was lying between the counters, and, if others picked it up, they told him that it was lying between the counters." Thereupon the defendant moved for a mistrial on the ground that the court had expressed an opinion on the evidence, which is forbidden by Civ. Code 1895, § 4334, which motion the court overruled, saying at the time to the jury, "It was not the intention of the court to express any opinion as to what the testimony is." From reading the motion it is evident that the court neither expressed nor intimated any opinion as to what had been proved. In ruling on the motion to exclude he merely stated what he understood the witness to state. The point is controlled by *Green v. State*, 43 Ga. 369 (4), where it was said that the court might "interrupt counsel misstating the evidence to the jury, and correct the statement of what was sworn to by the witnesses on the trial." "Will it be held in the progress of the case, where counsel differ as to what has been sworn, that the court may not correct error by recalling the witness, if possible, or by stating from his notes or his remembrance what a witness swore?" "The intention of the law is to prevent the court from usurping the province of the jury, and alleging the fact to be proven which is controverted, but not to inhibit him from putting before the jury the truth of what a witness swore." Again, in *Reinhart v. Miller*, 22 Ga. 403 (10), 68 Am. Dec. 506, it was held that a reference to the evidence given in the case made by the presiding judge, in deciding a point raised by counsel in the progress of the case, is not error.

An assignment of error must be complete in itself. It is claimed that the testimony of Gay as to hunting for money and finding a hole under the steps from which a box may have recently been taken was irrelevant. If so, it was also harmless, so far as we can infer from this motion. It does not appear that he found anything, and at best the evidence was purely negative. *Travelers' Ins. Co. v. Thornton*, 119 Ga. —, 46 S. E.

678. If, on its face, manifestly prejudicial, or if the motion discloses in what way irrelevant testimony has been harmful, a new trial may be granted for its admission over objection. But mere irrelevancy is not sufficient to upset a verdict. Such evidence cumbers the record, sheds no light, gives no assistance, and prima facie is calculated to do no harm. If it does, the motion should disclose how it worked such a result.

The state of a witness' feelings to a party may always be proved for the consideration of the jury (Civ. Code 1895, § 5289), and it was not error for the court to permit the Solicitor General to ask one of the witnesses for the defendant if she was not his paramour; the court instructing her that she could answer the question or not as she saw fit.

The state introduced in evidence a letter written by the defendant, and, for the purpose of proving its execution, offered that portion of his testimony in the case of Walker v. State in which he admitted having written it. Thereafter Brown offered all of his testimony given on the trial of Walker, and excepts to the court's refusal to admit the same. "The admission, in a conversation or document, by the defendant, of a fact disadvantageous to himself, will not be received without receiving at the same time all such other parts of such conversation or document, whether emanating from himself or from another, as may tend to explain or qualify the part first given. The whole relevant context is in such case to be left to the jury, who are to say whether the facts asserted by the defendant in his favor are true." Wharton's Cr. Ev. (9th Ed.) § 688. "Only the relevant parts of the context are to be received." Id. The principle underlying this rule is that one cannot offer that part of an entire conversation, letter, or record which is helpful to him, and prevent his opponent from using the modifying, qualifying, and explanatory context; but it has no application to those parts of a conversation which relate to a subject entirely different from that offered in the first instance. When, therefore, the state introduced Brown's admission that he had written a letter, it was estopped from objecting to everything else therein which the defendant said on that subject. But this did not make relevant and admissible all of the self-serving declarations as to alibi, and other independent statements wholly disconnected with the letter, its contents, or the circumstances under which it was written. Civ. Code 1895, § 5196.

On a careful examination of this record we find no error in the admission or exclusion of evidence. There is no assignment upon the court's charge or refusal to charge. The evidence was sufficient to sustain the verdict. It was satisfactory to the trial judge, and the judgment is affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 610)

TAYLOR v. ATLANTIC & B. R. CO.

(Supreme Court of Georgia. March 3, 1904.)

KILLING STOCK—PRESUMPTIONS—DIRECTING VERDICT.

1. This case is not, upon its facts, distinguishable from that of Macon & B. R. Co. v. Revis, 46 S. E. 418, 119 Ga. —; and it follows that there is no merit in the plaintiff's complaint that the court below erred in directing the jury to return a verdict in favor of the defendant company.

(Syllabus by the Court.)

Error from City Court of Waycross; J. C. Reynolds, Judge.

Action by J. T. Taylor against the Atlantic & Birmingham Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

J. S. Williams, for plaintiff in error. J. L. Sweat, for defendant in error.

TURNER, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 570)

ROBBINS et al. v. STATE.

(Supreme Court of Georgia. March 3, 1904.)

CRIMINAL LAW—ACCUSATION—NEW TRIAL.

1. The accusation stated the offense substantially in the terms and language of the Penal Code, and so plainly that the nature of the offense charged would be easily understood by the jury, and it was therefore sufficient to withstand a general demurrer.

2. The evidence not being sufficient to show the guilt of the accused beyond a reasonable doubt, a new trial should have been granted.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Stephney Robbins and others were convicted of crime, and bring error. Reversed.

Robt. M. Hitch and Edmund H. Abrahams, for plaintiffs in error. W. W. Osborne, Sol. Gen., and Garrard & Meldrim, for the State.

COBB, J. Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 607)

HILL v. JULIAN.

(Supreme Court of Georgia. March 3, 1904.)

ADMINISTRATOR—ACTION AGAINST—TIME OF BRINGING—CERTIORARI.

1. The statutory provision that no suit to recover a debt due by a decedent shall be commenced against his legal representative until the expiration of 12 months from his qualification is for the security of such representative, to protect him from suit until he can ascertain the condition of the estate; and, if he suffers a judgment to be rendered against him during that period, a claimant of property against which such judgment is sought to be enforced cannot bring into question the validity thereof, since its rendition within that period can in no way have operated to his prejudice. Baker v. Shephard, 30 Ga. 706.

2. A finding in favor of the claimant was not demanded by the evidence adduced on the trial of this case in the magistrate's court wherein it originated; and, this being so, the judge of the court below did not abuse his discretion in overruling the petition for certiorari, in so far as it brought under review the verdict of the jury in the magistrate's court.

(Syllabus by the Court.)

Error from Superior Court, Coffee County; F. W. Dart, Judge.

Action between Noel Hill and G. W. Julian. From the judgment, Hill brings error. Affirmed.

Benjamin T. Allen, for plaintiff in error. Levi O'Steen, for defendant in error.

TURNER, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 628)

WILLIAMS v. MANGUM.

(Supreme Court of Georgia. March 3, 1904.)

CERTIORARI—DISMISSAL.

1. Where the judge of the superior court sanctions a petition for certiorari which is not properly verified, and in his answer to the writ the justice of the peace fully supports and corroborates the averments of the petition in all material particulars, it is too late to dismiss the certiorari on the ground that the averments of the petition are not sufficiently verified.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action between one Williams and one Mangum. From the judgment, Williams brings certiorari. From an order dismissing the writ, Williams brings error. Reversed.

J. H. Leavitt, Perry Bloodworth, and Hugh M. Dorsey, for plaintiff in error. James E. Warren, for defendant in error.

COBB, J. The judge dismissed the certiorari because the petition was not verified in the manner prescribed in Civ. Code 1895, § 4638. Under the ruling in Taylor v. Gay, 20 Ga. 77 (8), which was followed in Taylor v. State, 118 Ga. 52, 44 S. E. 834, it was error to dismiss the certiorari. The failure to verify the petition is a good reason for the judge to refuse to sanction it (Paulk v. Hawkins, 106 Ga. 206, 32 S. E. 122); but, after the petition has been sanctioned, and the answer of the magistrate filed, it is too late to dismiss the certiorari for the defect in the affidavit, if the answer supports the allegations of the petition.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 616)

SWEAT v. LATIMER.

(Supreme Court of Georgia. March 3, 1904.)

JUDGMENT—SETTING ASIDE.

1. A motion to set aside a judgment must be predicated upon some defect apparent upon the

face of the record. Regopoulos v. State, 42 S. E. 1014, 116 Ga. 596; Tietjen v. Merchants' Bank, 43 S. E. 780, 117 Ga. 501.

(Syllabus by the Court.)

Error from City Court of Waycross; J. C. Reynolds, Judge.

Action between C. M. Sweat and J. H. Latimer. From the judgment Sweat brings error. Affirmed.

John T. Myers, for plaintiff in error. J. Walter Bennett, for defendant in error.

FISH, P. J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 569)

HOPKINS v. STATE.

(Supreme Court of Georgia. March 3, 1904.)

ASSAULT WITH INTENT TO KILL—EVIDENCE—CONVICTION OF LESSER OFFENSE.

1. The evidence was sufficient to support a conviction of assault with intent to murder.

2. The defendant having been found guilty of the lesser offense of shooting at another, a new trial will not be granted; it appearing that the verdict was in conformity with a charge given at his request.

(Syllabus by the Court.)

Error from Superior Court, Hall County; J. J. Kimsey, Judge.

John Hopkins was convicted of shooting at another, and brings error. Affirmed.

A. C. Brown, J. O. Adams, and H. H. Dean, for plaintiff in error. W. A. Charters, Sol. Gen., for the State.

FISH, P. J. While the prosecutor was engaged in an altercation with another person, he was fired on by two bystanders. The evidence strongly indicated that the shots which took effect were fired by the defendant, and there was sufficient evidence to have sustained a verdict for assault with intent to murder, for which the defendant was indicted. There was evidence, however, that another bystander also fired, and it is not absolutely certain which pistol contained the bullets which took effect. It appears from a note of the judge that, at the request of counsel for the defendant, he charged on the law of shooting at another, and the defendant was convicted of that offense. It is assigned as error that the verdict is contrary to law and the evidence; the plaintiff in error insisting here that he should have been found guilty of assault with intent to murder, or not guilty. There was evidence to warrant the charge in reference to shooting at another. But in any event the defendant cannot complain of a verdict which was rendered in conformity with a charge requested by himself. Quattlebaum v. State (Ga.) 46 S. E. 677.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 572)

RUSS et al. v. STATE.

(Supreme Court of Georgia. March 3, 1904.)

CRIMINAL LAW—APPEAL—REVIEW.

1. It is not complained that the court committed any error of law. The judgment of conviction was fully authorized by the evidence, and will not be reversed by this court.

(Syllabus by the Court.)

Error from City Court of Bainbridge; B. B. Bower, Judge.

Madison Russ and others were convicted of crime, and bring error. Affirmed.

Harrell & Hartsfield, for plaintiffs in error. Albert H. Russell, for the State.

CANDLER, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 566)

MORGAN v. STATE.

(Supreme Court of Georgia. March 3, 1904.)

CRIMINAL LAW—INSTRUCTIONS—WEIGHT OF EVIDENCE—ASSAULT WITH INTENT TO KILL—STABBING.

1. It has been repeatedly held by this court that it would be better, in charging on the defendant's statement, to follow the statute, and there leave the matter.

2. The charge in relation to the weight to be given the defendant's statement was like that in *Hackett v. State*, 33 S. E. 842, 108 Ga. 46, and, while not approved, is yet not such error as will imperatively require the grant of a new trial.

3. "Unless there be great superiority in physical strength of an assailant who strikes another a blow with his fist, or ill health in the assailed at the time, or other circumstances producing relatively great inequality between them in combat, the assailed cannot justifiably resent the blow by stabbing the assailant."

4. There was evidence to sustain the verdict, and no ruling or charge of the court requiring the grant of a new trial.

(Syllabus by the Court.)

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

W. M. F. Morgan was convicted of stabbing, and brings error. Affirmed.

Ballinger and Morgan had a controversy in reference to a note. Ballinger claimed that in the controversy Morgan called him a liar, and that when he replied in kind, Morgan struck him over the shoulder with a knife. Morgan insisted that Ballinger called him a liar, and when answered in kind struck at Morgan, who backed, and, being feeble, as a result of three weeks' confinement in bed, and Ballinger being more powerful, Morgan put his hand in his overcoat pocket and pulled out a knife which had been used for opening cans, and which he casually picked up as he passed through the house; that he cut Ballinger very slightly, and did it almost involuntarily, and as the result of the attack by a more powerful man. There was nothing in the evidence to indicate that the meeting was premeditated. It seems to have been an accidental encounter

on the streets. The exact difference in the size of the two men does not appear. There was some difference as to the length of time Morgan had been out of bed. The defendant was found guilty of stabbing, and excepts to the refusal of the court to grant a new trial. The motion for a new trial complains, among others, of the following charge: "(1) I charge you further, that if you find that the defendant was the aggressor, that he provoked Ballinger to strike him, and, having so provoked him, stabbed him with a knife, although Ballinger may have been the stronger man, though defendant may not have been in a physical condition to cope with him without a knife, he would still be guilty of the offense of stabbing. (2) On the other hand, if you find that Ballinger was the aggressor, that he brought about the difficulty and assaulted the defendant without provocation, and there was great discrepancy in the strength of the parties on account of their age and physical condition, and the defendant was unable to defend himself without the use of a knife, and, being without fault on his part, used a knife simply in self-defense, and didn't act beyond the provocation given, didn't carry the assault beyond that, then he wouldn't be guilty of anything."

W. E. Mann and R. J. & J. McCamy, for plaintiff in error. Sam P. Maddox, Sol. Gen., for the State.

LAMAR, J. The defendant was charged with assault with intent to murder, but found guilty of the lesser offense of stabbing. On a careful examination of the evidence we are forced to the conclusion that there was evidence sufficient to sustain the verdict. Nor can a new trial be granted because the judge gave the charge, on the defendant's statement, similar to that complained of in *Hackett v. State*, 108 Ga. 46, 33 S. E. 842. It is true that this court has said that it would be better in all cases to give in charge the statute, and there leave the matter. *Hendricks v. State*, 73 Ga. 581; *Ozburn v. State*, 87 Ga. 185, 186, 13 S. E. 247. And in *Harrison v. State*, 83 Ga. 136, 9 S. E. 542, Chief Justice Bleckley said: "But why should the presiding judge be more specific than the statute itself, or go beyond its terms? There is no obscurity or ambiguity in the statute. The Legislature has made the matter as clear as can the judiciary. Why should not the Legislature be left to address the jury in its own language?" These observations would indicate that a departure from the language of the statute harmful to the defendant would be cause for the grant of a new trial, but for the decisions in *Hackett v. State*, 108 Ga. 46, 33 S. E. 842, and *Teasley v. State*, 106 Ga. 842, 32 S. E. 335, to both of which Little, J., indicated his dissent. The charge is not an improper argument for counsel, but, coming from the mouth of the judge, it is undoubtedly calcu-

lated to greatly prejudice the defendant to have the jury's attention directed to the fact that he is not under oath, under no penalty to speak the truth, and is not subject to cross-examination without his consent; and for the jury to be told also to consider his interest in the case, and determine what faith they should give the statement. Nevertheless, just such a charge was held not to be ground for a new trial in *Hackett v. State*, supra.

Mere inequality in size and strength will not authorize the smaller combatant to resent the blow by stabbing the assailant. The charge of the court was in accordance with the ruling in *Floyd v. State*, 36 Ga. 91, 91 Am. Dec. 760. Compare *Malone v. State*, 77 Ga. 768 (6); *Hinch v. State*, 25 Ga. 699 (2).

We find no error in the other charges to which exception was made.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 564)

WILLIAMS v. STATE

(Supreme Court of Georgia. March 3, 1904.)

LARCENY—EVIDENCE.

1. It was not error to admit in evidence articles of clothing traced to the possession of the accused, there being sufficient additional evidence to authorize the jury to find that the articles introduced were the ones shown to have been stolen from the prosecutor.

2. The charges complained of were free from any material error. The evidence amply warranted the verdict, and it was not error to overrule the motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Charles Williams was convicted of crime, and brings error. Affirmed.

Jere Moore, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

FISH, P. J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 563)

REED v. STATE

(Supreme Court of Georgia. March 3, 1904.)

SUNDAY LABOR—EVIDENCE—SELLING DOMESTIC WINE.

1. Where a person having several different occupations works at one on the Sabbath day, he is guilty of violating Pen. Code, § 422, even though that particular business does not occupy most of his time on the other days of the week.

(Syllabus by the Court.)

Error from Superior Court, Brooks County; R. G. Mitchell, Judge.

Ollie Reed was convicted of violating the Sunday law, and brings error. Affirmed.

Bennet & Bennet, for plaintiff in error. W. E. Thomas, Sol. Gen., for the State.

LAMAR, J. The defendant was indicted for violating Pen. Code, § 422, in that she sold domestic wine on the Sabbath day. There was evidence that she was engaged in several occupations, each of which may have taken more of her time than that of selling wine, of which it appears she had large quantities on hand. There was evidence that one witness bought a gallon upon each of five or six separate occasions within two months preceding the indictment; that others went to her place for the same purpose. Selling wine, therefore, was enough within the pursuit of her business or the work of her ordinary calling to have made it impossible for her to have recovered for the purchase price of any she sold on Sunday. "Those things which are repeated daily or weekly in the course of trade or business are parts of the ordinary calling of a man exercising such trade or business." *Rex v. Whitnash*, 7 Barn. & C. 602. This particular line of her business was possibly not so active as others; still selling wine was work of her ordinary calling. There was no conflict in the testimony, and no assignment of error on any charge or refusal to charge, from which we assume that the judge correctly instructed the jury as to what they must find beyond a reasonable doubt before they could convict the defendant.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 559)

BRAZZELL v. STATE.

(Supreme Court of Georgia. March 3, 1904.)

CARRIERS—FAILURE TO PAY FARE—CONCEALMENT—DEFENSES.

1. Where one without fare or ticket is ordered by the conductor to leave the train, and, after opportunity to comply, conceals himself in the car and continues the journey, he is guilty of violating the provisions of the act approved December 21, 1897 (Acts 1897, p. 116).

2. Nor would the contention that the defendant was under the influence of liquor afford relief to him from liability for his criminal act. Pen. Code, § 89.

(Syllabus by the Court.)

Error from City Court of Moultrie; W. A. Covington, Judge.

Charles Brazzell was convicted of stealing a ride on a train, and brings error. Affirmed.

The defendant was an employé of the Georgia Northern Railway Company. He got upon the train at Moultrie, bound for Albany. The conductor asked him if he had a ticket or a pass, and, upon his answering in the negative, told him he would have to pay his fare, or get off at the next stop, on the outskirts of the town. The train stopped at the point indicated long enough for the defendant to alight. The conductor testified that he suspected that the defendant was trying to "beat" his way, and not only searched for him when the train started, but also instruct-

ed the baggage master to do likewise. Both went through the train several times without discovering the defendant, but subsequently the baggage master found him crouched down between the seats. In his statement the defendant claimed to have been drunk, and to have no recollection of what he had done. Having been found guilty, he moved for a new trial on the general grounds.

Alfred R. Kline, for plaintiff in error. T. W. Mattox, Sol., for the State.

LAMAR, J. When he entered the train, the defendant made no effort to conceal himself; and, although he did not pay his fare, or offer to do so, he was not then guilty of any violation of the act of 1897 (Acts 1897, p. 116) making it unlawful to steal a ride on a railroad train. When, however, the conductor directed him to get off, and the train stopped long enough to enable him to do so, but instead he remained in the car and secreted himself from the crew, he violated the statute. Nor was his claim that he was under the influence of liquor any reason to set aside the verdict. Pen. Code, § 39. He was able to form a guilty intent, if sober enough to try to hide.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 562)

BUTLER v. STATE.

(Supreme Court of Georgia. March 3, 1904.)

CRIMINAL LAW—APPEAL—REVIEW.

1. No complaint is made that the judge committed any error of law. The evidence, while not demanding the conviction of the accused, was sufficient, if believed by the jury, to warrant the verdict which they returned. That verdict was approved by the trial judge, and this court will not interfere with it.

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

John Butler was convicted of crime, and brings error. Affirmed.

John Murrow and J. J. Murray, for plaintiff in error. W. E. Thomas, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

CANDLER, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 563)

JOHNSON v. STATE.

(Supreme Court of Georgia. March 3, 1904.)
DISORDERLY CONDUCT—PROFANE LANGUAGE—CERTIORARI.

1. The evidence adduced on the trial of this case in the county court warranted a conviction of the accused on the charge of using profane language in the presence of a female, in violation of the provisions of Pen. Code 1895, § 396; and as the presiding judge, in charging

the jury as to the law governing the case, fully and fairly submitted to them the questions on which they were called upon to pass, the court below properly declined, on certiorari, to set their verdict aside.

(Syllabus by the Court.)

Error from Superior Court, Morgan County; H. M. Holden, Judge.

Sarah Johnson was convicted of using profane language, and brings error. Affirmed.

George & Anderson, for plaintiff in error. J. E. Pattie, Sol. Gen., and E. W. Butler, for the State.

TURNER, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 561)

MILLER v. STATE.

(Supreme Court of Georgia. March 3, 1904.)

CRIMINAL LAW—NEW TRIAL—DISCRETION OF TRIAL COURT.

1. The evidence fully authorized the verdict. All applications for new trials upon the ground of newly discovered evidence are addressed to the sound legal discretion of the trial judge; and, even if the newly discovered evidence relied on as a ground for a new trial was not cumulative in its nature, there is nothing in the record to indicate that the judge abused the discretion vested in him in overruling the motion on this ground.

(Syllabus by the Court.)

Error from Superior Court, Hart County; B. D. Evans, Judge.

Bill Miller was convicted of crime, and brings error. Affirmed.

A. G. & Julian McCurry, for plaintiff in error. D. W. Meadow, Sol. Gen., for the State.

COBB, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 515)

STEADMAN & CO. v. SOUTHERN PINE CO. OF GEORGIA et al.

(Supreme Court of Georgia. March 3, 1904.)

INJUNCTION—GRANT—REVIEW.

1. This case falls within the well-established rule that a judgment granting an injunction will not be disturbed by this court when it appears that the evidence touching the matter in controversy was conflicting, and called for an exercise of the discretion with which the trial judge was vested.

(Syllabus by the Court.)

Error from Superior Court, Coffee County; T. A. Parker, Judge.

Action by the Southern Pine Company of Georgia and others against Steadman & Co. Judgment for plaintiffs, and defendants bring error. Affirmed.

Dart & Roan and E. D. Graham, for plaintiffs in error. Toomer & Reynolds, Jno. C.

McDonald, and Quincey & McDonald, for defendants in error.

TURNER, J. Judgment affirmed. All the Justices concurring, except **SIMMONS, C. J.**, absent on account of sickness.

(119 Ga. 566)

SOLOMON v. STATE

(Supreme Court of Georgia. March 3, 1904.)

CRIMINAL LAW—APPEAL—REVIEW.

1. One of the charges complained of was entirely free from error. The other, even if erroneous, could not possibly have been injurious to the accused. The evidence amply warranted the verdict of guilty, and it was not error to overrule the motion for a new trial.

(Syllabus by the Court.)

Error from City Court of Cartersville; **A. M. Foute, Judge.**

Bill Solomon was convicted of crime, and brings error. Affirmed.

James B. Conyers, for plaintiff in error. **Sam P. Maddox, Sol. Gen.**, for the State.

CANDLER, J. Judgment affirmed. All the Justices concurring, except **SIMMONS, C. J.**, absent on account of sickness.

(119 Ga. 616)

F. R. STEADMAN & CO. v. DORMINEY-PRICE LUMBER CO.

(Supreme Court of Georgia. March 3, 1904.)

INJUNCTION—CONFLICTING EVIDENCE—REVIEW.

1. Any conflict in the evidence as to notice by the plaintiffs of defendant's interest in the timber, and as to what would be a reasonable time within which the timber should be cut, was a matter to be passed on by the trial judge, and there was no abuse of discretion in refusing the injunction.

(Syllabus by the Court.)

Error from Superior Court, Coffee County; **T. A. Parker, Judge.**

Action by **F. R. Steadman & Co.** against the **Dorminey-Price Lumber Company** to enjoin a trespass. Judgment for defendant, and plaintiff brings error. Affirmed.

Dart & Roan, for plaintiff in error. **Jno. C. McDonald** and **Quincey & McDonald**, for defendant in error.

FISH, P. J. **F. R. Steadman & Co.**, claiming to have a perfect legal title to lot No. 267 in Coffee county, brought a petition under the woodcutters' act (Civ. Code 1895, § 4927) to enjoin a trespass thereon by the **Dorminey-Price Lumber Company**. The defendant set up a right to the timber by virtue of a conveyance older than that under which the petitioners claimed; averring that the plaintiffs were not bona fide purchasers for value, without notice of the defendant's interest. The defendant claimed under a lease dated December 13, 1889, by which **Ricketson** conveyed to **Bewick**, of Wayne county, Mich., the timber, logs, and growing trees on lot

267; said lease to expire in three years from the time the lessee commenced to cut the timber. There was evidence that the conveyance of the timber was subject to a prior lease of the same timber for turpentine purposes, and that the defendant had been prevented from cutting the timber by reason of the opposition of those holding the turpentine privilege, which was not only prior in date, but had to be exercised before the timber was cut. There was also evidence as to the great extent of the timber owned by the defendant, as to the remoteness of that in litigation from transportation at the time of the conveyance, and much evidence as to what would have been a reasonable time in which the owner could have been expected to begin work in cutting the timber on lot 267 for sawmill purposes. It also appeared that neither the owner of the fee nor the plaintiffs had given any notice to the defendant to begin work. On the hearing the judge refused the injunction upon the defendant giving bond conditioned to pay plaintiffs any damages they might recover on the final trial, whereupon they excepted.

It was for the trial judge to pass upon the disputed questions of fact, and we find no abuse of discretion in refusing the injunction.

Judgment affirmed. All the Justices concurring, except **SIMMONS, C. J.**, absent on account of sickness.

(119 Ga. 561)

SURLES v. STATE.

(Supreme Court of Georgia. March 3, 1904.)

ASSAULT—EVIDENCE—APPEAL—NEW TRIAL.

1. The accused was convicted of assault and battery. The evidence fully authorized the verdict. The newly discovered evidence, even if true, showed no justification for the battery. The discretion of the trial judge in refusing to grant a new trial will not be interfered with.

(Syllabus by the Court.)

Error from City Court of Newnan.

Thomas Surles was convicted of assault, and brings error. Affirmed.

A. H. Freeman and **W. C. Wright**, for plaintiff in error. **W. G. Post** and **W. L. Stallings**, for the State.

FISH, P. J. Judgment affirmed. All the Justices concurring, except **SIMMONS, C. J.**, absent on account of sickness.

(119 Ga. 563)

JOHNSON v. STATE.

(Supreme Court of Georgia. March 3, 1904.)

LARCENY—EVIDENCE—TRIAL—BURDEN OF PROOF—NEW TRIAL.

1. The accused was deprived of no substantial right by the refusal of the court to allow his counsel to prove by a witness whose name appeared on the indictment as prosecutor that he did not, in point of fact, sustain any such relation to the case. The trial judge did not, in exercising his privilege of himself examining witnesses introduced by the prosecution, inti-

mate any opinion as to the weight to be given their testimony; and the jury were fully and fairly instructed as to the burden resting on the state of showing that at the time the accused acquired possession of the horse alleged to have been stolen he had formed a secret intent of appropriating it to his own use, and that its subsequent appropriation by him was in pursuance of such original intent.

2. There was evidence from which the jury might well have reached the conclusion that the accused, with intent to steal the animal, went to the owner, and, under the pretense of hiring the horse for a limited time, obtained possession of him with a view to driving to a distant city, and there selling him; and, this being so, the court below doubtless exercised a wise discretion in declining to grant the accused a new trial.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

J. E. Johnson, alias C. C. Gunter, was convicted of theft, and brings error. Affirmed.

Jere Moore, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

TURNER, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 612)

GRIFFIS v. G. S. BAXTER & CO.

(Supreme Court of Georgia. March 3, 1904.)

ERROR—BILL OF EXCEPTIONS—REVIEW.

1. The bill of exceptions complains that the court below erred in sustaining a plea in abatement to the plaintiff's petition. That plea set up the pendency of another suit between the same parties on the same cause of action. The bill of exceptions does not contain any evidence, or specify a brief thereof, as necessary to an understanding of the alleged errors. It does specify the record in the first suit, and that record is incorporated in the transcript brought to this court; but there is nothing to show that it was introduced in evidence on the trial of the plea in abatement, nor is there in the transcript any approved brief of the evidence.

Held, there being nothing before this court which can be recognized as showing upon what the judgment of the court below was based, that judgment will not be held error.

(Syllabus by the Court.)

Error from Superior Court, Clinch County; T. A. Parker, Judge.

Action by A. R. G. Griffis against G. S. Baxter & Co. Judgment for defendant, and plaintiff brings error. Affirmed.

S. L. Drawdy and Simon W. Hitch, for plaintiff in error. Toomer & Reynolds, for defendant in error.

CANDLER, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 568)

GAINES v. STATE.

(Supreme Court of Georgia. March 3, 1904.)

HOMICIDE—EVIDENCE—INSTRUCTIONS.

1. The instructions given the jury touching the law of conspiracy were not subject to criti-

cism because "not properly adjusted to the case on trial," nor because they embraced an "intimation by the court that the [accused] was guilty of murder by actual perpetration"; his theory of "an accidental killing" was not supported either by the testimony or by his statement to the jury; and no reason appears why their verdict of guilty should be set aside, it being fully warranted by the evidence relied on by the state for a conviction.

(Syllabus by the Court.)

Error from Superior Court, Hall County; J. J. Kimsey, Judge.

Jim Gaines was convicted of murder, and brings error. Affirmed.

A. C. Brown, J. O. Adams, and H. H. Dean, for plaintiff in error. W. A. Charters, Sol. Gen., and Jno. Q. Hart, Atty. Gen., for the State.

TURNER, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 675)

FOSTER v. ATLANTA RAPID TRANSIT CO.

(Supreme Court of Georgia. March 4, 1904.)

NEW TRIAL—HEARSAY EVIDENCE.

1. The admission, over the objection of a party, of hearsay evidence, the natural tendency of which was to discredit his witnesses and prejudice his case, requires the grant of a new trial, when it is applied for upon this ground.

(Syllabus by the Court.)

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Action by Frank Foster, by his next friend, Henry Foster, against the Atlanta Rapid Transit Company. Judgment for defendant, and plaintiff brings error. Reversed.

Rucker & Rucker, for plaintiff in error. Rosser & Brandon and W. T. Colquitt, for defendant in error.

FISH, P. J. Frank Foster, by his next friend, Henry Foster, brought suit in the city court of Atlanta against the Atlanta Rapid Transit Company, a street railroad company, for damages. The petition alleged that Frank Foster, while a passenger on a car of the defendant company, and prepared to pay his fare, was, without warrant or authority of law, pushed and kicked from the same by the conductor in charge of the car, whereby he sustained certain specified injuries. The defendant company, by its answer, denied that its conductor committed any of the acts charged in the petition. On the trial of the case there was a sharp conflict in the testimony introduced by the parties. The jury found a verdict for the defendant. The plaintiff made a motion for a new trial on the usual grounds, to which, by amendment, there was added one other. This last ground alleged error in the following ruling of the court: L. O. Simmons, a witness for the defendant, testified that the names of the persons who were on the car

that night were turned over to him, and he went to see them. The court then, over the objection of plaintiff's counsel, allowed him to testify as follows: "I did not subpoena them because they did not know anything about it. They said they did not know anything about the transaction, and so I did not need them." The objection made to the admission of this testimony was that it "was incompetent, irrelevant, immaterial, and hearsay." The motion for a new trial alleged that this testimony was hurtful to the plaintiff, because two witnesses for the plaintiff had sworn that the conductor came into the car after he had kicked the plaintiff, Frank Foster, off, and said, "I am going to kill a lot of them little sons of bitches," and "further stated he was going to kill a lot of them damned little niggers, and laughed about it." In a note to this ground, the trial judge states: "The court stated to the jury that he let this evidence in to account for the nonproduction of the witnesses, and not for the purpose of proving facts." The record shows that one of the witnesses who swore that the conductor made the statements mentioned above testified that others on the car heard these statements. According to the testimony of the conductor, there were many people on the car at the time it was alleged he kicked and pushed the plaintiff off, especially at and near the end of the car where this was said to have occurred; and the circumstances testified to by the plaintiff and his witnesses were of such a character that, if they really occurred, other passengers on the car would very likely have had knowledge of them. Therefore, for the court—no matter what may have been his purpose in admitting this testimony—to allow Simmons, an agent of the defendant company charged with investigating the case and looking for witnesses, to testify that he had received a list of the names of the persons who were on the car when it was alleged this occurrence took place, and had seen these people, and they had told him they knew nothing about it, was to admit hearsay testimony, the natural tendency of which was to discredit the testimony of the plaintiff's witnesses and to injure his case. To allow a witness, presumably of good standing and character, to testify that he had seen the persons who were on the car at the time the plaintiff was alleged to have received his injuries, and they had stated to him that they knew nothing of such an occurrence as the one in question, was, in a measure, equivalent to these persons themselves so stating to the jury. It was to allow statements not made under oath, unsifted by cross-examination, possibly made by the parties to avoid being subpoenaed as witnesses, and prejudicial to the plaintiff, to be submitted to the jury. Who can say what force and effect such hearsay statements may have had upon the minds of jurors, considering a case in which the testimony of the witnesses

who really appeared before them was, upon the vital issue in the case, so painfully conflicting? That the evidence was open to the objection that it was hearsay, there can be no doubt. Its admission absolutely required the grant of a new trial. That the court told the jury that it was admitted only for the purpose of accounting for the nonproduction of witnesses does not affect the question of its admissibility. It would open a very wide door for the introduction of hearsay testimony to hold that testimony of this character was admissible for such a purpose. All that a party would have to do to get before the jury unsworn statements of persons shown to have been present when a given transaction was alleged to have occurred, tending to show that it did not occur, would be to introduce a witness who would swear that he had seen such persons, and they had told him that they knew nothing about such an occurrence. Neither the plaintiff nor the defendant was under any legal obligation to introduce as witnesses all the persons who were on the car at the time of the alleged occurrence, and so neither was required to account for the nonproduction of such persons as witnesses. Besides, if either had been under any obligation to account for the nonproduction of such persons, this was not the way in which to do it. If production were required, nonproduction could not be excused upon such a ground, and hearsay evidence would be none the less inadmissible. The way to account for the nonproduction of a witness is to show inability to produce him. To sustain the ruling of the court, the defendant in error cites *Richmond & Danville R. Co. v. Garner*, 91 Ga. 27, 16 S. E. 110. In reference to this citation, it is sufficient to say that there the absent witness was the plaintiff's wife, and he accounted for her nonproduction by simply showing that she was detained at home by reason of the sickness of her children. The question of the admissibility of hearsay evidence was not involved.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 597)

SIMS v. CORDELE ICE CO. et al.

(Supreme Court of Georgia. March 3, 1904.)

OPTION TO PURCHASE—DEATH OF PURCHASER—RIGHTS OF ADMINISTRATOR—POSSESSION OF REALTY—RECEIVER.

1. A contract right to purchase designated property within a given time at a stipulated price, upon the credit of the person owning such right, is not assignable, and, upon his dying within the time limited for the exercise of such right without having exercised it, it does not pass into the hands of his administrator as an asset of his estate.

2. There was no merit in the general ground of the demurrer. The petition stated a cause of action against the defendant alleged to be in the wrongful possession of the plaintiff's property for the recovery of such property and rea-

sonable rent for the same, and also for the appointment of a receiver for such property pending the litigation between the parties.

3. There was a misjoinder of causes of action, and also a misjoinder of parties defendant, and, as the demurrer attacked the petition upon these special grounds, the judgment sustaining the same must be affirmed. But direction is given that, before the judgment of this court is made the judgment of the court below, the plaintiff be allowed to amend his petition so as to cure these defects therein; that, upon his doing so, the case stand for trial upon the petition as thus amended; and that, upon his failure to do this, the judgment below be unconditionally affirmed.

(Syllabus by the Court.)

Error from Superior Court, Dooly County; Z. A. Littlejohn, Judge.

Action by S. R. Sims against the Cordele Ice Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Allen Fort & Son, James Taylor, and E. A. Hawkins, for plaintiff in error. J. T. Hill, J. H. Hall, and Whipple & McKenzie, for defendants in error.

FISH, P. J. This case was dismissed in the court below upon a demurrer to the plaintiff's petition, and the bill of exceptions alleges that the court erred in sustaining the demurrer. The demurrer was both general and special. The general ground alleged that the petition set forth no cause of action, and that the plaintiff had an adequate remedy at law. By way of special demurrer, it was alleged that there was a misjoinder of causes of action, and also that there was a misjoinder of parties. The demurrer was sustained generally, the judgment not indicating that it was sustained upon any particular ground or grounds. We are therefore to consider whether either of the grounds was sufficient to authorize the judgment of the court.

1, 2. We will first consider the main question involved in the case, and that is whether the plaintiff's petition set forth a cause of action against the Cordele Ice Company. This involves a consideration of the option or right which the petition shows the plaintiff proposed to grant to G. R. Sims in the event the proposition submitted by the plaintiff to T. B. Sims was accepted. The proposition made to T. B. Sims and the option offered to G. R. Sims were, as the petition shows, contained in the following letter written by the plaintiff to the former: "Americus, Ga., March 23rd, 1899. Mr. T. B. Sims, Cordele, Ga.—Dear Tom: In reference to disposition of the Cordele Ice Machine, make you the following proposition, namely: First, you turn back to me possession of the property, also quitclaim to same, or in other words your interest in same cease, in consideration of which shall lease to you for the term of three years the Cordele Ice Machine, you to keep in repair the machine and building. Also further agree at the expiration of your lease, grant G. R. Sims the

option of purchasing the above machine for the sum of \$9,000.00 divided into nine installments of one thousand dollars, payment to bear interest at the rate of 7% from date of same. The above proposition only to be considered upon the surrender of all claims that the Cordele Ice Co., T. B. & G. R. Sims or either might hold against S. R. Sims or holdings of S. R. Sims. Above proposition also to bind you to pay and keep paid all accrued expenses upon the Cordele Ice Machine in the way of taxes; also insurance taxes or other expenses that might come against that piece of property during your possession. * * * Should you see your way clear to accept above named proposition so notify me in order that I may have necessary papers drawn, embodying above in legal form. Awaiting your early reply, I remain, yours, S. R. Sims." The plaintiff alleged that the proposition contained in this letter had been withdrawn by him before its acceptance, while the defendants contended that the petition showed that this contention had been decided adversely to the plaintiff in litigation between him and T. B. Sims, and was res judicata in the present case. The plaintiff further contended that the option offered by him to G. R. Sims was void, because without consideration, and, if not void originally, it was not assignable, and, never having been accepted by G. R. Sims, expired upon his death. The defendants contended that this option or right of G. R. Sims to purchase the property in controversy upon the terms stipulated in this letter was based upon a sufficient consideration, which had been received by the plaintiff; that it was transferable, and upon the death of G. R. Sims was an asset of his estate, which passed into the hands of his administrator, and, as such, was duly sold by the administrator and purchased by Mrs. G. R. Sims, and by her transferred to the Cordele Ice Company, which thereupon became entitled to purchase the property in controversy from the plaintiff upon the terms stipulated in the option; and that all of this was shown by the plaintiff's petition.

So far as the decision of this case is concerned, it does not matter whether the proposition made by the plaintiff to T. B. Sims resulted in a binding contract between the parties or not. We take it for granted that it did, and that everything necessary in order to vest in G. R. Sims the right to purchase the property in controversy between the plaintiff and the Cordele Ice Company, upon the terms mentioned in the offer of S. R. Sims to him, had been done, so that, while he lived, without his consent the option could not have been withdrawn by S. R. Sims before the time within which it could be accepted had expired. But the right to purchase the property upon the terms stipulated was one which was purely personal to G. R. Sims, and could not have been transferred by him to any one else without the

consent of S. R. Sims. As it was a right which no one else but G. R. Sims could exercise, when he died without having exercised it it became extinct. It did not pass to his administrators as an asset of his estate, and hence Mrs. Sims acquired nothing by the attempted sale and transfer to her of this right by the administrator, and therefore had nothing to transfer to the Cordele Ice Company.

It is well settled that a contract right which is coupled with liabilities, or involves a relation of personal confidence between the parties, cannot be transferred to a third party by one of the parties to the contract without the consent of the other. *Tifton, Thomasville & Gulf Railway Co. v. Bedgood*, 116 Ga. 945, 43 S. E. 257, and cases cited. This being true, it is very clear that a right which one person has to make a given contract with another, which is coupled with the assumption of liabilities by the former to the latter, and involves a relation of personal confidence between them, cannot be transferred to a third party without the consent of the party against whom such right is held. The right of G. R. Sims to purchase the property "for the sum of \$9,000.00 divided into nine installments of one thousand dollars," bearing interest at 7 per cent., was not only coupled with the assumption of liabilities on his part to his uncle, S. R. Sims, but also involved a relation of personal confidence between them. S. R. Sims could not be compelled to sell his property upon such terms to any one else but the person to whom he had contracted to thus sell it. He had the right to decide for himself to whom he would sell his property upon a credit, and could not be forced to so sell it to any one else.

Upon the question of the assignability of the option, counsel for the defendants in error cite *Simms v. Lide*, 94 Ga. 553, 21 S. E. 220. There the right to purchase the property in controversy for a designated sum was neither coupled with the assumption of any future liability by the purchaser to the seller, nor did it involve any relation of personal confidence between the parties. It was simply dependent upon the payment in cash of the stipulated purchase price within the time limited for the existence of the option. The same may be said in reference to the case of *Perry v. Paschal*, 103 Ga. 134, 29 S. E. 703, which is also cited in support of the contention of the defendants in error. Many cases may be found which hold that a right to purchase given property for a stipulated sum, to be paid when the property is purchased, is assignable; but we know of no case in which it has been held that one who has acquired the right to purchase another's property at a designated price upon his own credit can, without the consent of the owner of the property, transfer such right to a third person, so as to entitle the transferee

to purchase the property upon the same terms and upon his credit.

Unquestionably, the plaintiff's petition stated a cause of action for the recovery of his property from the Cordele Ice Company, which was in possession and control of the same without any lawful authority whatever, and refused, upon his demand therefor, to deliver it to him. This is true whether the plaintiff was entitled to the equitable relief for which he prayed or not. If he was not entitled to have a receiver appointed to take charge of and preserve the property pending the litigation, he was entitled to recover possession of the property, and reasonable rent therefor. But we think, under the allegations of his petition, he was entitled to have his prayer for a receiver granted. He alleged that the property was liable to deteriorate in value; that it had not been properly cared for; that the house in which the ice plant was located was in bad repair; that the furnace which belonged to the plant had been abandoned; that the boiler which operated the machine for the past seven or eight years was disconnected from the machinery, and was depreciating in value; that, while no improvements had been made on his property, the adjoining property of the ice company had been improved, an artesian well bored thereon, a new boiler installed, and preparation made looking to the operation of another ice factory in case he should get possession of his property; and that the property was liable to be destroyed by fire, and he had not been able to ascertain whether it had been insured. While the Cordele Ice Company was not alleged to be insolvent, the petition alleged that only 10 per cent. of the subscriptions to its capital stock had been paid in; that the corporation had incurred debts in excess of the amount paid in, and was still borrowing money, and might incumber the property by mortgage or otherwise. Under these circumstances, we think the appointment of a receiver would have been authorized, in order to fully protect the rights of the plaintiff. Civ. Code 1895, § 4900.

Counsel for defendants in error invoke the doctrine of *res judicata*, claiming that the plaintiff's petition showed that the questions involved in the present case were also involved in certain litigation in Sumter county between T. B. and S. R. Sims, the plaintiff here, and were there decided adversely to the latter, and that the plaintiff in this case is concluded by the judgment rendered in that. We do not think that the plaintiff's petition contains allegations or admissions upon which the doctrine of *res judicata* could be raised by demurrer. But, be this as it may, it is evident that there is nothing whatever therein which shows that the main question with which we have been dealing was involved in the Sumter county litigation. We do not see how the question as to the assignability of the option could have been in-

volved in that case, and there is certainly nothing in the plaintiff's petition to show that it was. The allegations of the petition show that this question arose after the death of G. R. Sims, and in consequence of the attempt of his administrator to sell the option at administrator's sale, and the claim of the Cordele Ice Company that it had purchased this option from Mrs. Sims, who had purchased it at such sale.

3. While the general ground of the demurrer was without merit, we think that the two special grounds mentioned above were meritorious. There were two separate and distinct causes of action in the petition against different defendants. The first and main cause of action, which we have discussed above, was against the Cordele Ice Company, for the recovery of the property in controversy, and reasonable rent for the same during the time that company held it. The second and minor cause of action was against Mrs. G. R. Sims and T. L. Blackwell, administrator of G. R. Sims, for the recovery of a money judgment against them for the value of certain piping, pumps, tools, etc., which belonged to the plaintiff, and which the petition alleged they had converted. According to the petition, the property sought to be recovered of the ice company was in the possession of that company alone; neither Mrs. Sims nor Blackwell being connected with its possession, or exercising the slightest control over it. And the Cordele Ice Company was not charged with any responsibility whatever for the loss or conversion of the property for the value of which the plaintiff sued Mrs. Sims and Blackwell. Here, then, were both a misjoinder of causes of action and a misjoinder of parties defendant. A misjoinder of parties is also apparent when we take into consideration the fact that Hill, Parker, and Ryals are made parties defendant to the action, neither of whom is charged with being in possession of the property involved in the main cause of action, or with having appropriated or converted the property involved in the minor cause of action. They are simply charged, together with Mrs. Sims, "and perhaps others," with having organized a corporation, "chartered under the laws of Georgia, known as the Cordele Ice Company," which corporation, "without any right or authority of law," took possession of the plaintiff's property known as the "Cordele Ice Plant." They are not sued for the possession of this property, nor for the value of the property alleged to have been converted by Mrs. Sims and Blackwell, nor is it alleged that they have incurred any liability to the plaintiff whatever. Why they were made parties defendant at all, does not appear; no recovery being asked against them, and no prayer for relief being directed against them. While it may have been perfectly proper for their names to appear in the petition, in order to clearly present to the court the circumstances out of which the

plaintiff's main cause of action arose, they were neither necessary nor proper parties defendant to either cause of action set forth in the plaintiff's petition.

For the above reasons, we think the petition was clearly demurrable for misjoinder of causes of action and for misjoinder of parties defendant, and we therefore feel constrained to affirm the judgment; but for the reasons stated in *Brown v. Bowman*, 119 Ga. 153, 46 S. E. 410, we direct that, before the judgment of this court is made the judgment of the court below, the plaintiff be allowed to amend his petition so as to meet the objections raised by these special grounds of the demurrer; that, upon his doing so, the case stand for trial upon the petition as thus amended; and that, upon his failure to do this, the judgment below be unconditionally affirmed.

Judgment affirmed, with direction. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 734)

MOYER v. RAMSAY-BRISBANE STONE CO.

(Supreme Court of Georgia. March 7, 1904.)
PETITION—AMENDMENT—EVIDENCE—NONSUIT.

1. The amendment which the plaintiff proposed to make to his petition was properly disallowed by the trial court, inasmuch as he thereby sought to introduce a new and distinct cause of action.

2. It does not appear that the court, in excluding evidence or in declining to permit specific questions to be propounded to a witness introduced in behalf of the plaintiff, committed any error which was prejudicial to him.

3. As the plaintiff failed to prove his case as laid, a nonsuit was properly granted on motion of the defendant.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by James D. Moyer against the Ramsay-Brisbane Stone Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Arnold & Arnold, and Moore & Pomeroy, for plaintiff in error. Smith, Hammond & Smith, for defendant in error.

TURNER, J. The plaintiff in error, James D. Moyer, brought a suit for damages against the Ramsay-Brisbane Stone Company, a corporation, alleging in his petition that he was, on the 24th day of November, 1900, in the employ of that company, doing work as a laborer on the new Empire Building, in the city of Atlanta, Ga., the "said company having the contract for the stonework on the said building," and he being employed by the company "as a laborer to assist in the work on the said building, such as hoisting stone into place, loading and unloading stones, and doing any and all work that he might be ordered to by the foreman in charge of the work"; that on the day named, while

he was at work on the building, the company's foreman ordered him "to take a certain derrick apart, and that in doing the said work under the orders of the said foreman he was thrown violently from the stand upon which he was working, and hurled into a cellar about 20 feet from the place upon which he was working; and that, as a result of the said fall, his leg was broken in two places," and he also sustained other serious and painful injuries, etc. By way of amendment to his petition the plaintiff introduced the following allegations concerning the character of the derrick which he was ordered to take apart: "The construction of the derrick above referred to is very simple, being made of wood, but braced and mortised together, the upright pieces of the derrick being about eight by three inches in dimensions, and thirty to thirty-five feet in length. At the bottom there is a sill about seven feet long, in which the side timbers are mortised. About midway between the cap and the sill is a brace mortised into the side timbers. These mortises were all fastened by bolts. Near the bottom of these side timbers is mechanically arranged a drum, with cogwheels, so that the weights can be raised and lowered by turning this drum by the crank. At the top of this derrick tackles are fastened, through which a rope passes to and around this drum." The plaintiff further alleged in his petition that he "was a green hand, and had been at work on the building but a short time, and that he had no experience at all in taking derricks apart, and that the Ramsay-Brisbane Company, knowing that it was a dangerous piece of work and that he was inexperienced, failed to give him any instructions, or to warn him of his danger, and that they were negligent in not so warning and instructing" him; that he "did not know of his risk, and that the said company failed to warn him," he being inexperienced, and not knowing of the danger, and that in failing so to do the company was negligent, as aforesaid; that plaintiff and "another were sent alone to take the derrick apart, and that it was impossible for them to have done the work in any other way than the one in which they did, because of the great weight of the derrick"; that plaintiff "did the work in the only way possible, acting under orders, even had they known of the dangers," of which he did not know. By the amendment above referred to the plaintiff was allowed to add to his allegations of fact the following: The "derrick was a dangerous piece of machinery for a green and inexperienced hand," such as he, "to work with, and that defendants did know, or should have known, of these facts"; that the "sill of the said derrick was lying flat on the ground, with the side beams resting in a slanting position on a small line-house near the platform on which" he was working; that he "was knocking off the cap" above mentioned, "after having removed bolts, and that in so doing, the force which

held them together being removed, the tension caused one of the said side timbers to fly violently around, striking" and injuring him in the manner stated. The plaintiff sought to still further amend his petition by alleging that: "The cap at the top of the two beams held them together in such a way, by reason of the brace as above described being too long, that there was a tendency on the part of the two beams to fly apart when the cap was removed, thus making a defect in the construction of the derrick which was unknown to" him. On objection by defendant's counsel, this last amendment was disallowed by the court, and to this ruling the plaintiff excepts. He further makes complaint that the court erred in rejecting certain testimony offered by him, and also erred in entering up against him a judgment of nonsuit.

1. As has been seen, the theory upon which the plaintiff brought his suit was, as shown by the allegations of his original petition, that the taking apart of a derrick of the kind described was a hazardous undertaking, at least for one inexperienced in doing that kind of work; and, as he was a green hand, the company was under a duty to warn him of the hazards incident thereto, and was guilty of negligence in failing to perform this duty at the time he was ordered to take the derrick apart. In other words, his sole complaint was that the company's foreman did not tell him, an ignorant and inexperienced hand, that the particular work he was specially ordered to do was inherently dangerous for some reason unknown to him, but which was or ought to have been known by the company's foreman. The proposed amendment was not, therefore, germane to the case as originally stated. On the contrary, it is apparent that the plaintiff undertook, by means of this amendment, to introduce a new and distinct cause of action, based upon the theory that the defendant company was guilty of negligence in providing a derrick which was defectively constructed, and therefore liable to violently spring apart and injure any one undertaking, in the usual and proper way, to take it apart by removing the cap, as was done by the plaintiff. That the company was negligent, in that it did not furnish to its employees suitable and safe machinery and appliances with which to perform their duties, was not even remotely hinted at in the original petition, but was for the first time suggested by the proposed amendment which the trial judge refused to allow. We think he very properly declined to permit the plaintiff to thus amend his pleadings.

2. It appears that the court, on objection made by counsel for the defendant, declined to permit certain questions to be propounded to an expert witness who was sworn by the plaintiff. But as it is not shown what answers to these questions the plaintiff expected to elicit from the witness, we cannot

undertake to deal with his complaint that the court improperly held that the questions were not such as the plaintiff had a right to ask. *Bigby v. Warnock*, 115 Ga. 386, 397, 41 S. E. 622, 57 L. R. A. 754. One of the answers of this witness seemed to be based upon the hypothesis that the derrick which the plaintiff was ordered to take apart was defectively constructed, and that the plaintiff's injury was attributable alone to this fact. This being so, we think the court properly excluded what the witness said in this connection, for it was wholly irrelevant to the issues presented by the pleadings, and its rejection did no harm to the plaintiff.

3. A careful reading of the evidence satisfies us that the plaintiff failed to prove his case as laid, for there was no testimony in support of his contention that the danger incident to taking apart a derrick such as that described in his declaration was one which an inexperienced workman could not anticipate and guard against, and accordingly it did not appear that it was incumbent on the defendant company to warn the plaintiff of the hazard attending the performance of the work he was called on to do by its foreman. In fact, we are impressed with the idea that the injury to the plaintiff was caused by an unusual, if not improper, adjustment of the timbers used in constructing the particular derrick he was attempting to take apart; and that, if he had any cause of action against the company, the defective construction of this derrick gave rise thereto, rather than its failure to instruct him as to the hazards incident to the kind of work in which he was engaged as its employé. We accordingly hold that the motion to nonsuit was properly sustained by the court below.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 564)

SMITH v. STATE.

(Supreme Court of Georgia. March 3, 1904.)

CRIMINAL LAW — APPEAL — BILL OF EXCEPTIONS—NEW TRIAL—ASSAULT WITH INTENT TO KILL—INSTRUCTIONS.

1. When the bill of exceptions recites that the court passed an order overruling the motion for a new trial, it is not necessary that such order should be specified as a part of the record to be transmitted.

2. An express approval of the grounds of an amendment to a motion for a new trial affords a presumption that the amendment was allowed.

3. The law, as embodied in Pen. Code 1895, §§ 70, 71, and the law requiring that, to justify the killing, the danger must be urgent and pressing at the time, as embodied in Pen. Code 1895, § 73, may both be appropriately given in the same case, provided they are not confused, or made applicable to the same theory or state of facts. In the present case the charge complained of was of such a character as to confuse the different branches of the law of homicide, and the error thus committed required the granting of a new trial.

4. In the trial of one charged with assault with intent to murder, it was error to charge the jury that if they believed that, had the party died, it would have been murder, they would be authorized, and it would be their duty, to find the accused guilty of the offense charged.

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Charlie Smith was convicted of assault with intent to kill, and brings error. Reversed.

Hendricks & Harrison, for plaintiff in error.
W. E. Thomas, Sol. Gen., for the State.

COBB, J. The accused was convicted of assault with intent to murder, and he assigns error upon the refusal of the judge to grant him a new trial.

1. The bill of exceptions recites that an order was passed overruling the motion for a new trial. This order was not specified as a part of the record to be transmitted, and the Solicitor General contends that this court should not consider the motion for a new trial, because it does not appear from the record that the judge has ever passed upon the motion. We think the recital in the bill of exceptions that an order was passed overruling the motion is sufficient to authorize this court to assume that the motion has been overruled, and a proper order passed to that effect.

2. There appears in the record an amendment to the motion for a new trial, upon which there is an entry, signed by the judge, in which it is stated that the recitals of fact contained in the grounds of the amended motion are "approved as true." The record does not disclose any order which in terms allowed the amendment. It has often been held that an order which simply "allowed" an amendment to a motion for a new trial did not have the effect of verifying the grounds of such an amendment. It is now contended that under the principle of these decisions an order approving or verifying the grounds of an amendment is not, in effect, an allowance of the amendment. We cannot concur in this view. We can understand how an unverified amendment to a motion for a new trial may be allowed, but we think that, when the grounds of an amendment to a motion for a new trial appear to have been approved by the judge, a presumption arises that the amendment has been allowed, and this presumption remains until it appears that by an order duly passed the amendment was in fact disallowed.

3. The proposition stated in the first paragraph of the third headnote is so well settled that it is unnecessary to do more than cite one of the more recent cases recognizing this ruling. See *Jordan v. State*, 117 Ga. 405, 43 S. E. 747, and cit. We think the charge complained of in the present case was subject to the criticism that it confused the principles stated in the sections of the Code

referred to in such a way as to prejudice the rights of the accused, and that the court erred in refusing to grant a new trial upon this ground.

4. In reference to the proposition stated in the fourth headnote, see *Gallery v. State*, 92 Ga. 463, 17 S. E. 863, and cit.

The foregoing deals with all of the assignments of error that require special notice. If there were any other errors or inaccuracies in the charge, the judge will no doubt correct the same on another trial.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 696)

POWELL v. NEAL LOAN & BANKING CO.

(Supreme Court of Georgia. March 4, 1904.)

FRAUDULENT CONVEYANCE—EVIDENCE.

1. There was no error of law requiring the granting of a new trial.

2. The evidence disclosed a transaction between husband and wife which resulted in the stripping of the husband of all means to pay his debts, and, while the testimony of the husband (the wife not having been called as a witness) was such as to show that the transaction was bona fide, and based upon a valuable consideration, still there were circumstances, though slight in their nature, which were sufficient to authorize a finding that the transaction was brought about for the purpose of hindering, delaying, and defrauding creditors of the husband. The jury having found to this effect, and this finding having received the approval of the trial judge, this court will not interfere.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by the Neal Loan & Banking Company against H. S. Powell. Judgment for plaintiff, and defendant brings error. Affirmed.

R. B. Blackburn, for plaintiff in error. O. E. & M. C. Horton, for defendant in error.

FISH, P. J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 618)

WOODWARD v. MILLER & KARWISCH
et al.

(Supreme Court of Georgia. March 3, 1904.)

SALE—BREACH OF WARRANTY—TORT—FRAUD—PLEADING—AMENDMENT.

1. The manufacturer of a buggy, who sells it to a municipal corporation for the use of one of its employes, representing it to be strong and in good condition, but knowing that it is in fact defective, the defect being so concealed by the use of paint and grease that the purchaser cannot detect it, is liable in damages to the person whose use of the buggy was contemplated at the time of the sale for injuries caused by such defect; and this is so notwithstanding there was no privity of contract between the plaintiff and the defendant in the sale of the buggy.

2. The amendments which were allowed merely amplified the original petition, and were not

open to the objection that they set out a new cause of action.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Park Woodward against Miller & Karwisch and others. On the sustaining of a general demurrer to the petition, plaintiff brings error and defendants cross-error. Reversed.

Arnold & Arnold and Howell C. Erwin, for plaintiff. Black & Jackson and W. H. Terrell, for defendants.

CANDLER, J. The main bill of exceptions assigns error upon the sustaining of a general demurrer to the plaintiff's petition. The defendants filed a cross-bill complaining of the allowance of an amendment to the petition. The case made by the declaration was, in substance, as follows: The plaintiff is superintendent of the waterworks department of the city of Atlanta, and in the performance of his duties has occasion to ride between different points in the city. The defendants are manufacturers and sellers of buggies, carriages, and other vehicles. On July 30, 1901, the plaintiff, in behalf of the city of Atlanta, bought of the defendants a buggy for his use, the defendants at the time representing to him that the buggy was in good condition, extra strong, and fitted for the service for which it was intended. After purchasing the buggy, the plaintiff began to use it, and on or about November 12, 1901, while riding in it on the streets of Atlanta, "the spindle extending from the right front axle broke, the buggy was wrecked and turned over, causing the horse to run away, and plaintiff was thrown about and around and on the Belgian block pavement, and greatly and permanently injured." The defendants were lacking in ordinary care in the manufacture, inspection, sale, and handling of the buggy. An ordinary test would have led to the discovery of the defect which caused the spindle to break. "There was a large crack in said axle, but the defendants had caused and directed the same to be covered with grease, and the crack filled in. This crack extended through the larger part of the spindle, and so weakened the same that the weight of the buggy caused the same to break. The crack was visible to the defendants, in the exercise of ordinary care, before they placed the grease upon the spindle, and had the defendants exercised ordinary care in sounding and testing the buggy in any way they would have discovered the break or crack." On account of the crack being filled and covered with grease, the plaintiff could not, in the exercise of ordinary care, discover its existence, and was unaware of it. The defendants falsely represented to the plaintiff that the buggy was in good condition, knowing at the time that the representation was false. The plaintiff's injuries were described, and were alleged to be per-

manent. Two amendments to the petition were offered, and were allowed over the defendants' objection. The first alleged that the spindle which broke was made of "defective, cheap, imperfect, and improperly welded iron and steel, * * * and flaws and incipient cracks were present in it." The second set up that at the time of his injuries the plaintiff was in the discharge of his duties as superintendent of the water-works system of Atlanta; that the defendants, who reside in Atlanta, knew at and prior to the time the buggy was sold that it was to be used by the plaintiff in the discharge of his duties, and sold the buggy expressly for such use; and that the plaintiff was injured by being thrown out into the street by the giving way and breaking of the axle, which caused the buggy to drop to the ground. "He was not hurt by the horse running away. The horse ran away after the buggy fell, and after plaintiff was injured."

1. We do not hesitate to hold that the petition set out a cause of action. Independently of the question of liability to the plaintiff on the alleged warranty of the buggy, we are clear that under the allegations the defendants were guilty of a tort for which the plaintiff could hold them liable. The gist of the action is the alleged false representation, knowingly made, as to the quality and condition of the buggy. In this it is very similar to an action of deceit. It makes no difference that there was no privity of contract between the plaintiffs. It appears that the plaintiff's injuries were sustained while the buggy was being put to a use expressly contemplated by the parties when the sale was made. "A particular transaction may sometimes be looked upon as affording the right to bring an action either for the breach of contract or in tort. Take, for instance, the too familiar case of a railway disaster caused by the company's negligence. The company are liable to the passenger in contract because they gave him a ticket, and in tort because they were not sufficiently careful in carrying him. In such a case as this there is clearly direct privity between the plaintiff and the defendants. But, generally speaking, privity is not necessary to support an action in tort. * * * If a railway company contract with a master to carry his servant, and in doing so are guilty of negligence, which causes bodily hurt to the servant and consequent damage by loss of service to the master, the company may be sued in contract by the master and in tort by the servant." Note to *Landridge v. Levy*, 4 M. & W. 337; *Shirley*, L. C. 346. In that case, which is closely in point in the present discussion, a father bought from a gunsmith a gun, which was warranted, telling the gunsmith at the time of the purchase that he wanted the gun for the use of himself and his sons. The gun, while being used by one of the sons, exploded, injuring him, and suit was brought by him against the seller of the

gun for the tort. The defendant contended that the right of action, if any, was in the father, to whom the sale had been made; but it was held that the suit in tort could be maintained by the son. In the able and exhaustive brief of counsel for the plaintiff a large number of cases of similar import are cited, but for the purposes of the present discussion we deem it necessary to refer to only a few of those most closely in point. In *Lewis v. Terry* (Cal.) 43 Pac. 398, 31 L. R. A. 220, 52 Am. St. Rep. 146, it was held that "one who sells a folding bed, representing it to be safe for use, when he knows it to be dangerous, is liable for injuries caused by the defects in the bed to any person who uses it, although there may be no privity of contract between them." That decision was based on the principle that the defendant was guilty of a wrong independently of his contract, viz., his false representation as to the safety of the bed, and that thereby the case was brought within the operation of the law of torts. In *Schubert v. J. R. Clark Co.* (Minn.) 51 N. W. 1103, 15 L. R. A. 818, 32 Am. St. Rep. 559, the plaintiff was a painter in the employment of a contractor. The contractor ordered of a retail merchant a stepladder for the use of the plaintiff. The merchant, not having such a ladder in his stock, ordered the defendant, a manufacturer, to deliver one to the place designated by the contractor. The ladder so delivered was made of defective and inferior material, and was dangerous, but its defects were hidden from view by paint, varnish, and oil. By reason of its weakness the plaintiff fell from it and was injured. The court held the defendant "liable for injuries caused by such negligence to one into whose hands the dangerous implement comes for use in the usual course of business, even though there be no contract relation between the latter and the manufacturer." We have been able to find in our own Reports only one case at all in point in the present discussion. In *Blood Balm Co. v. Cooper*, 83 Ga. 457, 10 S. E. 118, 5 L. R. A. 612, 20 Am. St. Rep. 324, this court held: "Where one prepares a proprietary or patent medicine, and puts it upon the market, and recommends it to the world as useful for the cure of certain diseases, the bottle containing it having therewith a prescription, made by the proprietor of the medicine, in which he states that it is to be taken in certain quantities, and the medicine with this prescription is sold by the proprietor to a druggist for the purpose of being resold to persons who might wish to use it, and the druggist sells the same to a person, who uses it in the quantity thus prescribed, and the same contains an ingredient such as iodide of potash in such quantity as proves harmful to the person thus using it, the proprietor is liable." We recognize that there is some distinction between the case cited and the case now under consideration, but it seems clear that the same principle

of law is applicable in both. Many courts have laid down a different rule governing the sale of articles which are inherently dangerous, such as a deadly poison or a powerful explosive, from that which is applied to the sale of ordinary articles of commerce; holding that the negligent sale, shipment, or handling of such inherently dangerous articles will render the negligent person liable to any one who may be injured by reason of his negligence, regardless of the question of privity between them, while as to articles not inherently dangerous there must be some privity between the parties to give a right of action. This rule, however, can have no application to the present case in view of the fact that the petition distinctly alleges that the plaintiff's use of the buggy was contemplated by the defendants when the sale was made, that they knew of the defects in the spindle, and that they concealed this defect from him by the use of paint and grease, and represented to him that the buggy was in perfect condition. The case of Cobb v. Clark Co., 118 Ga. 483, 45 S. E. 305, cited in the brief of counsel for the defendants, has no bearing upon the case now under discussion. There the plaintiff entered into a written contract with a building company, which was erecting a building adjoining his premises, concerning the building of a party wall between the two buildings. The defendant, a contractor for the building company, was not a party to this contract. The suit was brought against it for alleged negligence in the erection of the wall for the building company. This court held, necessarily, that whatever duty was owed to the plaintiff in the construction of the wall was by the building company, with which he had a written contract on the subject; that the defendant owed the plaintiff no duty, and was not liable to him in damages.

2. There was no error in allowing the amendments to the petition. These amendments merely amplified the original petition, and set out more in detail the nature of the alleged defects in the buggy and the circumstances of the plaintiff's injury. By no construction can they be held to introduce a new cause of action.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 678)

RAY v. PITMAN et al.

(Supreme Court of Georgia. March 4, 1904.)

EQUITABLE MORTGAGE—FORECLOSURE—QUITTING TITLE—PETITION—AMENDMENT—DEMURRER.

1. The original petition was sufficient as against a general demurrer. The amendment thereto related to matters which were germane, and was properly allowed, and the general demurrer to the petition as amended was properly overruled.

2. A defect in a petition resulting from a non-joinder of proper parties cannot be taken advantage of by general demurrer.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by J. H. Pitman and J. H. Widener against Annie F. Ray. Judgment for plaintiffs, and defendant brings error. Affirmed.

Lavender R. Ray and W. R. Hammond, for plaintiff in error. J. H. Pitman, for defendants in error.

COBB, J. J. H. Pitman and J. H. Widener brought their petition against Annie F. Ray, alleging: On March 1, 1892, L. R. Ray, the husband of defendant, borrowed from Robins \$1,200, gave him a promissory note for that amount, and executed a deed to land to secure the payment of the note. After the delivery and record of the security deed, Ray conveyed to the defendant the property described in the security deed. In 1897 Robins brought a suit in ejectment in the superior court of Coweta county against the defendant and her husband; and a consent judgment was rendered, in which it was provided that the plaintiff should recover possession of the land, but should convey the same to Annie F. Ray whenever she should pay the amount due on the note of her husband, and that in the meantime the plaintiff should account to her for the rents and profits of the land, and she should have possession of the premises whenever the debt of her husband was paid. Neither the husband nor the wife having paid any part of the debt, Robins brought suit in the superior court of Douglas county against L. R. Ray on the note; and on August 23, 1901, a judgment was rendered in favor of the plaintiff for stated amounts as principal and interest, these amounts being arrived at by what purported to be an accounting of the rents and profits from the date of the judgment in Coweta superior court to the date of the judgment last referred to. The defendant was not a party to this proceeding. Robins, after filing a deed to L. R. Ray in the office of the clerk of the superior court of Coweta county, caused the land to be levied upon under the execution from the superior court of Douglas county, and after due advertisement the same was sold by the sheriff to the plaintiff J. H. Pitman, who thereafter conveyed an interest in the same to the plaintiff J. H. Widener. It is alleged that the plaintiffs are informed that the defendant still claims that she has a right to redeem the land, but that she has never offered, and does not now offer, to pay any part of the debt. The prayer is that, if the defendant still has a right to redeem, she be required to come in and tender the amount due on the debt, and that the time within which the tender should be made, and the amount of the tender, be fixed and determined. To this petition the defend-

ant filed a general demurrer. The plaintiffs, over the objection of the defendant, were allowed to amend the petition by alleging that the interest on the debt exceeds by \$500 the amount of the rental value of the property since the same has been held by the plaintiffs and by Robins, and that the annual interest exceeds the annual rental value of the property, and by adding a prayer that an accounting be had, and the amount that the defendant ought to pay be determined—the plaintiffs offering to give full credit for all rental or income—and that a decree be molded directing a sale of the land, and the payment to plaintiffs of the balance due on the debt to Robins; the balance to be paid over to the defendant. The defendant renewed her general demurrer to the petition as amended. The court overruled the demurrers, and the defendant excepted, assigning error upon this judgment, and also upon the judgment allowing the amendment above referred to.

Mrs. Ray, not being a party to the judgment in Douglas county, is not bound in any way by that judgment. Her rights in the land, as to Robins or any one claiming under him, are to be determined solely by the judgment in Coweta superior court. It is contended that the effect of this judgment was to preclude Robins from afterwards bringing suit against L. R. Ray upon the note, and that, even if this is not true, Robins was certainly precluded from filing a deed to Ray, and selling the land under the execution founded upon the judgment on the note. For the purposes of this case only, this may be conceded. Treating the judgment in Douglas superior court as an absolute nullity, it may still operate as an estoppel against Robins in favor of any one who has been misled by his conduct in reference to this suit and the proceedings thereafter, and, being so misled, have acted to their prejudice. If the purchaser at the sale under this judgment paid the amount of his bid to the sheriff, and the amount so paid was, after proper deductions for costs and expenses, received by Robins, he would be thereafter, as against such purchaser, estopped from setting up the defect in the sale; and in equity the purchaser, not having received title on account of the sale being void, would be subrogated to the rights of the creditor who had received his money. Under the allegations of the petition, we think Pitman, the purchaser at the sheriff's sale, was subrogated to the rights of Robins under the judgment in Coweta superior court. See Civ. Code 1895, § 5471; Ashley v. Cook, 109 Ga. 653, 35 S. E. 89 (2).

The question to be determined, then, is, what are the rights of Robins under the judgment in Coweta superior court? It is contended that the effect of this judgment was to place Robins in possession for the purpose of applying the rents and profits of the land to the payment of his debt, and

that he has waived all other remedies he might have had before he resorted to the one which had the effect to place him in possession of the land. It is conceded, though, that he might notify Mrs. Ray that he no longer recognized her right to redeem, and that, after notice to this effect, if she did not redeem or bring some appropriate proceeding against him for an accounting at least within 10 years from the time of this notice, her right of redemption would be barred. See, in this connection, Gunter v. Smith, 113 Ga. 18, 38 S. E. 374 (4). That is, that Robins, or any one claiming under him, must arbitrarily declare that he no longer recognizes the right to redeem, and then wait at least 10 years before any disposition can be made of the property, while in the meantime the property may be depreciating in value, and the rental value, which at no time exceeds the interest on the debt, may be annually growing less and less. If Robins had not acquired possession of the land, he could have brought about a foreclosure sale, either at law or in equity, at any time he saw proper. It has been held that the holder of a security deed may maintain at the same time an action upon his note, praying for a sale of the land to satisfy the same, and also an action to recover the possession of the land upon the title which the security deed gives him. See Dykes v. McVay, 67 Ga. 502; Hines v. Rutherford, Id. 614; Ashley v. Cook, 109 Ga. 655, 35 S. E. 89; Georgia Mills v. Clarke, 112 Ga. 253, 257, 37 S. E. 414 (2). This being true, after there has been a judgment in the ejectment case, which simply gives to the creditor possession of the land in order that he may receive the rents, issues, and profits, and apply them to his debt—Polhill v. Brown, 84 Ga. 339, 10 S. E. 921 (10); Gunter v. Smith, 113 Ga. 18, 38 S. E. 374 (3)—we see no good reason for holding that after the creditor has pursued the remedy resulting in possession to a point where he sees that he cannot, either in justice to himself or his debtor, further pursue that remedy, he should not, for the purpose of enforcing payment of the balance of the debt then due, resort to some other recognized remedy, either at law or in equity. While in the present case he might be precluded from bringing suit on the note, on account of Mrs. Ray being the owner of the equity of redemption, a court of equity, which would recognize Pitman as the owner of the debt, and Mrs. Ray as the owner of the land subject to the debt, could certainly render a decree which would do equity between these two parties; that is, compel Pitman to account for the rental value of the property from the date of the judgment in Coweta superior court, and, after the sum thus ascertained is credited upon the Robins debt, require the land to be sold, and the balance due on that debt paid from the proceeds of the sale, and the balance remaining, if any, paid over to Mrs. Ray, who

would, in equity, be entitled thereto. Equity, which always favors the creditor, and abhors that which delays him in the collection of his debt, would certainly not turn away from its door a creditor who comes in praying that he may be allowed to account for that which is due his debtor, and apply the same in part satisfaction of the debt, and for a decree of sale of property expressly pledged for the payment of the debt, when neither the debtor, nor the vendee of the debtor, who claims the property pledged, offers to pay the debt, and such vendee interposes as the only objection to the rendition of the decree that the creditor, having elected to go into possession, must stay in possession until her right to redeem has become barred by lapse of time, notwithstanding the property pledged is depreciating in value, and the rental value of the property is not, and probably never will be, in the present condition of the property, as much as the annual interest on the balance due on the debt. The petition was overflowing with equity, and the amendment, which simply relieved certain defects in the petition as originally drafted, was properly allowed. It was argued that the petition was defective for want of parties. It may be that Robins should have been a party, either plaintiff or defendant, and possibly L. R. Ray should have been a party. See, in this connection, *Wilkins v. Gibson*, 118 Ga. 33, 58, 38 S. E. 374, 84 Am. St. Rep. 204 (10). There was no demurrer raising the question of nonjoinder, and a defect of this character cannot be taken advantage of by general demurrer. See *Hightower v. Mustian*, 8 Ga. 506 (3), 510; *Rusk v. Hill*, 117 Ga. 723 (3).

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 630)

ATLANTA TRUST & BANKING CO. v. NELMS et al.

(Supreme Court of Georgia. March 8, 1904.)

INJUNCTION—REFUSAL—AFFIRMANCE ON ERROR—RES JUDICATA—AMENDMENT OF PETITION.

1. A judgment of a trial court refusing an injunction when the same depends entirely upon a question of law is, upon its affirmance by the Supreme Court, while not a final judgment in the case, a final adjudication of such question.

2. An application was made for an injunction, and the only reason shown by the defendant as cause against the granting of the injunction was a general demurrer. The judge, at the first term, passed an order refusing the injunction, and also an order sustaining the demurrer and dismissing the case. Separate bills of exceptions were sued out by the plaintiff assigning error upon each of the judgments, and the judgment refusing the injunction was affirmed by the Supreme Court. At a subsequent term the case based upon the other bill of exceptions came on for a hearing, and no other questions were involved therein than such as were involved and decided when the judgment refusing the injunction was under review. *Held*, that the

judgment last referred to will be treated as res adjudicata, and the judgment sustaining the demurrer will be affirmed.

3. The application for a direction allowing the plaintiff to amend its petition upon the filing of the remittitur is denied, no sufficient reason appearing why this case should be taken out of the general rule preventing the filing of an amendment after a judgment sustaining a general demurrer is affirmed.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by the Atlanta Trust & Banking Company against J. W. Nelms and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Dorsey, Brewster & Howell, for plaintiff in error. W. R. Hammond, Jno. L. Hopkins & Sons, and R. O. Lovett, for defendants in error.

COBB, J. The Atlanta Trust & Banking Company filed an application for an injunction against Nelms and others. The interlocutory hearing was had during the term to which the case was returnable. The defendants filed a general demurrer, and urged this as a reason for not granting the injunction prayed for. The plaintiff offered an amendment to its petition, which the court refused to allow. No other reason was shown against the granting of the injunction than the demurrer above referred to. The court passed on the same day two orders, each embracing a separate judgment; the one refusing to grant the injunction prayed for, and the other sustaining the general demurrer and dismissing the case. The plaintiff filed two bills of exceptions—one to the judgment refusing the injunction, and the other assigning error upon the judgment sustaining the demurrer; and in each bill of exceptions error was assigned upon the ruling of the judge refusing to allow the amendment to the petition. The bill of exceptions in each case was transmitted with the appropriate record to this court. The one upon the first writ of error was returnable to the October term, 1902, and the judgment on this writ of error was affirmed. *Atlanta Trust & Banking Company v. Nelms*, 116 Ga. 915, 43 S. E. 380. The case now before us is the one made by the bill of exceptions assigning error upon the judgment sustaining the demurrer, the case being returnable, under the law, to the March term, 1903, and having been regularly continued to the present term on account of the death of one of the parties. The same questions, and no others, that were made and decided in the case when it was here on the first writ of error are made by the assignments of error in the present case. In each instance the questions were whether or not the court erred in disallowing the amendment to the petition, and whether, as matter of law, the allegations of the petition were sufficient to authorize the relief prayed

for. Both of these questions were decided adversely to the plaintiff in error when the case was here before, and under the ruling in the case of *City of Atlanta v. First Methodist Church*, 83 Ga. 448, 10 S. E. 231, which was approved and followed in *Ingram v. Mercer University*, 102 Ga. 226, 29 S. E. 273, an affirmance of the judgment on the writ of error now before us results, because the judgment of the trial judge refusing the injunction depended upon a question of law, and when that judgment was affirmed by the Supreme Court the point in question was finally adjudicated, and the parties in the case were thereafter bound by that judgment. See, also, *Savannah Railway v. Savannah*, 115 Ga. 187, 41 S. E. 592. This rule is, however, not applicable unless the judgment is based entirely upon a question of law. *Collins v. Carr*, 116 Ga. 39, 42 S. E. 373. If the hearing on the demurrer had taken place after the affirmance of the judgment refusing the injunction, the trial judge would have been bound by the former judgment, which had been affirmed, and would have been compelled to sustain the demurrer. The fact that the two judgments were rendered on the same day does not prevent the principle that would have been applicable under the facts just referred to from being controlling. The judge, in passing the order sustaining the demurrer and dismissing the case, simply anticipated a result which was inevitable in the event his judgment refusing the injunction was affirmed. Following the precedent in the cases above cited, the judgment in the present case will be affirmed.

The plaintiff in error asks that, in the event the judgment is affirmed, this court give direction that it be allowed to amend its petition upon the filing of the remittitur. The general rule is, as stated by counsel in their brief, that, where a case is dismissed on demurrer, and such judgment is affirmed by the Supreme Court, no amendment can be allowed upon the filing of the remittitur, unless direction to that effect is given by the Supreme Court. Applications for such direction are addressed to the discretion of this court, and we are unable to see any good reason why this case should form an exception to the general rule. The litigation has been of several years' duration, and was pending long enough before the judgment sustaining the demurrer for the plaintiff, if it had been in the exercise of due diligence, to have discovered all that was necessary to the maintenance of its case. The controversy first appeared in this court in 1902 (115 Ga. 53, 41 S. E. 247), and seems to have originated in the trial court either in the early part of 1901 or the latter part of 1900. The judgment on demurrer was entered on November 13, 1902. We must decline to give the direction asked.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 648)

CAULEY v. WADLEY LUMBER CO.

(Supreme Court of Georgia. March 4, 1904.)

JUDGMENT BY DEFAULT—OPENING—TIME OF MOTION—NONSUIT.

1. While, under Civ. Code 1895, § 5072, a trial judge is vested with a wide discretion as to opening a judgment of default on motion made at the trial term of a case, there is no provision of law authorizing him to entertain and grant a motion to open a default presented at any subsequent term at which the case is called for trial. *Thornton v. Coleman*, 30 S. E. 782, 104 Ga. 625, 627. To move to open a default at the term at which a case regularly stands for trial is purely a matter of grace, and this privilege must be exercised, if at all, within the time prescribed by the statute whereby it is conferred. *Ingalls v. Lamar*, 41 S. E. 573, 115 Ga. 293, 296. The present case differs from the case of *Davis v. South Carolina Railroad Co.*, 33 S. E. 437, 107 Ga. 420.

2. The error committed by the court below in allowing the defendant to file an answer at the second term after the trial term of this case rendered all subsequent proceedings nugatory, since the plaintiff was thereby deprived of a substantial right (*Lenny v. Finley*, 45 S. E. 317, 113 Ga. 427); and for this reason, if for no other, the judgment of nonsuit rendered against her should be vacated.

(Syllabus by the Court.)

Error from City Court of Douglas; Levi O'Steen, Judge pro hac vice.

Action by S. E. Cauley against the Wadley Lumber Company. From a judgment opening a default, plaintiff brings error. Reversed.

Lankford & Dickerson and Ohas. T. Roan, for plaintiff in error. Quincey & McDonald, for defendant in error.

TURNER, J. Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 610)

HUXFORD v. MEINHART & SCHAUL.

(Supreme Court of Georgia. March 3, 1904.)

GUARANTY—PAROL EVIDENCE—CONTRACT.

1. A., in person, and B., through a representative, entered into a parol agreement by which A. was to become liable to B. for the debt of a third person. Subsequently A. wrote to B. a letter which merely purported to give A.'s understanding of the terms of the agreement. B. sued A. on the agreement, and A. did not plead the statute of frauds. *Held*, that the letter was not the contract, but was merely a written admission as to its terms, and it was error to refuse to allow A. to testify to a version of the agreement different from that expressed in the letter.

(Syllabus by the Court.)

Error from City Court of Douglas; J. W. Quincey, Judge.

Action by Meinhardt & Schaul against C. Huxford. Judgment for plaintiffs. Defendant brings error. Reversed.

Lankford & Dickerson and Dart & Roan, for plaintiff in error. Simon W. Hitch, for defendants in error.

FISH, P. J. The defendant agreed, for a valuable consideration, to be liable to plaintiffs for an account to be contracted with them by Gillis. Gillis thereafter contracted an account to the amount of \$700.48. Subsequently a disagreement arose between plaintiffs and defendant as to the extent of the latter's liability, it being then contended by the defendant that he was to be responsible for only one-half of the account, and a parol agreement was entered into in reference to the matter between the defendant and a representative of plaintiffs. Thereafter the defendant wrote to plaintiffs a letter, a copy of which is as follows: "Dear Sirs: I will protect you in half of the J. W. Gillis acct., and instructed your Mr. Einstein to so inform you, but in the meantime I hope you will be as lenient with me as possible and I will help you collect the balance as far as I am able. Trusting this will meet your approval, I am, yours truly, C. Huxford." At the trial the representative of the plaintiffs with whom the parol agreement was entered into by defendant testified that the agreement was to the effect that the defendant was to be liable to pay \$350.48 in the event Gillis did not pay the account. The defendant offered to testify that the agreement between him and the representative of the plaintiffs was not that he was to pay one-half of the account, but that he was to see that at least one-half of it was paid by Gillis, and that he was to be liable for only so much of one-half of the account as Gillis did not pay. The court rejected this evidence. There was evidence that Gillis had paid \$250 of the account; the plaintiffs contending that the defendant was liable for \$350.24, and the defendant contending that he was liable for only \$100.24.

It is insisted that the ruling of the court was correct, because the evidence offered tended to contradict and vary the writing above referred to, which it is claimed was unambiguous. The writing was not the contract. It was simply a written declaration by the defendant of what he, at the time the letter was written, understood to be the terms of the agreement which had been previously entered into between him and the representative of the plaintiffs. What was the contract between the parties depended upon what took place prior to the writing of the letter. While the letter might be used as an admission of the defendant, it was not the contract, and therefore did not preclude the defendant from giving in parol his version of the transaction as he then understood it. The representative of the plaintiffs had been heard fully before the jury as to his version, the defendant was entitled to be heard in the same manner, and it was for the jury to determine what was the truth in reference to the transaction. In passing upon this question, of course, the jury should consider the written admission of the defendant. The evidence should have been ad-

mitted, and the case submitted to the jury under appropriate instructions.

While the defendant, in his plea, denied that he ever agreed in writing to pay the account, the plea does not, in terms, set up the want of a writing as a defense to the action, and we have therefore treated the case as if the statute of frauds was not pleaded.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 887)

ATLANTA, K. & N. RY. CO. v. SMITH.
(Supreme Court of Georgia. March 4, 1904.)
PLEADING—PETITION—WRONGFUL DEATH—
RIGHT OF ACTION.

1. A judgment of a trial judge holding that a petition has been framed in compliance with the pleading act of 1893 (Civ. Code 1895, § 4961), requiring all petitions to "set forth the cause of action in orderly and distinct paragraphs numbered consecutively," will not be reversed unless it is apparent that there has been an utter disregard of the provisions of the act.

2. Under the Tennessee statute, upon which the present suit was based, the personal representative of a deceased has a right to recover for his homicide in the event he left surviving him a widow, and in that event it is immaterial whether there were also children. Allegations in the petition referring to the children of the deceased, when the suit is based upon the fact that there was a widow, are irrelevant, and should be stricken as surplusage. Whether, under the law of Tennessee, the recovery would be for the sole benefit of the widow, or the children would be interested therein, is not now decided; the defendant not being concerned with what shall be done with the proceeds of the recovery in the event it is paid to the personal representative, who, under the law of Tennessee, has a right to bring the suit.

3. There was no general demurrer. The special demurrers were not well taken, with the exception of the one dealt with in the preceding note.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Maude Smith against the Atlanta, Knoxville & Northern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Smith, Hammond & Smith, for plaintiff in error. Arnold & Arnold, for defendant in error.

COBB, J. This was an action for damages on account of a homicide which occurred in the state of Tennessee. The plaintiff, who was the widow of the deceased, brings the suit as administratrix of his estate. The defendant is a railway corporation of this state. The defendant filed various special demurrers to different parts of the petition. The demurrers were overruled, and it excepted.

1. It was insisted that the petition as a whole was defective because it did not set forth the alleged cause of action in orderly and distinct paragraphs numbered consecutively, and that one of the paragraphs was

especially subject to objection, containing, as alleged in the demurrer, at least 20 different acts of negligence, and consisting of nearly two pages of typewritten matter. The pleading act of 1893 provided that petitions should "set forth the cause of action in orderly and distinct paragraphs numbered consecutively." Civ. Code 1895, § 4961. The act does not prescribe any penalty for a failure to comply with its terms. A petition not subdivided into paragraphs at all would evidence such a disregard of the requirements of the law that the same should be dismissed on motion. A petition which makes a paragraph of every sentence, without reference to substance, would also evidence such a disregard of the spirit of the law that it should be dismissed on motion, for the reason that such a paragraphing would not be orderly. The true course lies between these two extremes. It is impossible to satisfactorily define what would be an orderly paragraph, and this matter must be left largely to the discretion of the trial judge. If, upon an examination of the petition, he is satisfied that there has been a substantial compliance with the requirements of the act, his judgment in holding that the petition sets forth the cause of action in distinct and orderly paragraphs will not be reversed, unless it is plainly apparent that the provisions of the act have been substantially disregarded by the pleader. See, in this connection, *Orr v. Cooledge*, 117 Ga. 195, 207, 43 S. E. 527 (4). While we think that some of the paragraphs in the present petition might have been well subdivided into several paragraphs, still we cannot say that there has been such a disregard of the provisions of the act that the judge erred in upholding the petition as framed. It would seem to be the best practice, in actions for damages on account of negligence, to make each distinct act of negligence the subject of a separate paragraph.

2. The present suit was based upon three sections of the Tennessee Code (Shannon's), which were set out in the petition, and which are as follows:

"Sec. 3130. The right of action which a person, who dies from injuries received from another, or whose death is caused by the wrongful act, omission or killing of another, would have had against the wrongdoer in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his widow, and in case there is no widow, to his children, or to his personal representative for the benefit of his widow or next of kin, free from the claims of creditors.

"Sec. 3131. The action may be instituted by the personal representative of the deceased, but if he declines, the widow and children of the deceased may, without the consent of the representative, use his name in bringing and prosecuting the suit, or giving bond and security for costs, or in the form

prescribed by paupers. The personal representative shall not in such case be responsible for costs, unless he sign his name to the prosecution."

"Sec. 3134. Where a person's death is caused by the wrongful act, fault or omission of another, and suit is brought for damages, the party suing shall, if entitled to damages, have the right to recover for the mental and physical suffering, loss of time, and necessary expenses, resulting to the deceased from the personal injuries, and also the damages resulting to the parties, for whose use and benefit the right of action survives from the death consequent upon the injuries received."

The petition alleged that the plaintiff was the widow of Clyde Smith, as well as administratrix of his estate, and that she had by her deceased husband two minor children, whose names and ages were stated, and who were alleged to be the next of kin of the deceased. One ground of the demurrer complains that there was a misjoinder of parties, in that the children were, in effect, joined as parties plaintiff with the administratrix; and the demurrer further raised the question that the allegations which set forth the names and ages of the children and the fact that they were the next of kin were irrelevant, and should be stricken as surplusage. We do not think that under the allegations of the petition the children were joined as parties, but we are of opinion that all reference to the children was irrelevant, and should have been eliminated from the petition. Under the Tennessee statute the right of action for a homicide is in the personal representative, provided there is a widow, or children, or next of kin. If there is no one answering to any of these descriptions, there is no cause of action. It is therefore necessary that there should be an allegation that the deceased left a widow, or children, or next of kin, to make the cause of action complete. And when the petition alleges that there is a widow, the cause of action is complete, and it is immaterial whether the deceased had children or other next of kin. Consequently, any allegation in reference to such children or next of kin should be stricken as surplusage. The fact that there is a widow is all that is necessary to give a right of action to the representative. Whether, under the Tennessee law, a recovery by the representative upon the ground that there is a widow would inure to the benefit of the children when there are children, as well as to the widow, or what should be done with the proceeds of the recovery, is a question which we do not now decide, nor is this question one in which the defendant is at all interested. The personal representative has a right to recover when he shows that the deceased left surviving him a widow, and what disposition the personal representative makes of the recovery is no concern of the defendant.

3. The alleged negligent acts of the defendant are set forth in two paragraphs of the

petition. It is alleged in the demurrer that there is no allegation in these paragraphs that the negligent acts were the cause of, or contributed to, the homicide of the deceased; and there are numerous grounds of special demurrer criticizing the verbiage of the different averments, and alleging that various allegations of negligence are mere conclusions of the pleader. When the petition is taken as a whole, we think it sufficiently appears that the plaintiff claims that the death of her intestate was the result of the negligent acts which are set forth in the paragraphs of the petition above referred to, and facts necessary to authorize the allegations of negligence are set forth in these paragraphs. The averments of a petition are required to be certain only to a common intent, and we think the allegations of this petition are at least up to this low degree of certainty. The criticisms upon the verbiage of the petition are not such as to require any of the allegations to be eliminated from the petition. There was no general demurrer, and none of the special demurrers were well taken except the one referring to the allegation in reference to the children of the deceased. The judgment will be affirmed, with directions that these allegations be stricken from the petition, and that the costs of this writ of error be paid by the defendant in error.

Judgment affirmed, with directions. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 672)

TRUST CO. OF GEORGIA v. SCOTTISH UNION & NAT. INS. CO.

(Supreme Court of Georgia. March 4, 1904.)

INSURANCE POLICY—ACTION BY MORTGAGEE—PARTIES—REFORMATION OF POLICY.

1. A mortgagee may maintain an action at law, in his own name alone, for loss under an insurance policy payable to him, as his interest may appear, when the amount of his debt exceeds or equals the value of the insurance, and the mortgage embraces all of the insured property which was destroyed.

2. The petition set out a good cause of action on the policy as written.

3. There was a want of necessary parties, and a failure to set out facts entitled the plaintiff to a reformation of the policy.

4. Under Civ. Code 1896, § 4833, the failure of the petitioner to make the necessary parties, or to set up facts authorizing a reformation of the policy, did not deprive it of the right to recover what it might be entitled to on the policy as actually written.

5. The plaintiff does not lose the benefit of a good cause of action where it fails to establish a better.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by the Trust Company of Georgia, receiver, against the Scottish Union & National Insurance Company. Judgment for defendant, and plaintiff brings error. Reversed.

Hawkins borrowed from the Fidelity Trust & Loan Company \$1,685, and secured the same by a deed to real estate, under Civ. Code 1895, § 2771. The receiver of this company applied to the Scottish Union & National Insurance Company for a policy of insurance on the building. The petition averred that the receiver paid the premium, and that on February 2, 1901, in consideration of said premium, the insurance company did insure W. A. Hawkins for an amount not exceeding \$1,000 on the property described, the policy stipulating that "any loss that may be ascertained and proved to be due the assured under this policy shall be held payable to W. K. P. Wilson, Rec. Fidelity Trust & Loan Company, as interest may appear, balance to assured." On September 17, 1901, there was indorsed on the policy the statement that "notice accepted that the Trust Co. of Georgia has been appointed Receiver for the Fidelity Trust and Loan Co., in place of W. K. P. Wilson, and loss clause is hereby changed accordingly." The Trust Company of Georgia, as receiver of the Fidelity Loan & Trust Company aforesaid, alleged in its petition that by a mistake Hawkins had been named as the assured, that the interest insured should have been that of the receiver, and that naming Hawkins as the assured was the result of a mistake of fact and law. It averred the loss of the building by fire, the making of the proper proof, compliance with all the conditions precedent and subsequent, and that the insurance company denied liability generally; that after the fire Hawkins had left the state, and his whereabouts were unknown. It prayed for a reformation of the policy by striking the name of Hawkins, and inserting in lieu thereof the name of petitioner, as receiver of the Fidelity Trust & Loan Company. It also prayed "that a judgment may be rendered in petitioner's favor against the defendant company for the amount of said policy, to wit, one thousand dollars, with interest from the date of the defendant company's denial of liability under said policy and refusal to pay the same, namely, the 26th day of February, 1902." The defendant demurred on the ground that there was nothing setting forth wherein the mistake consisted, how or by whom it was made, nor was the mistake sufficiently set forth to enable the defendant to plead thereto; that Hawkins was a necessary party, but he was not named as a party, nor was any process asked against him. Subject to its demurrer, the defendant answered. The court sustained the demurrer, but allowed 10 days in which to cure the defects pointed out by the demurrer, in default whereof the case should stand dismissed. The plaintiff did not amend, and excepts to the judgment of dismissal.

Anderson, Anderson & Thomas, for plaintiff in error. King, Spalding & Little, for defendant in error.

LAMAR, J. It has been held that a bill to annul a contract for fraud and illegality, with an alternative prayer that the court would specifically enforce it if the same was found to be valid, presents two inconsistent and irreconcilable causes of action, and is fatally defective. *St. Louis R. Co. v. Terre Haute R. Co.* (C. C.) 33 Fed. 448, citing *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158. But here the policy as written was not void, and the plaintiff might have a cause of action thereunder, even if unable to establish its right to a reformation and the advantages incidentally flowing therefrom. In a suit to reform, the complainant may also obtain a decree for the relief to which he is entitled under the instrument as reformed. And in like manner, under our broad and practical system of pleading, there is no reason why the petitioner, on failure to establish his cause of action for the reformation, might not recover judgment for what he was entitled to under the policy as actually written. Compare *Gunn v. Barrett*, 69 Ga. 690. For "the superior courts * * * on the trial of any civil case, shall give effect to all the rights of the parties, legal or equitable, or both, and apply on such trial remedies or relief, legal or equitable, or both, in favor of either party, such as the nature of the case may allow or require." Civ. Code 1895, § 4833. But while the want of necessary parties, and the allegations in the petition, made it impossible to reform the policy, the petition did set out a cause of action on the policy as originally prepared. It averred the payment of the premium, the issuance of a policy to Hawkins, with the loss payable to his creditor as its interest might appear, the destruction of the premises by fire, the presentation of proofs of loss, and the company's refusal to pay; and prayed for a money judgment on said policy. There was no ground for the objection that a splitting of the cause of action on the policy would result, as there was an allegation that the mortgaged debt exceeded the amount due under the policy. The defendant in error insists that Hawkins as mortgagor was also a necessary party on this branch of the case. And while there is some conflict on the subject, yet the weight of authority is in favor of the proposition that "a mortgagee may maintain an action at law, in his own name alone, for loss on the insurance policy payable to him, as his interest may appear, when the amount of his debt exceeds the value of the insurance, and the mortgage embraced all of the property which was destroyed." *Chipman v. Carroll* (Kan.) 23 L. R. A. 305, and note; *Lowry v. Ins. Co. of North America* (Miss.) 21 South. 664, 37 L. R. A. 779, 65 Am. St. Rep. 597; *Maxcy v. New Hampshire Fire Ins. Co.* (Minn.) 55 N. W. 1130, 40 Am. St. Rep. 325. Compare *Hawkins v. Central Ry. Co.*, 119 Ga. 159, 46 S. E. 82; *Loudermilk v. Loudermilk*, 93 Ga. 443, 21 S. E. 77; *Liverpool Ins. Co. v. Ellington*, 94 Ga. 785, 21 S. E. 1006; *Bentley v.*

Standard Fire Ins. Co., 40 W. Va. 729, 23 S. E. 584; *Traders' Ins. Co. v. Mann*, 118 Ga. 381, 45 S. E. 426; Civ. Code 1895, § 3077.

The defense of multifariousness is not favored. In this case there was no demurrer on the ground that there was a misjoinder, or that the causes of action were inconsistent, or that the petition was multifarious. The defect alleged was that the petition did not allege how or by whom the mistake was made, or in what it consisted. These grounds of demurrer were well taken and properly sustained. The petition did not set out issuable facts sufficient to warrant the reformation of an instrument, which not only explicitly named Hawkins as the assured, but in that shape was afterwards assigned to the present plaintiffs, who took the same, not as the assured, but with a clause reciting that the loss should be payable to it as its interest might appear. Even had the allegations been sufficient to warrant a reformation of the instrument, Hawkins was a necessary party. His rights under the policy as written might have been different from those under a policy in which he was not named and where the mortgagee was described as the assured. But in setting forth a defective cause of action for reformation of the policy, the plaintiff did not lose the benefit of the good cause of action on the policy as written. Under Civ. Code 1895, § 4833, the plaintiff would not lose the good because it failed to secure the better. Where a petition is sustainable for one cause of action, it should not be dismissed as a whole because defective as to another cause of action therein set out. *Lowe v. Burke*, 79 Ga. 166, 3 S. E. 449.

The plaintiff should be allowed to prosecute its case for the recovery of a money verdict, and the judgment is reversed. All the Justices concurring, except **SIMMONS, C. J.**, absent on account of sickness.

(119 Ga. 704.)

ROBERTS v. KUERT.

(Supreme Court of Georgia. March 4, 1904.)
RULES OF COURT—CONSTRUCTION—REVIEW—
VACATING JUDGMENT.

1. Generally speaking, the construction placed upon its own rules by a court of original jurisdiction is conclusive; and only in cases where it is clear that the construction given is wrong, and that injustice has been done, will the discretion of the judge of such a court construing its rules be interfered with by a reviewing court. 8 Am. & Eng. Enc. L. (2d Ed.) 81, and cases cited.

2. It appears that a meritorious defense was filed to the action brought by the plaintiff. The case, by agreement, went to the "absence docket." Under the construction given by the judge to the rule of court by virtue of which it was sought to take the case from the "absence docket" and place it upon the trial calendar, there was not a proper compliance by the plaintiff with that rule. A verdict and judgment in favor of the plaintiff having been taken in the absence, and without the knowledge of the defendant, this court cannot say that the court abused its discretion in vacating the judgment

and reinstating the case upon a timely motion made for that purpose. *Lambert v. Smith*, 57 Ga. 25

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action between T. C. Roberts and M. R. Kuhrt. From the judgment Roberts brings error. Affirmed.

James K. Hines, for plaintiff in error. Fulton Colville, for defendant in error.

FISH, P. J. Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 634)

WILLIS v. FELTON, Judge.

(Supreme Court of Georgia. March 3, 1904.)

MANDAMUS TO JUDGE.

1. The certificate of a trial judge to a bill of exceptions, complaining of a judgment which affirmatively appears to have been entered in exact compliance with a judgment of this court, will not be compelled by mandamus.

Cobb, J., dissenting.

(Syllabus by the Court.)

Application by John Willis for writ of mandamus to W. H. Felton, judge. Denied.

R. Douglas Feagin and Hall & Wimberly, for plaintiff in error. Bacon, Miller & Brunson and W. C. Nottingham, for defendant in error.

CANDLER, J. Harrell brought an action in Bibb superior court against Willis, to dispossess him as a tenant holding over. The jury found that the plaintiff was entitled to the possession of the premises sued for, and also returned a verdict in his favor for \$264, double rent. The case was brought to this court, where the judgment of the court below was affirmed on condition that the plaintiff, within 10 days after the filing of the remittitur in the office of the clerk of the superior court, would "write off from the verdict all rent prior to the date of the demand for possession, to wit, October 9, 1902." See *Willis v. Harrell*, 118 Ga. —, 45 S. E. 794. It was also held, in effect, that the plaintiff was entitled under the evidence to a verdict for double rent for the time elapsed since the date of demand for possession to the date of the verdict. When the remittitur reached the court below, counsel for the plaintiff filed the following paper: "In compliance with the terms of the remittitur from the Supreme Court in this case, and within ten days after said remittitur is filed in this court, the plaintiff, J. W. Harrell, does hereby, through his counsel of record, write off from the verdict all rent prior to October 9, 1902, and makes no further claim for such rent accruing prior to October 9, 1902, said rent written off amounting to \$227.34, and leaving the amount due said Harrell on said verdict the sum of \$36.66." Thereupon, over

the objection of counsel for Willis, his honor Judge Felton passed an order making the judgment of the Supreme Court the judgment of the superior court, and further reciting that, "it being shown to the court that said J. W. Harrell has complied with the requirements of the judgment of the Supreme Court, and written off and released from the verdict all rent prior to October 9, 1902, it is hereby ordered that the judgment of this court on said verdict do now proceed." Counsel for Willis then tendered to the judge a bill of exceptions to this court, complaining of this judgment on the ground that, the verdict of the jury for double rent being, all of it, necessarily for rent accruing prior to the date of demand (which was also the date on which the proceeding to dispossess was begun), under the terms of the remittitur from the Supreme Court, in order for the judgment to be affirmed, it was necessary for the plaintiff to write off the entire amount of the verdict. The bill of exceptions also recited that the amount of \$36.66, not written off by the plaintiff, "represented double rent from the date of the commencement of the proceedings to the date of the verdict." The judge refused to certify this bill of exceptions, and Willis petitioned this court for the writ of mandamus to require him to do so.

In order to reach a proper determination of this case, it is necessary to construe, to a certain extent, the ruling of this court in the case of *Willis v. Harrell*, to which we have already referred. It is true that in that case the court instructed the jury that, if they found that the defendant was a tenant holding over, the plaintiff would be entitled to recover double rent for four years next preceding the institution of the proceedings to dispossess, and that this charge was here held to be erroneous. It is also true that the amount found by the jury, \$264, is the amount of double rent proven for four years. In the light of its holding, however, to the effect that the plaintiff was entitled to a finding for double rent from the date of demand, or filing of the suit, to the date of the verdict, it can hardly be seriously contended that this court intended to treat the finding of \$264 as extending to the date of the institution of the proceedings, and no further. We will not look to the charge of the court to determine the meaning of a verdict. *English v. State*, 105 Ga. 516, 31 S. E. 448. The finding of \$264 was regarded as a sum in the abstract, without reference to dates, and it was the intention of this court to affirm the judgment of the court below, on condition that the plaintiff would write off from his verdict so much as would leave an amount representing double rent from the date of demand to the date of the verdict. It appears from the applicant's own showing that there was a literal compliance with this condition. The judge of the superior court, then, had no alternative but to enter the judgment which it is now sought to bring

to this court for review. It is universally held that there is no appeal from the judgment of a trial court rendered in accordance with the mandate of a higher court. 13 Enc. Pl. & Pr. 868, and authorities cited; and see, especially, *Jenkins v. Guarantee Trust Co.*, 55 N. J. Eq. 798, 38 Atl. 695; *Vansickle v. Haines*, 8 Nev. 164; *Wilkins v. Earle*, 46 N. Y. 358; *Humphrey v. Baker*, 103 U. S. 796, 26 L. Ed. 456. In the New York case cited it was held that "a judgment entered upon, and in conformity with, a remittitur from this court, is not an actual determination of the court below." And where it affirmatively appears, from the application for mandamus and the judge's response thereto, that the judgment complained of is in the bill of exceptions, which it is sought to compel him to certify, it would indeed be a vain thing for this court to require the judge below to grant a writ of error, which is expressly foredoomed to dismissal. This case is, of course, clearly distinguishable from those where this court has held that it will, without inquiring into the merits of the case, issue a mandamus absolute to require a trial judge to certify the truth of a bill of exceptions complaining of the overruling of a motion for a new trial, or of any ruling which necessarily controlled the verdict of the jury. It belongs rather to that class of cases where the merits of the question sought to be reviewed have already been determined, and a further consideration of them would be futile. To the first class of cases mentioned belongs *Taylor v. Reese*, 108 Ga. 379, 33 S. E. 917; to the latter, *Malone v. Hopkins*, 49 Ga. 221, *Hanye v. Candler*, 99 Ga. 214, 25 S. E. 606, *Cribb v. Parker*, 119 Ga. —, 46 S. E. 110, and other cases there cited.

Mandamus absolute denied. All the Justices concur, except *SIMMONS*, C. J., absent on account of sickness, and *COBB*, J., dissenting.

COBB, J. (dissenting). In my opinion this case is absolutely controlled by the ruling made in *Taylor v. Reese*, 108 Ga. 379, 33 S. E. 917, a decision by six justices, which has never been overruled, criticised, or doubted. While the judgment which is sought to be excepted to is exactly in accordance with what was said, and what was intended to be said, in the case of *Willis v. Harrell*, and the bill of exceptions which the judge has refused to certify is wholly without merit, still, in accordance with the ruling in the case first above referred to, the question should be allowed to come to this court in its orderly and regular way, and should not be determined on this application for mandamus. When the conclusion was reached that the answer of the judge in effect admitted that the bill of exceptions which he refused to sign was true in fact, no other course was, under the law, open to this court, than to make the mandamus absolute, requiring the bill of exceptions to be certified. The only

cases in which it is within the authority of this court to inquire into the merits of the questions raised by the bill of exceptions on the application for mandamus, where the judge has refused to sign the same, are those relating to the action of the judge on extraordinary motions for new trial in criminal cases, such as *Cribb v. Parker*, Judge, 119 Ga. —, 46 S. E. 110, and cases which that followed. Without reference to whether it was upon sound reasoning, cases of this character have been made a class peculiar to themselves, and taken out of the general rule requiring all cases to be brought to this court in a regular and orderly way. I do not think the present case can be brought within any reason which might be suggested for this class of cases, nor do I think that the court should at this time take another class of cases out of the old and established rule. The inevitable tendency of decisions like the present is to transfer all cases to the mandamus docket for disposition.

(119 Ga. 705)

RUSSELL v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. March 4, 1904.)
RAILROADS—INJURY AT CROSSING—EVIDENCE—PLEADING.

1. Though a standing railway train be an unauthorized obstruction of a public crossing, a person attempting to pass between the cars by climbing over the bumpers, if injured thereby in consequence of a sudden movement of the train, cannot recover, unless the engineer, conductor, or some other person having control of the train's movements, knew of his attempt to cross, or had notice of his exposure to danger. If the only employé who knew of the perilous position in which the person attempting to cross had placed himself was a watchman at the crossing, no recovery can be had, unless it appears that the watchman was so situated, after he knew of the dangerous position in which the person was placed, that he could signal the engineer or other employés in control of the train's movements, and thus prevent injury to the party attempting to cross, and that he failed to give such signal, or that he gave the signal and it was disregarded.

2. A count in a petition against a railway company claiming damages for negligence which alleges in general terms that the defendant was guilty of negligence should be stricken on special demurrer setting up that the petition fails to set forth the particulars in which the defendant was negligent, unless the defect in the petition is cured by amendment.

(Syllabus by the Court.)

Error from City Court of Atlanta; *H. M. Reid*, Judge.

Action by *Israel Russell* against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Arnold & Arnold, for plaintiff in error.
Dorsey, Brewster & Howell, for defendant in error.

COBB, J. The petition contains two counts. The first count alleged that the defendant, a railway company, caused a pub-

the crossing to be obstructed by a very long freight train, which extended several hundred feet on each side of the crossing into the darkness; that the crossing was obstructed for 15 or 20 minutes; that it was necessary for the plaintiff, in the discharge of a business duty, to go along the street which was obstructed, and that, after waiting about 15 minutes, he "undertook to go between the train, in plain view of everybody, and the defendant's watchman employed upon the crossing saw the plaintiff undertake to go between the cars, and saw his dangerous situation." It is also alleged that the "crew of the defendant, to wit, the conductor, the engineer, the fireman, and the trainmen, in the exercise of ordinary care, must have seen plaintiff undertake to go between the cars." And it is alleged that, while the plaintiff was in this perilous position between the cars, the train moved, without notice, and as a result thereof he was seriously injured. The court concludes with allegations as to the extent of the injury and the damages sustained.

The second count consisted of two paragraphs. The first was as follows:

"On or about the 27th day of February, 1903, at Peters street public crossing, and in the city of Atlanta, plaintiff was run over and injured by the running of the cars, locomotives, and other machinery of the defendant company at said crossing, and defendant failed to exercise all ordinary and reasonable care and diligence."

The second paragraph set forth the character of the injury, and the damages alleged to have been sustained.

The defendant filed a general demurrer to the entire petition, and a special demurrer to the first paragraph of the second count, on the ground that it did not set forth how the plaintiff was injured by the running of the cars, locomotives, and other machinery of the company at the crossing, and did not show wherein the defendant failed to exercise all ordinary and reasonable care and diligence. The court sustained the special demurrer to the first paragraph of the second count, and dismissed the remainder of the petition on general demurrer. Plaintiff excepted.

1. So far as the first count is concerned, we think the case is controlled, in principle, by the decision in *Andrews v. Railroad Company*, 86 Ga. 192, 12 S. E. 213, 10 L. R. A. 58. The allegation that the engineer, conductor, and other employes in charge of the train must have known of plaintiff's perilous position amounts to nothing. The right of the plaintiff to recover depends upon whether any employé who could have controlled the movements of the train knew of his dangerous position, and failed to take proper steps for his protection; and an averment short of actual knowledge on the part of such employes would not be sufficient to take the case out of the ruling in the *Andrews Case*.

It is said, though, that there is an averment that the watchman at the crossing knew of the plaintiff's dangerous position; but it appears from the petition that the transaction was at night; that the train extended a long way on each side of the crossing "into the darkness"; and it is not alleged that the watchman was in a position where he could have given a signal to any employé in charge of the movements of the train which would have had the effect to control its movements. It is not even charged that the watchman could have, by signal, controlled the conduct of other employes who had charge of the train. In the case of *Faulk v. Railroad Company*, 91 Ga. 360, 18 S. E. 304, the person injured was a boy 12 or 13 years of age, and was invited by the watchman at the crossing to go over the bumpers, and was injured while so doing. The age of the person injured, and the fact that he was expressly invited to cross by the employé who was stationed there to tell the public when to cross and when not to cross, distinguishes the case from the one now under consideration.

2. In an action which is based upon the negligence of the defendant, it is not sufficient to allege the negligence in general terms, when the defendant objects to such allegations by a special demurrer, calling for the particulars of the negligence complained of. See *Blackstone v. Railway Company*, 105 Ga. 381, 31 S. E. 90; *Miller v. Transportation Company*, 115 Ga. 1009, 42 S. E. 385. While, under this rule, negligence must be alleged in such a specific way as to put the defendant on notice of what it is to answer, still the rule is not to be carried to the extent of requiring minute particularity in the averments of negligence. See *Sims v. Railroad Company*, 111 Ga. 820, 35 S. E. 696.

Judgment affirmed. All the Justices concurring, except *SIMMONS, C. J.*, absent on account of sickness.

(119 Ga. 648)

HIGH v. PADROSA (two cases).

(Supreme Court of Georgia. March 4, 1904.)

ATTACHMENT—SITUS OF DEBT—DECLARATION—AMENDMENT—PLEA TO JURISDICTION.

1. As a general rule, the situs of a debt is at the place where the creditor is domiciled.

2. A declaration in attachment, based upon an attachment sued out against the defendant on the ground that he is a nonresident of the state, which alleges that the attachment has been executed by serving summons of garnishment upon a resident of this state, is amendable by averring that the debt due from the resident garnishee to the nonresident defendant is payable within the limits of this state.

3. A plea to the merits in an attachment case of the character above referred to, which is filed with a distinct protestation that no jurisdiction has been acquired, by the levy of the attachment, either of the person or property of the defendant, and which distinctly reserves the right to object to the jurisdiction of the court, does not have the effect to admit jurisdiction, and will not authorize a personal judgment against the defendant.

(Syllabus by the Court.)

Error from Superior Court, Glynn County; T. A. Parker, Judge.

Actions by Benito Padrosa against John High. Judgments for plaintiff, and defendant brings error. Affirmed in one case, and reversed in the other.

Ernest Dart, for plaintiff in error. W. E. Kay, for defendant in error.

COBB, J. 1. In the case of *Central of Georgia Railway Company v. Brinson*, 109 Ga. 354, 34 S. E. 597, 77 Am. St. Rep. 382, which was followed in *Johnson v. Southern Railway Company*, 110 Ga. 303, 34 S. E. 1002, each being a decision by six justices, the rule that the residence of the creditor fixes the situs of the debt was recognized and applied in garnishment cases. This rule was also applied in the cases of *Henry v. Lennox-Haldeman Company*, 116 Ga. 9, 42 S. E. 383, and *Beasley v. Lennox-Haldeman Company*, 116 Ga. 13, 42 S. E. 385, each being a decision by only five justices. Application is now made to review the two decisions first mentioned. Respectable authority may be found on either side of the questions involved in this case; but, after diligent investigation and mature reflection, the court, as constituted when the decisions referred to were rendered, adopted and followed the line indicated in the opinions in those cases. Some of the members of the bench as at present constituted, the writer being among the number, are entirely satisfied with the conclusions then reached, and the decisions will have to stand until the time arrives when there are six justices who feel disposed to take the contrary view. The case of *Molyneux v. Seymour*, 30 Ga. 440, 76 Am. Dec. 662, is, upon its facts, not in conflict with anything ruled in the cases above referred to. While some of the expressions of Judge Lumpkin may apparently conflict with the principle laid down in those cases, that case at last, as will be seen by the concluding paragraphs of the opinion, turned upon the validity and regularity of a South Carolina judgment which had adjudicated the question that there was, at the time that judgment was rendered, an attachable debt within the limits of South Carolina, and the court simply held that full faith and credit would be given to this judgment.

2. The attachment was issued by an officer authorized to issue attachments, and was regular upon its face. The attachment was not void, and property of the defendant could be lawfully seized thereunder. Whether any of his property had been actually seized was a question that might arise during the progress of the case. The declaration in attachment, as originally filed, showed that that which had been seized under the attachment was a debt due by a resident to a nonresident. In this condition the declaration was demurrable. *Beasley v. Lennox-Haldeman Co.*, 116 Ga. 13, 42 S. E. 385 (2). Presumptively the debt referred to was payable in Florida. This presumption was rebuttable,

and there was no reason why the plaintiff could not amend the declaration by alleging facts which would have the effect of rebutting the presumption arising from the silence in the original declaration as to the situs of the debt. See, in this connection, *Henry v. Lennox-Haldeman Co.*, 116 Ga. 12, 42 S. E. 383.

3. The defendant entered a special appearance for the purpose of raising objections to the proceedings. He filed a defense to the merits, but with a distinct protestation that he did not thereby admit jurisdiction of the court, either as to his person or as to the property in controversy, and distinctly reserved all right to object to the jurisdiction of the court at every stage of the case. A plea to the merits filed under such a reservation did not have the effect to admit the jurisdiction of the court, either as to the person of the defendant or as to the property in controversy. *Kahn v. B. & L. Ass'n*, 115 Ga. 450, 41 S. E. 648 (3), and case cited. See, also, *Associated Press v. United Press*, 104 Ga. 51, 29 S. E. 860.

The court seems to have submitted to the jury at one time the question of jurisdiction and the questions raised by the plea to the merits. So far as the record discloses, there was no objection to this procedure. It would have been more regular to have submitted the question of jurisdiction separately and distinctly from the questions raised by the plea to the merits. But if the jury had been instructed that, if they came to the conclusion from the evidence that the debt was not payable in Georgia, they should return a verdict for the defendant on the question of jurisdiction and proceed no further with the case, no harm would have resulted from the irregular submission of the two issues at one time. It seems, though, that the judge instructed the jury in effect that, if they found in favor of the defendant on the question of jurisdiction, this would be in effect a finding that the fund in controversy was not within the jurisdiction of the court, and the plaintiff was not entitled to a judgment condemning it to the payment of his debt, but they could then proceed to find against the defendant the amount of the debt due, as a basis for a judgment in personam against him. Under the view we have taken of the case, we think these instructions were erroneous, so far as they authorized the finding of a verdict which should be the basis of a judgment in personam. The plea to the merits, having been filed under the circumstances above indicated, did not alone authorize the rendition of a judgment in personam, and nothing having been done either by the defendant or the plaintiff which would, under the law, authorize such a judgment, the judgment must be reversed.

Judgment in one case reversed; in the other affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 648)

MERRY v. JONES et al.**(Supreme Court of Georgia. March 4, 1904.)
MORTGAGE—FORECLOSURE—BANKRUPTCY—INSOLVENCY PROCEEDINGS.**

1. Where the main purpose of the suit is to foreclose a mortgage, and there is also an incidental prayer for relief appropriate to insolvency proceedings, a receiver's possession thereunder will not be affected by a subsequent adjudication in bankruptcy.

2. But where the main purpose of the petition is to obtain relief appropriate only in insolvency proceedings, the fact that a mortgage may be foreclosed as an incident therein will not save the case from the nullifying effect of bankruptcy on pending state insolvency proceedings.

3. In the present case the mortgage does not appear in the record, the pleadings do not describe the mortgaged property, and there is no prayer for a foreclosure. The prayers, to marshal the assets, to enjoin other creditors from proceeding except in such suit, and to appoint a receiver to take charge of all the property of the defendant, are adjusted to insolvency proceedings, and not to the foreclosure of a mortgage.

(Syllabus by the Court.)

Error from Superior Court, Decatur County; W. N. Spence, Judge.

Proceedings by H. H. Merry, trustee in bankruptcy, against A. T. Jones, receiver, and others. Judgment for defendants, and plaintiff brings error. Reversed.

Merry, the trustee in bankruptcy of the Rogers Lumber Company, presented an intervention to the superior court of Mitchell county, averring that on December 5, 1901, the Rogers Lumber Company had been adjudicated a bankrupt in the District Court of the United States for the Southern District of Georgia; that he was the duly qualified trustee of its estate; that on the — day of —, 1901, A. T. Jones was appointed receiver of the property of the Rogers Company by the superior court of Mitchell county on the petition of the Lowe Company against the Rogers Company; that the receiver then had in hand \$1,725, the proceeds of a sale of the Rogers Company's property; and that Merry, the trustee, was legally entitled to the possession and control of said assets, and had been authorized by the District Court to make such application. He prayed to be allowed to intervene in the case of the Lowe Company against the Rogers Lumber Company, and for an order directing the receiver to turn over the money in his hands to the trustee. This petition was served on the receiver, and of the parties to the record at the time of the hearing the receiver alone answered, substantially admitting all of the facts set up in the trustee's petition; but he claimed that he was appointed receiver in an equitable proceeding for the foreclosure of a mortgage before the Rogers Lumber Company had been adjudicated a bankrupt and before the bankruptcy proceedings had been instituted, that he had only taken possession of the property covered by the mortgage, and that the fund in hand only represented the proceeds of

the sale thereof. The case was tried mainly on the pleadings in the case of the Lowe Company against the Rogers Lumber Company, from which it appears that on November 25, 1901, the Lowe Company filed in the superior court of Mitchell county a petition, which, after reciting that petitioner, the Lowe Company, was a corporation, and that the Rogers Lumber Company was a partnership, proceeds as follows: "They show that Rogers Company are indebted to them on two mortgages amounting to more than \$2,000;" that the Rogers Company is insolvent, owning a sawmill with appurtenances, besides a commissary containing several hundred dollars worth of goods, besides timber owned and leased—all worth between \$5,000 and \$8,000; that Jones Bros. have a claim against Rogers Company for \$1,500, about \$1,100 of which is secured by a mortgage on practically all of the property of the Rogers Company; that the Georgia Trading Company has a claim against the Rogers Company for about \$2,000, and claims some kind of a lien against said property; that the same is in the hands of the sheriff, who is taking steps to collect the same; that there are many laborers who have claims against the company for labor done at the sawmill, and there are many other claims besides, unknown to petitioner; that Jones Bros. have foreclosed their mortgage, and have sold the live stock, and \$664, proceeds thereof, are in the hands of the sheriff awaiting the determination of rules to determine conflicting priorities; that Jones Bros. have obtained an order to sell the sawmill plant on November 25, 1901, and, because of the peculiar character of the property, the want of local buyers, and the fact of its being advertised under a 10-day order as expensive to keep, instead of that usual under levy and sale, the property will be sacrificed, and bought in by Jones Bros. for far less than its value; that there will be many suits for the enforcement of liens and debts against the sawmill; that with this multiplicity of suits and conflicting claims the property will be consumed in costs, and to prevent a multiplicity of suits, and have all of said property sold to the best advantage, the petition prayed for the appointment of a receiver to take charge of the property; that the sheriff be enjoined from selling the same, and be required to turn over to the receiver the cash in hand as proceeds of the live stock; and that all of the creditors be enjoined from enforcing their claims separately, but be required to be made parties to this petition, and to prove their claims hereunder, and receive such sum as the court may award, and that the court proceed to sell through the receiver all of said property. Process was prayed against Rogers Company, Jones Bros., and the sheriff, who acknowledged service. A receiver was appointed, who was directed to take charge of all of the property of the Rogers Company in any way connected with

the sawmill or the shingle mill, the goods in the store, all timber belonging to the company or held under a lease, and the money in the hands of the sheriff; and all persons having possession of any property or money arising from the sale of the property of the company for the last 15 days were required to turn over the same to the receiver. The receiver was also authorized to continue the sawmill business until it could be sold after due advertisement. All other suits against the company or the property mentioned were enjoined, and the parties allowed to intervene in this cause. None of the defendants served answered, except Jones Bros., who asserted the necessity of the sale to preserve property mortgaged to them against loss, and denied any bad faith in connection therewith. The mortgage of Jones & Co. nowhere appears in the record. There are reports by the receiver set out, in one of which he describes the specific property sold, and the amount received for each article, but no reference is made as to what mortgage, if any, covered the same. In his answer to the present proceeding by the trustee he says that the funds in his hands are the proceeds of that portion of the Rogers Company's property connected with the sawmill mentioned in the petition under which he was appointed, and that he was appointed a receiver in a proceeding for the foreclosure of a mortgage before proceedings in bankruptcy had been instituted. He denies that the trustee is entitled to the possession of the fund. In his testimony he states that he took possession of the property mentioned in the order appointing him receiver, and sold the same. The receiver claimed that the property mentioned in the mortgage of the Lowe Company was not worth the amount of the mortgage of Lowe Company, and did not sell for near enough to pay off the claim; that the property mentioned in the mortgage of Jones Bros. was not worth and did not sell for enough to pay the debt; that the entire amount realized from the sale of the property was about \$2,300; that he took possession of no property as receiver except that embraced in the mortgages and other liens foreclosed in the state court; and that the total property sold did not bring enough to pay the liens thereon. In the record there is no copy of a note or other evidence of any debt and no copy of any mortgage. The court refused the prayer of the trustee generally, and he excepted.

Akerman & Akerman, for plaintiff in error.
J. W. Walters, S. S. Bennet, J. H. Merrill,
and C. L. Pettigrew, for defendants in error.

LAMAR, J. If, under foreclosure proceedings, the state court appoints a receiver to take charge of the mortgaged property, and the defendant is subsequently adjudicated a bankrupt, the trustee is not entitled to the possession of the mortgaged property, but

can only claim the surplus remaining after the payment of the secured debt. And where the suit was in fact one to foreclose a mortgage, this rule would not be changed, if, as an incident to the main purpose, the mortgagee went further, and also prayed for relief usually incident to state insolvency proceedings. See *Metcalf v. Barker*, 187 U. S. 177, 23 Sup. Ct. 67, 47 L. Ed. 122; *Carling v. Seymour Lumber Co.*, 113 Fed. 483, 51 C. C. A. 1, and *cit.* But the converse is not true. If the main purpose of the suit in the state court is to inaugurate insolvency proceedings, and a receiver thereunder takes possession of all the property of the defendants, his possession will not be saved from the nullifying effect of the subsequent bankruptcy because it also incidentally appears that the petitioner had a mortgage which was a lien on some of the property, and that it might be enforced in the progress of the administration of the insolvent's estate. The suit in the state court here was not a foreclosure proceeding. It is alleged that petitioner had a mortgage, but it is also alleged that he had a debt; and, without regard to the sufficiency of the pleading, the relief prayed for may have been asked as well because the complainant was a creditor as because it had a lien. The property on which petitioner had a lien was not described in the pleadings, the mortgage was not attached as an exhibit, it does not appear in the record, and there is no prayer for a foreclosure. On the contrary, the petition prayed for relief, which was appropriate only in an insolvency proceeding. It asked that all the assets of the defendant be taken in charge by the court; that a receiver be appointed; that all creditors be enjoined from proceeding under any other suit, and be required to set up their claims and liens in the pending equity cause; and that the court determine the rights of the parties. While it was not a case under the trader's act, it was yet seeking to do in the state court exactly what Congress declared shall be done exclusively in the court of bankruptcy, and was rendered nugatory by the adjudication in bankruptcy within four months thereafter. Jones & Co., one of the defendants in that case, was alleged "to have a mortgage on practically all of the property of the Rogers Company." This mortgage does not appear in the record; what property of the debtor was omitted does not appear; nor is it shown how much the property so mortgaged brought when sold. It is averred that their mortgage debt was only \$1,100, and it appears that the receiver now has in hand \$1,725, and that the amount realized by him at the sale was \$2,300. Even if it be conceded that upon the nullification of Lowe & Co.'s petition the rights of Jones & Co. reattached as they existed prior to the filing of the petition, there was no data to determine how much of the money now in the hands of the receiver covered property not included in their mort-

gage, nor does it appear what was the amount of their debt, nor how much in the hands of the receiver was in excess of that to which they may have been entitled. The trustee in bankruptcy is prima facie entitled to the custody of the property belonging to the bankrupt, and those who dispute his rights thereto must overcome his prima facie title by affirmatively showing the existence of the exception.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 696)

MORRISON v. DICKEY.

(Supreme Court of Georgia. March 4, 1904.)

TRIAL—INSTRUCTIONS—REMARKS OF COURT—CONTRACT—PAROL EVIDENCE—PLEADING.

1. The jury must take the whole charge as the law of the case.

2. The jury cannot be expected to select one part of a charge to the exclusion of another, nor to decide between conflicts therein, nor to determine whether one part cures a previous error, without having their attention specially called thereto and being instructed accordingly.

3. The plaintiff's agent and the defendant were in conflict as to the terms of the contract. In excluding the conversation between the agent and his principal, it was error under Civ. Code 1895, § 4334, requiring the grant of a new trial, for the judge to intimate that the agent was committing a fraud on his principal in representing to her that the contract was different from that already made with the other principal.

4. One clause in a written contract providing for the payment of \$750 "as hereafter agreed," parol evidence was admissible to explain the ambiguity, and to show not only the date, but the conditions, if any, on which such payment was to be made.

5. It was not error to refuse to strike a plea setting up that, under the agreement between the parties, the \$750 was payable out of the profits of the business sold.

(Syllabus by the Court.)

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Action by H. H. Morrison against J. L. Dickey. Judgment for defendant, and plaintiff brings error. Reversed.

It appears that Mrs. Morrison owned a business in Atlanta, known as the "EE-M Company," and on May 29, 1900, through her husband, sold to Dickey a half interest therein, in consideration of \$500 cash, and "\$750 to be paid as provided hereafter"; Dickey agreeing to pay into the business from time to time, as needed, other sums, alleged in the declaration to be \$2,500. Mrs. Morrison having, on December 9, 1902, sued Dickey for the \$750, it appears that on March 10, 1903, she sold him the balance of her interest in the business for \$2,500. The defendant, among other defenses to the pending suit for \$750, filed a plea of settlement, predicated on an instrument dated March 10, 1903, as follows: "Having this day sold my half interest in what is known as the EE-M Co., I agree to have settled the suit I brought

versus the said J. L. Dickey. It being a suit against said Dickey for a part of the purchase-money of my first sale of a one-half interest to said J. L. Dickey. [Signed] Hattie H. Morrison." Dickey also contended that the \$750 to be paid "as hereafter provided" was only to be paid out of the profits of the business; and the parties were in conflict as to whether that was the agreement. At the trial, on May 14, 1903, the plaintiff moved to strike the same, and filed a bill of exceptions pendente lite to the judgment refusing to sustain the motion, and assigns error thereon. The jury found for the defendant on the plea of settlement, which makes it unnecessary to refer to any of the exceptions, except those relating to that branch of the case. The plaintiff insisted that, while the instrument reciting the settlement was dated March 10, 1903, the same day as the instrument making the conveyance of the remaining half interest in the firm, as a matter of fact "the real date was about ten or fifteen days after the other paper was signed." Morrison testified that he agreed, for his wife, to dismiss the suit if Dickey would give his note; that Dickey said that the suit was in his way, and prevented him from getting money, and that if he could get rid of the suit he could get his affairs arranged all right; that after the contract of sale of March 10, 1903, had been signed, Dickey came back and refused to pay Morrison until "I had delivered this agreement to him to settle the case." Mrs. Morrison testified that she signed both papers bearing the same date, but the shorter paper (settlement) was not signed at the same time that the other one was. "It was several days afterwards, if I am not mistaken." Mr. Morrison was her agent, and she testified that she signed it because he asked her. The court refused to allow Mrs. Morrison to testify that her husband told her that Mr. Dickey was to give his note for \$750 and interest, as consideration for the settlement. Dickey testified that both the papers dated March 10th were probably not delivered until some days afterwards, but he submitted both papers at the same time to his attorney. "As to which of the two papers was brought to me first, I think the contract for the sale was brought first. It was some days after we reached the agreement before any money was paid. The trade was based entirely upon wiping out everything the Morrisons had in connection with the EE-M Company. I never would have closed that trade if these papers had not come to me bearing the same date, and both being part of the same trade. After leaving my attorney's office I closed the trade, and paid the purchase money for the remaining interest of Mrs. Morrison. Morrison delivered the release from the suit, and promised to see his attorney and arrange about his fee, and would have the suit dismissed." On cross-examination he testified that the verbal agreement was made on

March 10th, and the papers were not delivered until two or three days. They both were not brought together, but at separate times. "I supposed that the suit was settled, until I received notice from my attorney that the case was set for trial."

Error is assigned because the court, in excluding the testimony of Mrs. Morrison that her husband stated that Mr. Dickey was to give his note for \$750, stated, in the presence of the jury: "It looks to me as if he was general agent; and he has committed a fraud on her; she has to bear it;" the remark being calculated to prejudice the plaintiff in the minds of the jury, and being the intimation of an opinion that Morrison had committed a fraud on the plaintiff in making such statement to her. And because the court, in stating the contentions of the defendant to be that Mrs. Morrison claims that Dickey was to give a note for \$750, which he had failed to do, whereby the consideration had failed, failed also to instruct the jury that the settlement had been made after the concluded contract of sale, and that the agreement to dismiss the suit was nudum pactum. And because the court charged the jury (a) that "that settlement is a complete settlement of the case." (b) "If you believe that Dickey never agreed to give any \$750 note for the settlement, but that it was made for other reasons, then you will find for Dickey against Mrs. Morrison." (c) "It is a complete contract and settlement, and will be valid unless it is shown that it was agreed that Mrs. Morrison should be given a note for \$750."

W. R. Hammond, for plaintiff in error.
Felder & Rountree, for defendant in error.

LAMAR, J. The jury having found for Dickey on the plea of settlement, it is not necessary to consider assignments relating to other branches of the case. From an inspection of the general charge, which was included in the record, it does appear that the trial judge, in one portion thereof, did submit to the jury the question as to whether there was any consideration other than the \$750 note; and also instructed them that, if there was no consideration for the settlement, it was nudum pactum. But these general observations were inconsistent with the pointed and explicit statement that "I charge you that that settlement was a complete settlement of the case." This excluded the theory of the plaintiff that the settlement had been signed after the execution and completion of the contract of sale of March 10, 1903, and was therefore made, not as a part of the second sale, but without consideration. The defendant insists, however, that this error was cured by other portions of the charge. As to this answer, see *S. v. F. & W. Ry. v. Hatcher*, 118 Ga. 273, 45 S. E. 239, where it was said: "The attention of the jury was not specially called to the fact

that it was intended to correct what had been previously said. The jury must take the whole charge as the law, and it is not for them to select one part to the exclusion of another, nor to decide whether one part cures or qualifies another, without being instructed so to do by the judge."

Morrison testified that the consideration for the settlement of the pending suit was that Dickey was to give a note for \$750 and interest. This Dickey denied. In excluding the testimony of Mrs. Morrison that when she signed the settlement her husband told her that Dickey was to give the note for \$750, the court said: "It looks to me as if he was general agent; and he has committed a fraud on her; she has to bear it." There may be a clerical error, but as this statement appears in the record it was the expression of an opinion that Morrison had committed a fraud. If, as seems probable, the court stated, "If he was general agent, and if he has committed a fraud on her, she has to bear it," it was an intimation of the same opinion. The conversation between the husband and wife, or principal and agent, may not have been admissible against Dickey; but it was prejudicial to the plaintiff's case to suggest that the agent, in that conversation, was stating to the wife something different from what he had agreed with the defendant.

It is unnecessary to consider any other assignment, except that based on the refusal to strike the plea to the effect that the \$750 was only to be paid out of profits. The undertaking to pay "\$750 as hereafter agreed" was on its face incomplete, and parol evidence was admissible to explain the ambiguity (*Civ. Code* 1895, § 5202), and show not only the date when such payment was to be made, but also the source from which and the condition on which it was to be paid. The time of payment might be fixed by a date, or it might also be referred to the period when profits had been earned.

Judgment reversed. All the Justices concurring, except **SIMMONS, C. J.**, absent on account of sickness.

(119 Ga. 613)

LEVADAS v. BEACH.

(Supreme Court of Georgia. March 8, 1904.)
JUSTICE OF THE PEACE—ENTRY OF JUDGMENT—EXECUTION—AFFIDAVIT OF ILLEGALITY.

1. While the plaintiff, or his attorney, under *Civ. Code*, § 5339, may enter judgment on a verdict, the justice of the peace may likewise enter judgment thereon upon his docket, and upon such a judgment so entered an execution may lawfully issue.

2. Where an execution has been levied on the property of the principal debtor, he cannot resist the same by an affidavit of illegality, setting up that the judgment is void as against the securities named as codefendants therein.

3. Where from the affidavit of illegality it appears that the defendant in *fi. fa.* admits owing a part of the execution debt, he must pay the amount so admitted to be due, or the officer

shall proceed to raise such amount, and accept the affidavit for the balance. Compare Civ. Code, § 5661.

(Syllabus by the Court.)

Error from Superior Court, Glynn County; T. A. Parker, Judge.

Action by J. L. Beach against S. D. Levadas. Judgment for plaintiff. Defendant brings error. Affirmed.

See 43 S. E. 418.

The judge refused a certiorari, and the record therefore contains only what was recited in the petition therefor. It alleged that on July 19, 1902, the jury returned a verdict in the justice's court in favor of Beach against Levadas; that the justice thereupon entered up judgment on the summons in said case, to which he affixed his official signature. There is no recital that the judgment was entered on the docket, except that it is recited, in an order offered in evidence, that on March 17, 1903 (not in term), the judgment was placed on the docket of the court, but that, as it had not been signed by the attorney, "the said attorney is now allowed to amend the judgment nunc pro tunc, by authorizing the said attorney for the plaintiff to sign the judgment upon the papers in the cause and on the docket of the court." Thereafter execution issued, and was levied on property of the plaintiff, who filed an affidavit of illegality. On the trial thereof the plaintiff in *fi. fa.* offered in evidence the judgment nunc pro tunc, to which Levadas, the defendant in *fi. fa.*, objected on the ground that the judgment on which the execution issued was not signed within four days after the adjournment of the court, as required by Civ. Code, § 5339; that on the day it was entered the justice's court was not in session, and the judge had no authority to make such order; and that Levadas or his counsel were not present or notified. The objection was overruled, and the order admitted, and the affidavit of illegality was dismissed, and the execution ordered to proceed.

Max Isaac, for plaintiff in error. Ernest Dart, for defendant in error.

LAMAR, J. Every citizen has the constitutional right to represent himself in court. Civ. Code, § 5701. This right, however, is rarely exercised in those cases where the pleadings and practice, of necessity, involve technical skill. But the law evidently contemplates that many suits will be prosecuted in a justice's court without either party being represented by counsel, and the practice therein is adjusted to this theory. Parties might be entirely ignorant as to the form in which a judgment should be entered, and therefore the law not only requires a justice to enter the judgment in those cases tried without a jury, but permits him also to enter the judgment where there has been a verdict. His power to do so is not destroyed

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by the fact that in a particular case the plaintiff is represented by an attorney, who, as an officer of court, might perform the same duty. *Scott v. Bedell*, 108 Ga. 209, 33 S. E. 903. Besides, the fact that the judgment must be entered on the docket clearly indicates that the entry thereon can lawfully be made by one whose duty it is to keep the docket and make entries therein. The judgment here having been properly entered by the justice, there was no necessity for an order nunc pro tunc, or for further action by the attorney. *Gunn v. Tackett*, 67 Ga. 725.

The defendant has had his day in court, and cannot go behind the judgment rendered; nor can he, as principal, seek, upon an affidavit of illegality, to attack the judgment because, as he contends, it was erroneously entered up against certain securities. If this be true, the execution may never be enforced against them. When such an attempt is made, they can be heard. The defendant cannot make their fight, or take advantage of defects as to third persons, in order to arrest the *fi. fa.*, when it is proceeding legally against him alone.

The defendant further insists that, from the face of the record, and as a matter of pure mathematics, it appears that the judgment was entered for too much interest. We have not before us the record, and are therefore unable to say whether this calculation be correct. But the other grounds of the illegality having been disposed of, it appears that he is justly indebted to the plaintiff for the principal and legal interest, whatever that may be. Even if he can thus attack a judgment from which he had the right to appeal or certiorari, yet he must pay what he owes before he can be heard by affidavit of illegality as to that which he does not owe. *White v. Mandeville*, 72 Ga. 705; *Stanford v. Connery*, 84 Ga. 782, 11 S. E. 507 (8a); Civ. Code, § 5661. The judge properly refused the certiorari.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 683)

ARMOUR PACKING CO. v. WYNN.

(Supreme Court of Georgia. March 4, 1904.)

JUDGMENT—LIEN—GARNISHMENT—BANKRUPTCY—ANSWER.

1. A judgment creates no lien on choses in action belonging to the defendant.
2. The lien obtained by the service of a summons of garnishment issued on an existing judgment is created by the garnishment, and not by the judgment.
3. Where a judgment was rendered in 1897, and a garnishment thereon was served in March, 1902, and on proceedings begun thereafter the judgment debtor was adjudged a bankrupt on April 3, 1902, the lien on the fund in the hands of the garnishee was "obtained through a legal proceeding instituted within four months prior to the filing of the petition for bankruptcy," and was rendered void by section 67f of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 568 [U. S. Comp. St. 1901, p. 3450]).

4. A garnishee having notice that his creditor has been adjudicated a bankrupt, and that part of the fund earned after the bankruptcy was exempt as wages, was authorized in his answer to set up the invalidity of the garnishment proceeding because of the bankruptcy, and also to show that part of the fund was exempt as wages.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Garnishment proceedings between C. G. Wynn and the Armour Packing Company. Judgment for the garnishee, and Wynn brings certiorari. From a judgment in his favor, the Armour Packing Company brings error. Reversed.

Wynn obtained a judgment against Haralson in 1897. On March 18, 1902, a summons of garnishment was served on the Armour Packing Company. Its answer was filed April 28, 1902. Wynn traversed the answer, and the issue came on to be tried on June 30, 1902. The plaintiff offered its judgment showing that the principal, interest, and cost thereof amounted to \$——. He also offered evidence to show that the Armour Packing Company, between March 22 and April 26, 1902, had paid Haralson \$108, being his weekly salary for that period. It later appeared that \$36 of this sum accrued before the bankruptcy proceeding, and \$72 between the filing of the petition therefor and the time of making answer. The garnishee, over the objection of plaintiff, offered the record to show that Haralson was adjudged a voluntary bankrupt on April 3, 1902, and, on May 24, 1902, had been discharged in bankruptcy from all debts provable April 5, 1902. The justice of the peace found in favor of the garnishee. Wynn sued out a certiorari. The judge of the superior court sustained the exceptions, and directed that judgment be entered in favor of Wynn against the Armour Packing Company for \$72. The Armour Packing Company excepts.

Smith, Hammond & Smith, for plaintiff in error. S. D. Johnson and L. R. Ray, for defendant in error.

LAMAR, J. The record merely abstracts the substance of the documents proving the adjudication and discharge in bankruptcy, and consequently the time of the filing of Haralson's petition to be adjudged a bankrupt does not appear. He was adjudicated a bankrupt on April 3, 1902, and discharged from all debts provable on April 5, 1902. In view of the practice in cases of voluntary bankruptcy, there would be a presumption that the petition had been filed immediately before the adjudication. Compare Collier on Bankruptcy (4th Ed.) 222, 221, and Forms in Bankruptcy No. 15. However that may be, Wynn's petition for certiorari clearly indicates that the voluntary petition in bankruptcy was filed after the service of the summons of garnishment. Liens which were created four

months before the filing of the petition are not divested by the bankruptcy, and can be enforced after the adjudication. *Metcalf v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122. But liens obtained through legal proceedings within four months prior to the filing of the petition in bankruptcy against one who is subsequently adjudged a bankrupt are declared to be null and void by section 67f of the bankrupt act. The judgment here was not a lien on the chose in action. Civ. Code 1895, § 5353; *Fidelity Co. v. Exchange Bank*, 100 Ga. 619, 28 S. E. 393. And, without discussing the character of the lien created by a garnishment, or determining whether the lien on a suit at common law differs from the lien of a garnishment issued on a judgment, it is sufficient to say that the lien does not inhere in the judgment itself, but is acquired, created, or obtained by the legal proceedings instituted by virtue of the garnishment, affidavit, and bond. It has been several times held that, where an ordinary action is brought, and a garnishment summons is served, and a judgment is obtained by the plaintiff against the defendant within four months of the filing of the petition in bankruptcy, and a like judgment is obtained thereafter against the garnishee, the lien of the garnishment is rendered null, even though it may have provisionally attached by being served more than four months before the filing of the petition in bankruptcy. *In re Lesser* (D. C.) 108 Fed. 201; *In re McCartney*, 109 Fed. 621, 6 Am. Bankr. Rep. 367. The result is not different under our statute, which permits a garnishment of a judgment already rendered. The judgment creditor has no right in or to the fund, and no lien on the money or the chose in action. Whatever interest he acquired here was obtained by virtue of legal proceedings instituted on March 18, 1902, within the period when, by the terms of the statute, one creditor could not secure or acquire preferences or priorities over less diligent creditors of the common debtor. The garnishee, having notice of the adjudication in bankruptcy, not only had the right to set up his nonliability to the garnishing plaintiff, but, if he had failed to make such defense, and had been subsequently sued by the trustee of Haralson, the judgment awarding the bankrupt's money in the hands of Armour Packing Company to Wynn would have afforded no defense. *Smith v. Johnston*, 71 Ga. 748 (3); *Lamar v. Chisholm*, 77 Ga. 306; *Rutherford v. Fullerton*, 89 Ga. 353, 5 S. E. 471; *In re Beals* (D. C.) 116 Fed. 530. The garnishee was therefore performing a duty imposed by law when it pleaded the bankruptcy not only as to the \$36 in which the trustee might have been interested, but also as to the \$72 earned by Haralson after the adjudication. The lien of the judgment on tangible property was not affected by the bankruptcy. But, while Haralson's property may not have been freed from the opera-

tion of the judgment, he was no longer personally liable for the debt represented thereby. Besides, the money represented wages. The certiorari should have been dismissed.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 658)

ATLANTIC & B. R. CO. v. DOUGLAS.

(Supreme Court of Georgia. March 4, 1904.)

CONTINUANCE—SURPRISE—ACTION FOR PERSONAL INJURIES—EVIDENCE—GOOD HEALTH.

1. In applications for continuance on the ground of surprise resulting from an amendment to pleadings, the party claiming surprise must make oath, or his counsel state in his place, "that such surprise is not claimed for the purpose of delay."

2. "Good health" is a relative term, and does not mean absolute freedom from physical infirmity, but only such a condition of body and mind as that one may discharge the ordinary duties of life without serious strain upon the vital powers.

3. It follows from the foregoing that when, in a suit by a female against a railroad company for damages for personal injuries, it is alleged that the plaintiff was, prior to the injuries, "in good health," a recovery may be had notwithstanding it appears from the evidence that at the time of the injuries the plaintiff was laboring under an infirmity of which she was ignorant, and which did not interfere with the discharge by her of the ordinary duties of life, and that the result of the negligence of the railroad company was, not to produce an infirmity, but simply to aggravate the existing infirmity.

4. There was no error in any of the rulings complained of which required the granting of a new trial. The verdict, though large, was authorized by the evidence, and the discretion of the trial judge in refusing a new trial will not be interfered with.

Syllabus by the Court.)

Error from City Court of Douglas; C. T. Roan, Judge pro hac vice.

Action by Janie Douglas against the Atlantic & Birmingham Railroad Company. Judgment for plaintiff, and both parties bring error. Judgment on the main bill of exceptions affirmed. Cross-bill dismissed.

J. L. Sweat and W. W. McDonald, for Atlantic & B. R. Co. L. A. Wilson and Toomer & Reynolds, for Janie Douglas.

COBB, J. Mrs. Douglas, a married woman, sued the railroad company for \$10,000 damages, and recovered a verdict for \$5,500. The railroad company assigns error upon the refusal of the judge to grant it a new trial.

1. Pending the trial the plaintiff amended her petition. Counsel for the defendant, claiming that the amendment was material, stated that he was surprised by the same, and moved to continue the case. The court refused this motion, and this is one of the errors assigned. Even if the motion for a continuance was sufficient in all other respects, it was lacking in one essential particular. Counsel did not state in his place,

or have any one representing the company to make oath, that the surprise was not claimed for the purpose of delay. The Code distinctly provides that, in all applications for continuance upon the ground of surprise resulting from an amendment to the pleadings, the opposite party shall make oath, or his counsel shall state in his place, "that such surprise is not claimed for the purpose of delay." Civ. Code 1895, § 5128. Counsel for the plaintiff in error contends here that, under the facts disclosed by the record, it was necessarily to be inferred that the application was not made for delay only. The Code does not leave this matter to inference; there must be an express statement to the effect that delay is not the purpose of the application; and, in the absence of such express statement, a judgment refusing to continue the case will not be reversed.

2, 3. The judge charged the jury that "a tort to health already impaired is redressed by giving damages both for further impairment and for any obstruction occasioned by the tort to recovery from existing disease. Wrongfully to cause or aggravate or protract illness is an injury to health, but, as I have charged you, this is a matter entirely for you to consider under the evidence and charge of the court." Error is assigned upon this charge, for the reason that there were no allegations in the petition which authorized the charge, or authorized a recovery under the rule embodied in the charge, and because the same was not authorized by the evidence. The latter objection is not well taken, as there was evidence upon which this charge could have been properly based. Whether or not, under the petition, the theory of the case presented by the charge was properly involved in the case, is the question to be determined. To determine this, it is necessary to ascertain what is meant by the phrase "good health," for the petition describes the condition of the plaintiff before the injuries by averring simply that at the time of the injuries she was 41 years of age, weighed 105 pounds, and was "in good health." The plaintiff testified that up to the time of the injuries her health had been very good, and that she had been able to attend to all of her household duties. Medical experts, who had made a careful examination of the person of the plaintiff—especially of the internal organs claimed to have been affected by the jump from the train which it was alleged caused the injuries complained of—testified that plaintiff had been afflicted with an infirmity of long standing, and that the jump from the train was not the sole cause of her loss of health and the suffering she endured, but that these were the result simply of an aggravation of the existing infirmity brought about by her leaping from the train. As to the condition of the plaintiff as disclosed by the examination of the medical experts there was practically no dispute, and this reference to the

evidence in dealing with a question arising under the pleadings is made simply for the purpose of showing that it is possible for a person to be in what is generally called "good health," and still be laboring under an infirmity of which he may be unconscious. The testimony of the plaintiff that she was in good health, and in such health that she could perform all of the onerous duties of the household, was undisputed. The testimony of the medical experts that she was at this time laboring under a physical infirmity which would make an accident to her more serious than if she had been free from infirmity was also uncontradicted. Is the statement that a person is in good health to be treated at all times and under all circumstances and conditions as importing that the person is absolutely sound physically? If being in good health means being absolutely free from physical infirmity, then there are few persons who can be properly considered as in good health, and fewer still if subjected to the scrutiny of the medical expert who has license to make an examination extending to matters both external and internal. "Good health" is a relative term, and means such a condition of body and mind that the ordinary affairs of life may be attended to without serious strain upon the vital powers. In life insurance cases it has been held that "good health" does not ordinarily mean freedom from infirmity, and that "good health" or "sound health" means a state of health free from disease or ailment that affects the general soundness and healthfulness of the system seriously. *Manhattan Life Insurance Co. v. Carder*, 82 Fed. 986, 27 C. C. A. 344; *Selvets v. Benefit Ass'n (Iowa)* 64 N. W. 671. See, also, in this connection, *Mass. Ben. Ass'n v. Robinson*, 104 Ga. 257 (10), 289, 30 S. E. 918, 42 L. R. A. 261. When the plaintiff alleged, therefore, that she was in good health, her petition is not to be construed as alleging that she was perfectly sound and free from all infirmities; and, consequently, when, under the evidence, it appeared that she was laboring under an infirmity of which she was ignorant, but this infirmity did not interfere with the discharge by her of the ordinary duties of life, and probably would not have ever interfered with her, but for the injuries resulting from the negligence of the railroad company, she was not precluded from recovering simply because it developed that the injuries to her were the result, not of the negligence of the company alone, but of that negligence and a pre-existing infirmity, which up to that time had not been the occasion of any inconvenience to her.

4. The foregoing deals with all of the special grounds of the motion that require discussion at length. Even if there was any error in admitting the evidence complained of, at the time of its admission, there was an amendment to the petition, subsequently allowed, which had the effect of curing the

error. The other charges complained of were not erroneous. It remains only to consider whether the evidence authorized a finding for the plaintiff, and, if so, whether the amount of the verdict was excessive. An elaborate discussion of the evidence would not be profitable. It is sufficient to say that there was evidence from which a jury could find that the defendant was negligent, and that the consequences of this negligence to the plaintiff were serious in their nature; that she had not only already suffered greatly in body and mind, but that such suffering would probably continue for years to come, even if not throughout her whole life. In other words, taking the case most favorably for the plaintiff, there was evidence from which the jury could find that the railroad company had not exercised that degree of diligence which the law required it to exercise toward a passenger when about to alight from one of its trains, and that the consequences resulting to the plaintiff from this negligence were serious in the extreme. The verdict is apparently large, but the case is one in which mental anguish and physical pain already suffered, as well as that which is to come in the future, is to be measured; and, under our system, the jurors are those upon whom the law imposes the duty of filling the measure which is to be delivered to the injured party, and this court has neither the inclination nor the desire to usurp the functions of the jury in these matters. This verdict has met with the approval of the trial judge, and we are not prepared to say that the amount is so large as to suggest the existence of bias or prejudice. The discretion of the trial judge in allowing the verdict to stand will not be interfered with.

Judgment on the main bill of exceptions affirmed. Cross-bill dismissed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 639)

KNOX v. COOK.

(Supreme Court of Georgia. March 4, 1904.)

TROVER—ANSWER—EVIDENCE—INSTRUCTIONS.

1. The answer of the defendant set up a meritorious defense, and it was not error to overrule the demurrer filed thereto.

2. This was an action of trover for the recovery of a dog. The defendant came into possession of the dog by gift from one who had no title to it, but who had received it from the plaintiff, to be kept until called for. His defense to the action was that immediately after coming into possession he called upon the plaintiff to know if he then claimed the dog, telling him that, if he did not, he (the defendant) would keep it as his own; that the plaintiff informed him that if he decided to claim the dog, he would let him know in "two or three days," or in "a few days"; that the plaintiff did not claim title to the dog for nearly two months; and that by his express agreement title had thereby passed out of him to the defendant. This was denied by the plaintiff. *Held*, that the sole question for determination by the jury was whether by the alleged agreement of the

plaintiff and his subsequent conduct he parted with title to the dog; and it was not error for the court to refuse to charge the jury that, "if plaintiff agreed to let defendant know in a day or two, or in a few days, whether or not he expected to claim the dog, he would still have a reasonable time in which to claim the dog and demand its return to him."

3. In view of the ruling made in the preceding headnote, it was not error requiring the grant of a new trial for the court to state in the hearing of the jury "that he did not consider the question of a reasonable time in the case; and that, besides, six weeks would not be a reasonable time in which to claim the dog"; nor for him to charge that, "if plaintiff promised to let defendant know in two or three days whether or not he expected to claim the dog, and failed to do so in two or three days, but did, after a long interval, call for the dog, during which time defendant spent money and time on the dog, then the dog would belong to the defendant, and plaintiff could not recover same."

4. The evidence was conflicting, but that for the defendant was sufficient to warrant the verdict returned in his favor. The trial judge was satisfied with the finding of the jury, and the judgment overruling the motion for a new trial will not be disturbed.

(Syllabus by the Court.)

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Action by Fitzhugh Knox against J. S. Cook. Judgment for defendant, and plaintiff brings error. Affirmed.

J. W. & J. D. Humphries, for plaintiff in error. Alexander & Powers, for defendant in error.

CANDLER, J. Judgment affirmed. All the Justices concur, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 693)

THOMAS & BLAKE et al. v. FORSYTH CHAIR CO.

(Supreme Court of Georgia. March 4, 1904.)
JUSTICE OF THE PEACE—ACTION ON OPEN ACCOUNT—SUMMONS—PLEADING.

1. There was, in this case, not even a substantial compliance with the requirement of section 4116 of the Civil Code of 1895, to the effect that, when suit is instituted in a justice's court to enforce the collection of an open account, there must be attached to the summons, at the time the same is issued, a copy of the account sued on. On the contrary, the exhibit attached to the summons was in no sense a bill of particulars, nor did it furnish to the defendants reasonable notice as to the character of the plaintiff's demand. Since the passage of the act of September 21, 1881 (Laws 1880-81, p. 66), the provisions of which are now embodied in the section of the Code just cited, "the plaintiff in an action in a justice's court must set forth, with some degree of certainty, his cause of action." *Powell v. Alford*, 89 S. E. 449, 113 Ga. 979.

2. The court below should, on certiorari, have corrected the error committed by the magistrate in overruling the motion of the defendants to dismiss the plaintiff's action for noncompliance with the statutory requirement above mentioned. (Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by the Fortyth Chair Company against Thomas & Blake and others. Judgment for plaintiff was affirmed on certiorari, and defendants bring error. Reversed.

James K. Hines, for plaintiffs in error. Frazer & Hynds, for defendant in error.

TURNER, J. Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 624)

WALKER et al. v. WOOD et al.

(Supreme Court of Georgia. March 3, 1904.)

BILL OF EXCEPTIONS—CORRECTION—RETENDER TO JUDGE—DELAY—EXCUSE.

1. Where a bill of exceptions is returned to counsel for correction and alteration, it should be retendered to the judge in its corrected form within a reasonable time; and where, in a given case, counsel delayed retendering the bill of exceptions for 55 days after the same was returned to him, the writ of error will be dismissed, unless it appears that the delay was occasioned solely by providential cause or imperative necessity.

2. While, in the present case, it does appear that the leading counsel in the case was prevented by providential cause from attending to the matter of correcting and retendering the bill of exceptions, no reason is given why his associate, who appeared at every important stage of the case, and who was alone present at the time the final decree was rendered, could not have made the corrections and changes indicated by the judge in less than the time referred to in the preceding note; it appearing that the associate counsel tendered (and presumably prepared) the original bill of exceptions within three days after the final decree.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action between Moses Wood and others and S. G. Walker and others. From the decree, Walker and others bring error. Dismissed.

W. W. Haden and R. O. Lovett, for plaintiffs in error. J. L. Hopkins & Sons and Frazer & Hynds for defendants in error.

COBB, J. The final decree was rendered on January 28, 1903. The bill of exceptions was tendered on January 31st. The judge was about to leave the state, and did not examine the same until his return on March 1st, when, upon an examination, he found that the bill of exceptions was not true, notified counsel to this effect, and set the matter for a hearing on March 4th, under the provisions of Civ. Code, § 5545. On that day Mr. Haden, who was leading counsel for the plaintiffs in error, and Judge Lovett, who was associated with him, were present, together with counsel for the defendants in error. The judge called the attention of counsel to certain corrections, alterations, and additions that he thought should be made in the bill of exceptions in order to make it speak the truth, and returned it to counsel for the plaintiffs in error on the day last named. The corrected bill of exceptions

was not tendered to the judge until April 29th. It appears that between the dates last mentioned Mr. Haden had serious and long-continued illness in his family. It also appears that, while Mr. Haden was leading counsel in the case, Judge Lovett prepared the original bill of exceptions, that he appeared with Mr. Haden at different stages of the case, and that at the time of the entering of the final decree he appeared alone. It further appears that the bill of exceptions as finally tendered and certified was the same as the one originally tendered, with the exception of the changes and corrections, and the addition of several pages of new matter which the judge had required to be embodied in the bill of exceptions. It is now contended that the delay in conforming to the judge's requirements and retendering the bill of exceptions was unreasonable, and that the writ of error should be dismissed, because the judge had no authority to certify the bill of exceptions at the time the same was retendered to him.

The law does not prescribe any time within which a bill of exceptions shall be corrected and retendered when it has been returned by the judge as untrue. See Civ. Code, § 5545. In *Joseph v. Railway Company*, 92 Ga. 332, 18 S. E. 294, it was held that 94 days was an unreasonable length of time to wait before making the corrections required by the judge. In *Allison v. Jowers*, 94 Ga. 335, 21 S. E. 570, it was held that 77 days was an unreasonable length of time; and Mr. Justice Lumpkin said: "The section is silent as to the length of time the party to whom it is returned, or his attorney, will be allowed to remove the judge's objections and tender a corrected bill of exceptions; but he certainly should not be allowed for this purpose (in the absence of some good reason for delay) longer than 30 days." In *Parkman v. Dent*, 109 Ga. 289, 34 S. E. 559, it was held that 120 days was an unreasonable length of time; and Mr. Justice Lewis said: "If, in any event, counsel tendering a bill of exceptions can ever be allowed any greater length of time for correcting the same than that given by statute for presenting it in the first instance, it should appear that the delay was occasioned by imperative necessity." In *Sutton v. Valdosta Guano Company*, 115 Ga. 794, 42 S. E. 94, it was held that seven months was an unreasonable length of time, it not appearing that the delay was occasioned "by providential cause."

When we take into consideration the fact that the original bill of exceptions was presented 3 days after the final decree was entered, and presumably must have been prepared within that time, we cannot escape the conclusion that the delay of 55 days in making the corrections in the bill of exceptions was so unreasonable as that the judge would by this delay be deprived of all authority to certify the bill of exceptions, unless it is

made to appear that this delay was due either to providential cause or imperative necessity. Let it be conceded as established that there was operating, during the entire 55 days, such providential cause as would have prevented Mr. Haden from participating in any way in the matter; no reason appears why the bill of exceptions could not have been corrected by his associate, Judge Lovett. It appears that Judge Lovett prepared the original bill of exceptions, and, while Mr. Haden was the leading counsel in the case, Judge Lovett seems to have appeared at all important stages of the case and participated actively as counsel in the matter, appearing alone at the time the final decree was entered. The record discloses absolutely no reason why the matter of making the corrections and changes and adding the necessary new matter should not have been done by Judge Lovett in the absence of Mr. Haden. The act of 1896 (Acts 1896, p. 45; Van Epps' Code Supp. § 6246) has no application to the present case. That act deals only with the subject of the delay of the judge in certifying the bill of exceptions, and not with the delay of counsel in tendering the same, either in the first instance or after it has been returned for correction.

We do not think that the case presented is one where the delay was occasioned by either providential cause or imperative necessity, and the writ of error must be dismissed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 664)

GRIFFIN v. MUTUAL LIFE INS. CO. OF NEW YORK.

(Supreme Court of Georgia. March 4, 1904.)

BANKRUPTCY—INTERVENTION BY TRUSTEE—PROSECUTION OF SUIT—ABATEMENT—RIGHTS OF DEBTOR.

1. A trustee in bankruptcy may, but need not, intervene as plaintiff in a suit brought by the bankrupt before the adjudication in bankruptcy.

2. If no trustee is appointed, or if the bankrupt court does not consider it to the interest of the estate to permit the trustee to prosecute the suit previously brought by the bankrupt, the action does not thereby abate, nor is the bankrupt's debtor discharged from liability in the pending action.

3. The bankrupt may have an interest in the recovery as the source from which he may receive any homestead exemption to which he is entitled, and he also has the right to enlarge the estate for the benefit of his own creditors.

4. If the bankrupt ultimately recovers in such suit, and any question arises as to the right of the trustee to the money when paid, or of the defendant to be protected in paying it to the proper party, both may be secured by appropriate action being taken for that purpose at a later stage of the cause.

5. If the failure to elect or appoint a trustee in bankruptcy in any way injured the rights of creditors, it did not discharge the bankrupt's debtor, nor destroy the bankrupt's reversion in the chose in action after his creditors had lost or exhausted their rights thereto.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by J. K. Griffin against the Mutual Life Insurance Company of New York. Judgment for defendant, and plaintiff brings error. Reversed.

On November 23, 1901, Griffin brought suit against the Mutual Life Insurance Company of New York for \$244, alleged to be due as commissions on policies of insurance written by him as agent of the company. The defendant appeared and answered, and on June 19, 1903, amended its answer by alleging that on December 5, 1901, the plaintiff had been duly adjudicated a bankrupt, and moved to dismiss the suit on this ground. This issue was submitted to the judge without a jury; it being admitted that Griffin had been adjudicated a bankrupt on the day named, that no creditors were present at the creditors' meeting, that no trustee was appointed by the creditors or the referee, and that during the pendency of the suit the bankrupt was duly discharged. The court sustained the motion, and Griffin excepted.

Lowndes Calhoun, for plaintiff in error.
J. H. Gilbert, for defendant in error.

LAMAR, J. We infer from the briefs and argument that the defendant insisted in the court below that the title to the chose in action on which suit had been brought in the state court vested by operation of law in the trustee in bankruptcy, and that the suit should be dismissed because the company would not be protected in any payment it might make to the plaintiff, if thereafter sued for the same cause of action by the trustee. Under the bankrupt act of March 2, 1867, c. 176, 14 Stat. 517, it was held to be no defense to an action for a debt that the creditor had become a bankrupt. After title vested in the assignee, and he, with notice, permitted a pending suit to proceed in the name of the bankrupt, he was bound by any judgment that might be rendered. Under the act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), the trustee may intervene, but is not bound to do so; but, on his failure to have himself substituted as plaintiff, the suit does not abate. It may still be prosecuted by the bankrupt. See *Thatcher v. Rockwell*, 105 U. S. 467, 26 L. Ed. 949; *Reed v. Paul*, 181 Mass. 129; *Herring v. Downing*, 148 Mass. 10, 15 N. E. 116; Act July 1, 1898, c. 541, § 11 (c) 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426]. The case here is much stronger, for there is no trustee. The creditors and referee alike treated the recovery as so doubtful and contingent as not to warrant the appointment of a trustee to prosecute the pending suit. Nonaction on their part did not release the insurance company from its liability. Although the plaintiff in the action had been adjudicated a bankrupt and discharged, he may have had an interest in the recovery, as being the only source out of

which he could obtain any homestead exemption to which he was entitled. But, irrespective of his own pecuniary interest, and assuming that the recovery, if any, would inure to the creditors, it was his right to have them receive as large a dividend as possible. While the two bankrupt acts are not identical, there is nothing in the present statute which makes inapplicable the former rulings of this court, to the effect that the fact that a plaintiff in the state court had been adjudicated a bankrupt did not prevent him from proceeding in the pending suit for the benefit of whom it might ultimately concern, where the representative of the creditors did not intervene. *Gilmore v. Bangs*, 55 Ga. 403 (3). If in such cases there is a recovery, and any question arises as to the right of the trustee or creditors to the money, or as to the defendant's being protected in paying it to the proper party, this may be secured by subsequent steps being then taken for that purpose. "There need be no danger of paying the debt twice." *Southern Express Co. v. Connor*, 49 Ga. 415. If the failure to elect a trustee has in any way injured the rights of creditors, it has not discharged the insurance company from the liability under which it may rest, nor has it destroyed the bankrupt's reversion in the chose in action after his creditors have lost or exhausted their rights thereto.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., not presiding.

(119 Ga. 628)

ARROWWOOD v. McKEE.

(Supreme Court of Georgia. March 8, 1904.)

JUDGMENT—VALIDITY—SIGNATURES—SECURITY DEED—JUDGMENT—RECONVEYANCE—EXECUTION SALE—TITLE ACQUIRED.

1. It is immaterial whether the judgment was one requiring the signature of the plaintiff's attorneys or that of the presiding judge, it appearing that as a matter of fact it was signed by both the judge and the plaintiff's attorneys.

2. The intention to sign the judgment by both the presiding judge and the attorneys for the plaintiff was manifest, and it was immaterial whether their signatures appeared on the right or the left side of the page on which the judgment was entered.

3. The security deed to "H. L. M., guardian of F. M. P.," as between the grantor and the grantee, had the effect to vest the legal title to the property described in the grantee for the purposes therein mentioned; and, default having been made in the payment of the note to secure which the deed was given, suit having been instituted, judgment obtained, and execution issued, a deed under the provisions of Civ. Code 1895, § 2771 et seq., reconveying the property to the debtor for the purpose of levy and sale, and executed by "H. L. M., guardian of F. M. P.," conveyed all the interest of the grantor in the land in question, and put title into the defendant as completely as it had been prior to the execution of the security deed.

4. At a sale of the property under such conditions the purchaser would obtain a good title as against H. L. M. either as an individual or in his capacity as guardian of F. M. P. The effect of the deed in the first instance being to put the title into him individually, and his deed

of reconveyance putting the title back through the same channel whence it came, his ward would look to him and his bond in the event of her money being lost.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by H. L. McKee, guardian, against L. A. Arrowwood. Judgment for plaintiff. Defendant brings error. Affirmed.

Lavender R. Ray, for plaintiff in error. A. Wright and C. W. Smith, for defendant in error.

CANDLER, J. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 666)

STEPHENS v. CITY OF ATLANTA.

(Supreme Court of Georgia. March 4, 1904.)

MUNICIPAL IMPROVEMENTS—FIERI FACIAS—LEVY—AFFIDAVIT OF ILLEGALITY—DISMISSAL.

1. A *fi. fa.* issued by the municipal authorities of a city to enforce the collection of an amount expended by it for work done in making repairs on a sidewalk in front of a designated city lot described as being the property of A. W. S., "Exec.," is, nothing else appearing, to be regarded as an execution against him in his individual capacity as owner of the property, inasmuch as the term "Exec.," following his name, is merely descriptive personae. *State v. Sallade*, 36 S. E. 922, 111 Ga. 700; *Dozier v. McWhorter*, 45 S. E. 61, 117 Ga. 786; *Glisson v. Weil & Co.*, 45 S. E. 221, 117 Ga. 843, and cases cited. Accordingly, where a levy of the *fi. fa.* is met by an affidavit of illegality, interposed by such person as owner, he is to be presumed to act in his individual, and not in a representative, capacity, though he be referred to in such affidavit as A. W. S., "Executor" (*Glisson v. Weil & Co.*, supra), and though he may, in subscribing to the affidavit, add that descriptive term to his name (*Wade v. Roberts*, 53 Ga. 26; *Bennett & Co. v. Gray*, 9 S. E. 469, 82 Ga. 592; *State v. Sallade*, 36 S. E. 922, 111 Ga. 701-702), especially when, in the body of the affidavit, he unequivocally alleges that the "property levied on and against which said execution issues is not, and never was, held by [him] as executor for any estate, but, on the other hand, belongs to" him and other named persons "as tenants in common, and so belonged to them at the time said work for which said execution issues was done." See, also, *Arrowwood v. McKee*, 46 S. E. 871, 119 Ga. —.

2. The court below improperly construed the *fi. fa.* under consideration in the present case as one issued against an executor with a view to bringing to sale property belonging to the estate he represented, to the levy of which *fi. fa.* no one save the duly authorized representative of the estate could be heard to object; and it follows that the court erred in dismissing the affidavit of illegality interposed by the plaintiff in error on the ground that the facts therein set forth disclosed that the property levied on did not belong to him at the time of the levy, and hence he had no right to the remedy he had undertaken to pursue.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Proceeding by the city of Atlanta against Alexander W. Stephens, executor. Judgment

for the city, and defendant brings error. Reversed.

H. W. Dent and Alex. W. Stephens, for plaintiff in error. Jas. L. Mayson and Wm. P. Hill, for defendant in error.

TURNER, J. Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 730)

STATE v. PAXSON & CANNON.

(Supreme Court of Georgia. March 7, 1904.)

STATE—ESTOPPEL—PRESCRIPTION—ACTION FOR INJUNCTION—TIMBER CUTTERS.

1. "The state can only be estopped from asserting her right to her own property by legislative enactment or resolution."

2. Prescription does not in any case run against the state.

3. The state, in her sovereign capacity, may bring an application for an injunction under the timber cutters' act, embraced in Civ. Code 1895, § 4927, by attaching to the petition, as an abstract of title, a statement setting forth that the land in controversy has never been granted, and that the title thereto is still in the state in her sovereign capacity.

(Syllabus by the Court.)

4. The Attorney General may bring an equitable action in the name of the state, in the nature of the common-law proceeding by information of intrusion, for the recovery of land, title to which is in the state, and, in aid of such action, obtain an injunction to restrain a trespass upon the land, without reference to whether the alleged trespasser is insolvent, or whether the damages resulting from the trespass are irreparable.

5. The petition in the present case can be properly construed as an action of the character indicated in the preceding note.

Per Cobb, J., dissenting.

Error from Superior Court, Coffee County; T. A. Parker, Judge.

Action by the state against Paxson & Cannon. Judgment for defendants, and the state brings error. Reversed.

Jno. C. Hart, Atty. Gen., and J. W. Haygood, B. B. Cheney, and Eldridge Cutts, for the State. Lankford & Dickerson and Dart & Roan, for defendants in error.

COBB, J. 1, 2. The state caused a part of her public domain to be surveyed into lots, and provided for the issuance of grants to all of such lots, except those bearing given numbers, such as 10 and 100; the lots bearing these numbers being reserved for school purposes. The lot in controversy is one of the lots reserved, numbered 100. No grant has ever issued for this lot. The title to the same is still in the state, unless such title was divested at a tax sale had under an execution issued by the Comptroller General for taxes against the lot as wild land. This execution was issued under the authority of the general laws of force at the time of its issuance in reference to the collection of

¶ 1. See *Execution*, vol. 21, Cent. Dig. § 177.

¶ 2. See *Limitation of Actions*, vol. 23, Cent. Dig. § 38.

taxes due by owners of wild land. The state, of course, owed no taxes to itself on its own property, and the Comptroller General was without authority to seize such property on an execution so issued. There is hence little difficulty in determining the question that, as a matter of law, the sale was void.

It is claimed, though, that as the sale was had by a public officer under authority of a process issued by another public officer, as the purchaser at the sale paid the amount of his bid, which, after deducting the expenses, was covered into the treasury of the state, and dealt with as the state's money, and as the original purchaser and those claiming under him have regularly returned the property for taxation each year, and paid the taxes due thereon, which have likewise been dealt with as the state's property, the state is estopped from asserting her title against the present occupants of the land, who claim under the purchaser at the tax sale. It is not pretended that the tax sale was had under the authority of any act or resolution of the General Assembly authorizing in express terms the sale of the lot in question, or of the class of lots to which that lot belongs. "As a question of law, the state is not bound nor estopped from asserting her rights to her own property, unless it be done in her sovereign capacity by a legislative enactment or resolution." *Alexander v. State*, 56 Ga. 479 (7), 486. Nothing done by the Comptroller General or the sheriff, or the tax officers of the county, or the Treasurer of the State, in reference to the fund which went into the State Treasury, derived from the sale of the land, or that derived from the taxes collected from year to year, would have the effect of estopping the state; no one of its public officers having acted within the scope of his authority when he dealt with the property or the fund. See in this connection, *Pol. Code 1895*, § 268; *Penitentiary Co. v. Gordon*, 85 Ga. 171, 11 S. E. 584. If it had been shown that the General Assembly had by resolution expressly ratified the unauthorized acts of these officers, and specially appropriated the money in the treasury, a different question would arise. The mere fact that under the usual appropriation acts the money in the Treasury has been paid out by the Treasurer would not any more estop the state than would the unauthorized acts of the other officers in reference to the sale of the property and the collection of the taxes. It necessarily follows from all this that it was not incumbent on the state to tender back to the defendants either the balance of the purchase price of the land which was covered into the Treasury, or the amount of taxes which had been collected from year to year since the sale.

The state, then, is the sole owner of the property; not having lost its right to assert its title by the sale, or by anything done since the sale, and resulting therefrom. Nor

is its title lost by the long-continued possession of those claiming under the tax sale, it being settled that prescription does not in any case run against the state. *Norrell v. Augusta Railway Co.*, 116 Ga. 813, 42 S. E. 466, 59 L. R. A. 101, and cases cited.

3. The state attached to her petition what is described as an abstract of title, which is as follows: "Title in the state of Georgia, as sovereign owner of the soil, no grant ever having been issued from the state." The majority of the court are of the opinion that the petition can be maintained under the timber cutters' act, embraced in *Civ. Code 1895*, § 4927. They hold that, as every abstract of title required by that act would begin with a grant from the state, the mere statement by the state that no grant has ever been issued constitutes a sufficient requirement with the terms of that act. They further hold that the principle of the former decisions of this court, ruling that a private citizen must, to bring himself within the terms of that statute, attach to his petition a perfect paper title, capable of being recorded (see *Wilcox Lumber Co. v. Bullock*, 109 Ga. 532, 35 S. E. 52; *Wiggins v. Middleton*, 117 Ga. 162, 43 S. E. 432, and cases cited), is not applicable in this case; that the state was not a party in any of those cases; and that the principle announced in them will not be extended to the state. I am unable to take this view of the matter. I think those decisions are controlling, and that the petition cannot be sustained under the timber cutters' act referred to. When the state proceeds as a sovereign to assert its rights it can bring to bear all the prerogatives incident to sovereignty. But when the state, in its corporate capacity, seeks to avail itself of a remedy common to all citizens, it stands in no better position than the citizen, and is entitled to no greater rights. It can use that remedy only upon the terms which are imposed upon the citizen. See the well-considered case of *State v. Lord*, 28 Or. 498 (3), 510, 43 Pac. 471, 31 L. R. A. 473. I dissent, therefore, from the proposition announced in the third headnote, and concur in the judgment of reversal only for the reason that, in my opinion, the petition is maintainable on another theory, which will be stated.

4, 5. At common law the King could not bring an action of ejectment, or trespass to try title, against an occupant of crown lands; these actions being founded upon disseisin, and it not being possible, theoretically, to oust the King. The remedy of the King was by information, called an "information of intrusion." See 8 Bacon's Abr. pp. 101, 96; 2 Bl. 261. This information was exhibited in the name of the King's Attorney General. *Attorney General v. Allgood, Parker*, 1; 2 Story's Eq. Jur. (13th Ed.) § 922. This rule of the common law has been followed by South Carolina (*State v. Arledge*, 1 Bailey, 551; *State v. Stark*, 3 Brev. 101), and rec-

ognized in New York and Massachusetts (see the opinion by Chancellor Kent in *Jackson v. Winslow*, 2 Johns. 82; *Cutts v. Com.*, 2 Mass. 284). See, also, 3 Wash. on Real Prop. (6th Ed.) § 2021. The Supreme Court of Colorado held, however, that disseisin was not necessary to the maintenance of the code action of that state substituted for ejectment, and that the state might proceed under the statute. *Brown v. State*, 5 Colo. 496. It is not necessary in this case to express any definite opinion as to whether the state might maintain the statutory action for the recovery of real property. I am clearly of opinion, however (and this is, of course, said for myself alone), that the state may maintain an action similar to the common-law information of intrusion, and that it may, in aid of such an action, obtain an injunction against a trespasser on its lands. It has been held in numerous cases, both in England and in this country, that the Attorney General may apply to a court of equity to abate a public nuisance by injunction. 10 Enc. P. & P. 902; 2 Story's Eq. Jur. (13th Ed.) § 922; Attorney General v. Richards, 2 Anstr. 603; *In re Debs*, 158 U. S. 587, 15 Sup. Ct. 900, 39 L. Ed. 1092; *Loftin v. Collins*, 117 Ga. 434, 43 S. E. 708, 61 L. R. A. 150. Even if a trespass upon public lands cannot be properly considered a public nuisance, the same principles which would authorize the Attorney General or other state officer to file an application in the name of the state for the purpose of enjoining a public nuisance would authorize an application to restrain a trespass upon public land. In each case the interest of the entire public is involved, and will be subserved by the decree rendered. Under our system of pleading and practice, where we pay little attention to form, and dig deep for substance, I think the present application can be properly construed as in its nature and essence an application by the Attorney General, in the nature of an information of intrusion, with a prayer for an injunction in aid thereof; and, so construed, the judge should, in my opinion, have granted the injunction. For these reasons, I concur in the judgment of reversal.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness, and FISH, P. J., disqualified.

(119 Ga. 637)

HUDSON et al. v. HUDSON et al.
(Supreme Court of Georgia. March 4, 1904.)
PLEADING—DEMURRER TO BILL—PARTITION—ACCOUNTING—ANSWER—AMENDED PETITION—SECURITY DEED—SALE BY CONSENT—DEFAULT OF PURCHASER—WITNESSES—COMPETENCY—AUDITOR'S REPORT—EXCEPTIONS.

1. A demurrer going to the whole bill should be overruled if any part thereof be sustainable.
2. The plaintiffs were, in any event, entitled to partition, and to an accounting as to the rents of the real estate; and, the grounds of the demurrer being general, it was not error to refuse to dismiss the petition.

3. The provision of the Code that the defendant must admit, deny, or explain why he does not admit or deny each paragraph, under penalty of having the allegations in the petition treated as prima facie true, relates to the answer of the original petition.

4. The failure of a defendant to answer an amendment does not authorize the court or the jury to treat the allegations in the amendment as being admitted.

5. But an amendment not setting up any fact affecting the cause of action, but relating to that which transpired in the presence of the court, or to a disposition by consent of the res in the hands of the court, or to a change in the condition of the property involved in the litigation, when such amendment is not traversed, may be treated as true by the court.

6. Where the maker and holder of a security deed mutually agree on a sale of the land, partly for cash and partly on time, to X., and for a division of the purchase money, and X. fails to complete the purchase, the creditor is not liable to the maker of the deed for the breach of such contract.

7. If the creditor allows X. to rescind, the latter is not relieved of his liability to the maker of the security deed, nor does the latter lose his interest in the land until after he has been paid the purchase price of his equity.

8. If thereafter, with the consent of all the parties to the litigation, the land was sold for more than was sufficient to pay the holder of the security deed, it was not error for the court to decree that out of the proceeds the original debtor should be paid the balance of the amount due him by X.

9. This was not a suit against an administrator, and the petitioners were competent witnesses for all purposes except as against the surviving partner as to transactions solely with the deceased partner. There was no objection to their competency on this ground. As against the objection urged, and at the time when the ruling was made, the auditor committed no error.

10. In view of the complicated character of cases generally referred to auditors, and the length of the resulting record, there are specially strong reasons for requiring the strictest compliance with the provisions of the statute that all exceptions shall clearly and distinctly specify the errors complained of.

11. The exception should contain all facts and rulings necessary to show harmful error. It should not be so incomplete as to force the court to search through the record to find error.

(Syllabus by the Court.)

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Action by J. J. Hudson and others against W. B. Hudson and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

L. N. Hudson died, owning real estate in fee, an interest as tenant in common with his brothers and sisters in other real estate, besides which he owned an interest in the mercantile business of Hudson & Bro., the defendant W. B. Hudson being the other partner. The petition alleges that L. N. Hudson owed no debts; that W. B. Hudson was in possession of the partnership assets, as well as of the individual real estate of the deceased; that W. B. Hudson had endeavored to buy from the heirs their interests in L. N. Hudson's share of the partnership; that the terms of the sale had been agreed

on, but that W. B. Hudson refused to pay the purchase price. Petitioners, two of the heirs at law of L. N. Hudson, filed an equitable petition setting up the facts aforesaid, and alleging further that W. B. Hudson was collecting the rents and appropriating them to his own use; that he threatened to enforce claims held by the partnership against the petitioners, although their interest as heirs of the deceased partner exceeded the amount due the firm. They prayed for a receiver, an accounting, a partition of the real estate, and an administration of the estate of the intestate in equity. By amendment all the heirs at law were made parties defendant. The defendants all demurred generally and on the grounds that there was a misjoinder of parties plaintiff and an adequate remedy at law. A receiver was appointed, and the case was referred to an auditor, who, under the statute, heard the demurrer and overruled the same, and made a report adjusting the equities of the parties, to most of which there is no exception. It appears that John R. Hudson, one of the plaintiffs, in order to secure the firm on his indebtedness of \$5,000, made a deed conveying 700 acres of land. This indebtedness was finally reduced to \$4,000, and John R. found a purchaser—Mrs. Hooks—who was willing to give \$5,500 for 400 acres. It was agreed that \$1,500, to be by her paid in cash, should be received by John R. Hudson, and he received the only cash actually paid by Mrs. Hooks. Later, she being unable to complete the purchase, Hudson & Bro., the holders of the security deed, paid her \$700 to secure a release of her equity in the land. The auditor reported that the firm was not indebted to John R. for the balance due on the \$1,500 which he was to receive out of the first purchase money; that this was an indebtedness of Mrs. Hooks to John R. John R. excepted to this ruling, and, after the report had been made, the petitioners amended the pleadings by alleging that by consent of all the parties to the litigation the 400 acres of land had been sold for \$8,000. The defendant demurred to the allowance of this amendment, and insists that the court could not act thereon, as he did, in decreeing that \$900 out of the \$8,000 should be paid to John R. Hudson and the balance to the firm. There was no denial of the facts stated in the amendment, and no proof offered in support thereof.

J. H. Lumpkin, for plaintiffs in error. J. A. Hixon and E. A. Hawkins, for defendants in error.

LAMAR, J. 1, 2. The demurrers went to the whole bill, and should have been overruled, because certainly in some respects it was sustainable. *Lowe v. Burke*, 79 Ga. 166, 3 S. E. 449. The plaintiffs were entitled to partition and to an accounting for the rents. Even if the allegations that the de-

fendant had bought their interest in the personal property of the deceased did not authorize them to maintain a suit in their own name, there was no demurrer on the ground that it could only be maintained by an administrator, and it was not erroneous to refuse to dismiss the petition as a whole. There were no special demurrers requiring that any specific allegations or relief prayed for should be stricken.

3, 4. The defendant must admit or deny each paragraph in the petition, or state a reason why he cannot do so. Allegations not answered are taken as prima facie true. Civ. Code, § 4961. But it is evident that this provision does not apply to amendments offered from time to time during the progress of the trial. Many amendments need not be answered at all. And where they are so material as to require an answer the defendant is entitled to time in which to make it. Civ. Code, § 5068. But by allowing the case to proceed without answering, or without claiming the time to answer, the defendant is not to be presumed to admit the truth of the allegations thus injected into the case. This right to the plaintiff and presumption against the defendant is limited to that answer required to be filed at a fixed time to a petition containing an orderly statement of the plaintiff's case as a whole. It does not apply to amendments intended to cure defects or supply omissions. This is frequently done by the substitution of one work for another, and the change is often of a character which could not be independently answered, even though it might be material. Nor does the statute apply to fuller and more elaborate amendments adding new facts which ought, in the first instance, to have been included in the petition. Our law is extremely liberal in the right to amend. But the privilege does not have coupled thereto the onerous presumption that everything therein stated is true unless a formal denial is filed by the defendant. The failure, therefore, of the defendant here to deny the facts stated is not to be treated as an admission under Civ. Code, § 4961. It was, however, a statement in reference to the disposition, by consent, of a portion of the res before the court. It did not set up any fact as to the cause of action, but related to that which transpired in the presence of the court, or within its knowledge. It is similar in effect to the suggestion of the death of one of the parties to the record, which, unless traversed, is universally taken to be true without proof.

5-7. The amendment alleged that by consent of all parties to the record land which was involved in the controversy had been sold for \$6,000. The defendant demurred, but did not traverse this allegation. The court, instead of decreeing as to the land itself, properly decreed what should be done with the money. When the firm, as creditor holding this land as security, and John R. Hudson as debtor, agreed to sell 400 acres to

Mrs. Hooks for \$5,500—\$1,500 cash, and \$4,000 in notes—of which John R. Hudson was to receive the \$1,500, the fact that Mrs. Hooks failed to complete the purchase did not make Hudson & Bro. liable to John R. Hudson for what he was to have been paid by her. He held his claim against her and retained his equity in the land until that debt was paid. And when the land was subsequently sold by consent of all parties the court rightly allowed him out of the proceeds an amount equal to his interest therein.

8. The suit was not against the administrator of L. N. Hudson, and therefore the witnesses were not incompetent to testify as to communications and transactions with him as an individual. If the case be considered as involving matters which were against W. B. Hudson as surviving partner, they were incompetent to testify as to transactions solely with the deceased partner, affecting partnership liability. But it was far too general to assign as error that the "auditor erred in ruling that petitioners were competent witnesses to prove transactions and communications with L. N. Hudson, deceased, on the ground that he was dead at the time the testimony was offered." It was not alleged that the communications were solely with the deceased partner, nor was there any motion to rule out any of the testimony thereafter introduced which may have come within the rule. As against the objection urged, and at the time when the ruling was made, the auditor committed no error.

9, 10. Cases referred to auditors are usually more or less complicated. The evidence is voluminous, and the fact that the complaining party is not only allowed to assign error on the decree generally, but to multiply exceptions by complaining of separate and distinct findings of fact and rulings of law, necessitate the strictest enforcement of all general rules requiring a clear assignment of error. The statute (Civ. Code, § 4589) makes this emphatic, and perfectly explicit. So do many decisions. *Roberts v. Summers*, 47 Ga. 439 (2). The rule seems to be universal that in this class of cases the exception should be so framed as to relieve the superior court and this court of the burden of going over the entire case, or of performing duties which properly belong to the master and counsel. *Stanton v. Ala. R. R.*, 2 Woods, 507, Fed. Cas. No. 13,296; *Holcomb v. Holcomb's Ex'rs*, 11 N. J. Eq. 281; *Warren v. Lawson*, 117 Ala. 339, 23 South. 65. "Parties excepting to a report should state with reasonable precision the grounds of their exceptions in connection with such other particulars as will enable the court to ascertain without unreasonable examination of the record what the basis of the exception is. For example, if the exception be that the commissioner received improper and immaterial evidence, the exception should show what the evidence was. If that he

had no evidence to justify his report, it should set forth what evidence he did have. If that he admitted the evidence of witnesses who were not competent, it should give their names, and specify why they were incompetent, what they swore to, and why their evidence ought to have been rejected." In re Commander in Chief, 1 Wall. 43, 17 L. Ed. 609. The plaintiffs in error properly omitted from the record much of the testimony in the auditor's report, relating as it did to matters disconnected with the assignment of errors.

In the main the exceptions in this case are admirably arranged, for they can be considered without constant reference to other parts of the record. The ruling complained of is set out, the evidence bearing thereon follows in immediate connection, and the error is clearly and distinctly alleged. All of these we have considered and discussed. But the exceptions as to the bar of the statute of limitations of certain items of the account, as to the admission of the certificate of deposit, as to the rent of the Mims house, and others, cannot be considered without a re-examination of the entire record, in order to determine whether there was error; and, if so, what was the materiality of the finding, or how and in what manner and to what extent it affected the result, or why a new trial should be granted therefor. The burden upon the plaintiff is twofold. He must not only show error, but that it was harmful. And in the case of auditor's reports, where the exception is not to a verdict, but to independent and isolated facts it ought to be shown to what extent they have affected the final decree; for, suppose an auditor does admit improper evidence, or does make an improper finding of fact, it does not necessarily follow that harm has resulted. *McDougald v. Dougherty*, 11 Ga. 570 (3).

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 709)

HERRING v. STATE.

(Supreme Court of Georgia. March 4, 1904.)

SUBORNATION OF PERJURY—INDICTMENT—SUFFICIENCY—SODOMY—INSTRUCTION.

1. An affidavit made by one to obtain a criminal warrant may be the basis of an indictment for subornation of perjury, and such indictment is not demurrable because it appears from the indictment that the words "to the best of his knowledge and belief" were inserted in the affidavit, as in the form prescribed for procuring such a warrant, it further appearing that the indictment charged that the alleged suborner and perjurer both knew that the charge contained in the affidavit was false; nor was the indictment in this case demurrable because it contained no averment that the false affidavit was actually used in procuring a warrant, nor because the offense was not set forth with more particularity, nor for any other reason assigned.

2. Sodomy, as defined in section 382 of the Penal Code of 1895, is a crime which may be committed otherwise than per anum.

3. The trial judge committed no material error in charging the jury, or in failing to charge or in refusing to charge as requested; and the evidence warranted the verdict.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

P. Herring was convicted of subornation of perjury, and brings error. Affirmed.

R. Douglas Feagin, for plaintiff in error. Wm. Brunson, Sol. Gen., and Dessau, Harris & Harris, for the State.

TURNER, J. Herring was by the grand jury of Bibb county charged with the offense of subornation of perjury. The charging part of the indictment was as follows: "For that the said Phil Herring did, on the first day of August," 1903, "in the county aforesaid, wilfully, knowingly and feloniously solicit, counsel and procure one J. W. Jordan to commit the offense of perjury, in the manner and form and by the means as follows, to-wit: in this, that the said Phil Herring did, in said State and county, and at the time aforesaid, wilfully, knowingly and feloniously solicit, counsel and procure the said J. W. Jordan to appear on the first day of August [1903] before W. A. McClellan, a justice of the peace of the 564th district, G. M., in and for said county, in a certain judicial proceeding, for the purpose of making and swearing to and subscribing to an affidavit that a warrant might be issued thereon by the said W. A. McClellan, justice of the peace aforesaid, in the name of the State of Georgia against Sam Dunlap for the offense of sodomy, and the said W. A. McClellan being then and there a judicial officer fully competent and authorized by law to administer a lawful oath, and the said W. A. McClellan, justice of the peace as aforesaid, having then and there jurisdiction of said judicial proceeding; and thereupon, a lawful oath being then and there administered to the said J. W. Jordan by the said W. A. McClellan, justice of the peace as aforesaid in said judicial proceeding, the said Phil Herring did then and there solicit, counsel and procure the said J. W. Jordan to swear, and the said J. W. Jordan being so solicited, counseled and procured by the said Phil Herring, did wilfully, knowingly, absolutely and falsely swear, amongst other things, in substance and effect the following: that is to say, that the said Sam Dunlap, to the best of the knowledge and belief of the said J. W. Jordan, did on the 14th day of July, 1903, in the county of Bibb and State of Georgia, commit the offense of sodomy, all of which said matter was then and there wilfully, knowingly and feloniously sworn to, in substance and effect, by the said J. W. Jordan, being then and there material to the issue in the judicial proceeding aforesaid, the said J. W.

Jordan being then and there in said judicial proceeding making, swearing and subscribing to an affidavit before the said W. A. McClellan, justice of the peace as aforesaid, for the purpose of having a warrant issued against the said Sam Dunlap for the offense of sodomy; and the jurors aforesaid, on their oaths aforesaid, do say that the said Sam Dunlap did not, in truth and in fact, on the 14th day of July in the year 1903, in the county of Bibb and State of Georgia, commit the offense of sodomy; and the jurors aforesaid, on their oaths aforesaid, do say that the said J. W. Jordan then and there well knew that the said Sam Dunlap did not commit the offense of sodomy, as the said J. W. Jordan did then and there swear, as aforesaid, and the said J. W. Jordan, then and there well knew that he, the said J. W. Jordan, did not believe that the said Sam Dunlap had committed the offense of sodomy, as the said J. W. Jordan had sworn in said affidavit, as aforesaid; and the jurors aforesaid, upon their oaths aforesaid, do further say that the said Phil Herring, on said first day of August, 1903, well knew that said testimony which he, the said Phil Herring, had so procured, counseled and solicited and induced the said J. W. Jordan to deliver, make, subscribe and swear to in said affidavit and in said judicial proceeding was false, and the said Phil Herring well knew that the said J. W. Jordan well knew that said testimony was false, and that he, the said Phil Herring, and J. W. Jordan both well knew that the said Sam Dunlap did not, on the 14th day of July, 1903, commit the offense of sodomy, as the said J. W. Jordan had sworn in said affidavit and in said judicial proceeding; and the jurors aforesaid on their oaths aforesaid, do further say that the said Phil Herring well knew that at the time the said J. W. Jordan subscribed to said affidavit in said judicial proceeding, which was so solicited, counseled and procured as hereinbefore set forth, that the said J. W. Jordan knew that the same was false and that the said Phil Herring knew that the same was false; and the jurors aforesaid do further say that the said Phil Herring did wilfully, knowingly and feloniously counsel, procure, solicit and induce the said J. W. Jordan to deliver said false testimony and make, subscribe and swear to said affidavit in said judicial proceeding at the time aforesaid, then and there intending and desiring that said false testimony should be used for the purpose of procuring a warrant to be issued as hereinbefore set forth against the said Sam Dunlap for the offense of sodomy, contrary to the laws of said State," etc.

The affidavit upon which the charge of perjury rested was as follows:

"State of Georgia, Bibb County. Personally appeared J. W. Jordan who, on oath, saith that to the best of his knowledge and belief Sam Dunlap did commit the offense of sodomy in the county of Bibb on

the 14th day of July, 1903, and this deponent makes this affidavit that a warrant may issue for his arrest.

"[Signed] J. W. Jordan.

"Sworn to and subscribed before me this 1st day of August, 1903.

"[Signed] W. A. McClellan, J. P."

To this indictment the plaintiff in error filed an elaborate demurrer, containing many grounds, which demurrer was overruled, and he excepted. The case was then tried by a jury, and he was found guilty. Thereupon he made a motion for a new trial on various grounds, which was refused, and to this refusal he excepted.

His counsel, in a supplemental brief, insists that grounds 1, 2, and 3 of the demurrer to the indictment are sufficient to dispose of the case, and these grounds will now be considered. They are as follows: "(1) Said indictment charges defendant with no crime under the laws of Georgia. (2) Said indictment is void on its face, because against public policy, and for the reason that an affidavit sworn to not absolutely, but to the best of affiant's knowledge and belief, and made for the purpose of procuring a warrant for the arrest of an alleged criminal, cannot be made the basis of an indictment for perjury. (3) Said indictment is contradictory upon its face, and in a material point, in that it charges that J. W. Jordan 'did willfully, knowingly, absolutely, and falsely swear, amongst other things, in substance and effect the following, that is to say: that the said Sam Dunlap, to the best of the knowledge and belief of the said J. W. Jordan, did on the 14th day of July, 1903, in the county of Bibb and state of Georgia, commit the offense of sodomy.' Defendant contends that swearing to the best of one's knowledge and belief is not swearing absolutely, and that said indictment for this reason charges no crime." The important question in this case is whether Jordan could be convicted of perjury under the form of affidavit above given. The other grounds of the demurrer will be generally treated hereinafter, so far as they appear material and necessary to the decision of this case.

1. The nice and subtle technicalities with which some of the courts in the past surrounded the crime of perjury rendered a conviction for that offense well-nigh impossible. It is probable that these niceties were devised by the common-law courts on account of the barbarous punishment which was visited upon persons convicted of this offense. The punishment has been humanely mitigated, and at the same time the class of persons competent to testify in court has been greatly enlarged. As all faith in judicial proceedings rests upon the final sanction of an oath, it is good policy, not only for this reason, but for those above indicated, to facilitate, in so far as may be consistent with law and justice, convictions for this crime. In order to simplify the practice in perjury cases, the

British Parliament in 1750 (which was before our adopting act) deemed it expedient to declare by 23 Geo. 2, c. 11, that: "Whereas, by reason of difficulties attending prosecutions for perjury and subornation of perjury, those heinous crimes have frequently gone unpunished, whereby wicked and evil-disposed persons are daily more and more emboldened to commit the same, to the great dishonor of God, and manifest let and hindrance of justice; for remedy whereof be it enacted, etc. Section 1. In every information or indictment to be prosecuted against any person for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, or before whom, the oath was taken (averring such court or person or persons to have competent authority to administer the same), together with the proper averment or averments to falsify the matter or matters wherein the perjury or perjuries is or are assigned; without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, other than as aforesaid; and without setting forth the commission or authority of the court or person or persons before whom the perjury was committed; any law, usage, or custom to the contrary notwithstanding. Sec. 2. In every information or indictment for subornation of perjury, or for corrupt bargaining or contracting with others to commit wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant; without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, and without setting forth the commission or authority of the court, or person or persons, before whom the perjury was committed, or was agreed or promised to be committed; any law, usage, or custom to the contrary notwithstanding." See Bish. Cr. Proced. § 907. This statute may, therefore, be treated as a part of our law governing the procedure in these cases. It was enlarged and re-enacted by 14 & 15 Vict. c. 100, §§ 20, 21; has been enacted into law by nearly all of those states which did not adopt it from the common law, and has been practically enacted by Congress. A very simple definition of perjury is contained in section 5302 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3653], which provides that: "Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury." Our statute governing the form of an

indictment (Pen. Code 1895, § 929) declares that: "Every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct, which states the offense in the terms and language of this Code, or so plainly that the nature of the offense charged may be easily understood by the jury." Under the English statute first above cited and this provision of our Code, we think the first ground of the defendant's demurrer was properly overruled, as the indictment returned against him contained every material averment under our definition of perjury and of subornation of perjury. Pen. Code 1895, § 256.

The second and third grounds of the demurrer assail the indictment upon substantially the same point, to wit, that the defendant was not charged with having sworn absolutely, but only to the best of his knowledge and belief. It is broadly insisted that an affidavit which contains the words "to the best of affiant's knowledge and belief" cannot be made the foundation of a charge of perjury. In every case of perjury it is essential to a conviction that it should be averred and proved that the false oath was willfully and knowingly taken. That element has entered into every case from the earliest days of the common law. An honest oath, though untrue, is not perjury. *Thomas v. State*, 71 Ga. 252; 2 Whart. Cr. Law (10th Ed.) §§ 1243, 1249. On the other hand, swearing to what he believes to be false, or what he knows nothing about, though it turns out to be true, is perjury, in some jurisdictions. 1 Bish. New Cr. Law, § 437, par. 3. It should also be borne in mind that the affidavit on which the indictment in the present case was predicated is in the form prescribed by section 884 of our Pen. Code of 1895. The words "to the best of his knowledge and belief" therefore are a part of the affidavit which the law directs shall be made before a warrant issues.

This court, in *Pennaman v. State*, 58 Ga. 336, dealt with a case of perjury assigned upon an affidavit containing these words. This statement can easily be verified by an examination of the original bill of exceptions in that case. Indeed, these words were twice repeated in the affidavit under consideration in that case. *Pennaman* filed no demurrer, and was convicted on his plea of not guilty. A motion for a new trial was made and overruled, in one ground of which complaint was made that the verdict was contrary to the law and the evidence. He also made a motion in arrest of judgment, based on various grounds, which was also overruled; and he excepted to the overruling of this motion, as well as to the refusal of the court to grant him a new trial. It is true that the precise point now presented was not specifically made in the *Pennaman* Case, but it is difficult to believe that the careful judge who delivered the opinion of the court in that case failed to see that the conviction of

Pennaman was contrary to the law and the evidence if the words "to the best of affiant's knowledge and belief" were fatal to a lawful conviction of perjury. Judge Bleckley said in that case: "Perjury may be assigned upon an affidavit charging an offense, and made for the purpose of procuring a warrant therefor. Such an affidavit, made for such a purpose, is the beginning of a judicial proceeding. It belongs to proceedings before arrest, and is treated of under that head in the Code. * * * It sets forth probable cause for a warrant, and upon it alone a warrant might issue. Enough is established to result legally in depriving the accused person for a time of his liberty. Treating probable cause as the issue or point in question, there can be no doubt that the matter of the affidavit is vitally material." From this terse statement of the elements of an affidavit to obtain a warrant it is sufficiently obvious that the question raised by such an affidavit is one simply of probability of the defendant's guilt, and the defendant in such a proceeding need only show that he is not probably guilty. It would seem, therefore, that it is peculiarly true in the present case that the perjury charged consists in swearing falsely and corruptly without probable cause or belief; "or, to give a definition drawn from the older common-law authorities" by Wharton, perjury "is the willful assertion as to a matter of fact, opinion, belief, or knowledge, made by a witness in a judicial proceeding as part of his evidence, either upon oath or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court, or in an affidavit, or otherwise, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury, or person holding the proceeding. * * * The offense consists in swearing falsely and corruptly without probable cause or belief; not in swearing rashly or inconsiderately, according to belief." 2 Whart. Cr. Law (10th Ed.) §§ 1244, 1245. In support of the above text the author cites 1 Hawk. c. 60, § 1; 3 Inst. 164; Bac. Ab. tit. "Perjury"; Burn's Justice (same title); Steph. Dig. Crim. Law, art. 135; Pickering's Case, 8 Grat. 628, 56 Am. Dec. 158; and a large number of decisions by the courts of this country.

The contention of the able counsel for the plaintiff in error seems justified by what is laid down in *Hawkins' Pleas of the Crown* (vol. 1, p. 433, § 7), where these words are used: "It is said that no oath shall amount to perjury unless it be sworn absolutely and directly, and therefore that he who swears a thing according as he thinks, remembers, or believes cannot, in respect of such an oath, be found guilty of perjury." This work was a well-known text-book at the time our first Penal Code was adopted, and it is likely that the above-quoted statement of the law was in the minds of the judges who expressed sim-

ilar opinions when dealing with certain civil cases. But in Curwood's edition of that work, in a footnote to the paragraph mentioned, cases are cited which show that the author mistook the law. In one of these (Miller's Case, 8 Wils. 427, 2 Bl. Rep. 881) Lord Chief Justice De Grey said it was a mistake mankind had fallen into that a person cannot be convicted of perjury who swears that he thinks or believes a fact to be true, for that he certainly may, and it only renders the proof of it more difficult. And in the case of the King v. Pedley (B. R. Trin. Term, 1784) this opinion was confirmed by Lord Mansfield. Cases in Crown Law, 269. This question was also agitated in the Common Pleas (Mich. Term, 1780) by Mr. Serjeant Walker, when Lord Loughborough and all the other judges were unanimous that belief was to be considered as an absolute term, and that an indictment might be supported upon it. And Russell, in his work on Crimes (vol. 1 [6th Ed.] p. 294), reviews the foregoing authorities with apparent approval. The author also refers to the case of R. v. Schlesinger, 10 Q. B. 670, saying: "An indictment for perjury alleged that the defendant swore that he thought that certain words written in red ink were not his writing; whereas the defendant, when he so deposed, thought that the said words were his writing; and the Court of Queen's Bench held that the assignment was sufficient. If a witness swore that he thought a certain fact took place, it might be difficult, indeed, to show that he committed willful perjury. But it was certainly possible, and the averment was as properly a subject of perjury as any other." In the case of Patrick v. Smoke, 3 Strob. 147, which was an action of slander, Frost, J., speaking for the court of appeals of South Carolina, said (page 152): "The plaintiff testified positively that the account was just and true, and, to the best of his knowledge and belief, no part thereof was paid. But, even if it be admitted the plaintiff only swore that the account was just to the best of his belief, perjury may be assigned of such an oath"—citing 2 Russ. on Crim. 592. A man cannot swear falsely, and shield himself from the penalty of perjury by stating in his affidavit that he believes his statement to be true. Hughes, Cr. Law, § 1588, citing Johnson v. People, 94 Ill. 513, 514; Rey v. Pedley, 1 Leach, 385; Com. v. Cornish, 6 Bin. 249. Oftentimes affiant's knowledge of matters stated in his affidavit must, of necessity, rest upon information derived from others; and where this is the case it is generally sufficient if he aver that such matters are true to the best of his knowledge and belief. Belief is to be considered an absolute term in this connection; hence to swear that one believes a thing to be true is equivalent to swearing that it is true, and perjury may be assigned on such affidavit. 2 Cyc. Law & Proced. 25 (4b), and cases cited. It follows from these authorities

that where a man swears willfully, knowingly, absolutely, and falsely to a matter material to the issue or point in question in some judicial proceeding, according to his knowledge and belief, or to the best of his knowledge and belief, he is guilty of perjury.

By reference to the indictment in this case it will be seen that it is distinctly charged that "Jordan then and there well knew that the said Sam Dunlap did not commit the offense of sodomy, * * * and the said J. W. Jordan then and there well knew that he, the said J. W. Jordan, did not believe that the said Sam Dunlap had committed the offense of sodomy." This denial of the affiant's knowledge and belief made an issue, which, though difficult to prove in some cases, is easily determined in a case of this character. As to the proper manner of negating knowledge and belief in such an indictment, see Whart. Cr. Law (10th Ed.) § 1302. In certain civil cases decided by this court it has been held that affidavits to the best of deponent's knowledge and belief were not permissible. See Bryan v. Ponder, 23 Ga. 480; Stancel v. Puryear, 58 Ga. 445; Neal v. Gordon, 60 Ga. 112; Martin v. Lamb, 77 Ga. 252, 256, 3 S. E. 10; Sprinz v. Vannucki, 80 Ga. 774, 6 S. E. 816; Plant v. Insurance Co., 92 Ga. 636, 19 S. E. 719. But on examination of these cases it will be found that the affidavits required were such as are prescribed by law as conditions precedent in pleading. They related to garnishment cases, cases of non exeat, illegality, non est factum, and attachment. The effect of these decisions is simply to require positive and unequivocal oaths in the kind of cases mentioned, and they have no application to the case now under consideration. It is true that in some of the cases cited the judges who delivered the opinions therein used terms in the way of argument or illustration which apparently support the contention of the plaintiff in error; but what was said in this respect was unnecessary to the decisions announced in those cases, and cannot, we think, properly be regarded as controlling, or even pertinent. Sometimes a statute providing for the making of an affidavit requires the facts to be positively stated, and where this is the case an affidavit based merely on information and belief cannot be received. 2 Cyc. Law & Proced. 24 (4a), and cases cited. A valid rule of practice would have the same effect.

The defendant's demurrer also set forth the complaint that there was no averment in the indictment that the affidavit therein referred to was ever filed with any officer having jurisdiction to issue a warrant. The authorities seem to regard such filing as unnecessary. Lord Tenterden, in the case of Rex v. White, M. & M. 271, said, in discussing the legal effect of an affidavit falsely made with the intention that it should be the basis of a motion for an injunction: "Can it make any difference that it afterwards turns out that

the motion is not made? The crime, if any, is the same, morally, in each case; and I certainly shall not, where the objection is open hereafter, hold it necessary to give proof of a fact which does not vary the conduct of the party in taking the oath in question." "And it has been since held that an affidavit sworn for the purpose of being used in a cause, but which is neither used nor filed, is nevertheless the subject of perjury." 1 Russ. Crim. (6th Ed.) 394, citing *Hammond v. Chitty*, Q. B., E. T. 1846, MSS. O. S. G., and also the following American authorities: *State v. Whittemore*, 50 N. H. 245, 9 Am. Rep. 196; *Miller v. Munson*, 34 Wis. 579, 17 Am. Rep. 461; *Malret v. Mariner*, 34 Wis. 582. An "avermment that the affidavit was filed in court is natural enough and common; still, as the defendant's guilt does not depend on what is done after the false swearing has transpired, it is wholly useless." Bish. Direc. & Forms (2d Ed.) note 5, p. 497, citing *Rex v. Crossley*, 7 T. R. 315.

What has been said above as to perjury applies with equal force to the offense of subornation of perjury. In view of the statute of 23 Geo. 2, and of the provisions of our Code hereinbefore quoted, we think the indictment in this case was not subject to demurrer, either upon the grounds specifically dealt with above or upon any of the other grounds relied on by the plaintiff in error in support of his contention that the indictment was not sufficiently explicit to enable him to fully understand and prepare to meet the charge intended thereby to be preferred against him.

2. According to the evidence adduced on the trial, a scheme was formed to extort money from Dunlap by means of an infamous charge brought against him; Herring, Jordan, L. H. Callaway, and one McCowan, a deputy sheriff, being privies to the plot. Herring furnished the charge, Jordan was to do the swearing, Callaway was expected to be a witness, and McCowan undertook to finance the enterprise. McCowan, however, betrayed the conspiracy to Dunlap, and, for a consideration, paid by Dunlap, undertook to help Dunlap in bringing the other parties to justice. The affidavit hereinbefore recited was taken by Jordan, and upon it a warrant was issued against Dunlap for the offense named. Dunlap was arrested, it seems, and gave bond. Just before the time appointed for the hearing on the warrant, McCowan seems to have paid Herring, Jordan, and Callaway \$5 each, though it is rather intimated than proven that Herring received from McCowan a much larger amount, inasmuch as he appears to have been able to visit Atlanta and Indian Springs, and had money on his return to Macon. It was shown that no one appeared at the time appointed for the hearing of the charge brought against Dunlap, and that the case was dismissed by the magistrate for want of pros-

ecution. Herring was indicted, as we have seen, for subornation of perjury. McClellan, the magistrate before whom Jordan subscribed to the affidavit, Callaway, Dunlap, and Jordan, were sworn as witnesses for the state on the trial of the case. Jordan, on his cross-examination by counsel for the defendant, testified that Herring, when endeavoring to induce him to make the false affidavit, described the alleged infamous act as having been committed by Dunlap, not per anum, but in even a more disgusting way; and Herring, in his statement to the jury, gave a similar account of the way in which the act was committed, insisting that the crime was actually perpetrated. All the other witnesses who were cognizant of the conspiracy testified, in substance, that the charge brought against Dunlap was known to be false, and was devised as a part of the blackmailing scheme.

In the motion for a new trial, the greatest effort on the part of counsel for the plaintiff in error was devoted to presenting his contention that the offense of sodomy cannot be committed otherwise than per anum. We have no access to the English statutes on this subject, but that this was the construction of the common-law writers seems to be settled by the weight of authority. See 3 Russ. Crim. (6th Ed.) 250; 1 Whart. Cr. Law (10th Ed.) § 579; Bac. Abr. tit. "Sodomy"; Clark's Cr. Law (2d Ed.) 367, and cases cited. But the judicial determinations which actually so limit the way in which this crime may be committed are few and unsatisfactory, and the text-writers just mentioned, in declaring that the offense must be committed in that part in which it is "usually" committed, seem to imply that it might be practiced in some other way. In 1 Hawk. Pleas of the Crown (which was, as hereinbefore stated, a leading text-book at the time our first Penal Code was adopted) it is said, on page 357, that: "All unnatural carnal copulations, whether with man or beast, seem to come under the notion of sodomy, which was a felony by the ancient common law." Our Pen. Code 1895, § 382, defines this crime as follows: "Sodomy is the carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman." It will be noted that this definition contains no limitation as to the organ with which such unnatural connection may be made. It will also be observed that bestiality (which was, according to the common-law authorities, a form of sodomy or buggery) is omitted from the foregoing definition of sodomy, and is made a separate and distinct offense. Pen. Code 1895, § 384. The latter section reads as follows: "Bestiality is the carnal knowledge and connection against the order of nature, by man or woman in any manner with a beast." It is also to be noted that there is no limitation as to the means by which this crime may be committed. After much reflection, we are satisfied that,

if the baser form of the abominable and disgusting crime against nature—i. e., by the mouth—had prevailed in the days of the early common law, the courts of England could well have held that that form of the offense was included in the current definition of the crime of sodomy. And no satisfactory reason occurs to us why the lesser form of this crime against nature should be covered by our statute, and the greater excluded, when both are committed in a like unnatural manner, and when either might well be spoken of and understood as being "the abominable crime not fit to be named among Christians." We therefore think that it made no difference in this case whether Herring and Jordan had in mind the one or the other form of the crime when Herring was persuading and procuring Jordan to make the false affidavit.

3. We have carefully read and studied the charge to the jury given by the trial judge, and have concluded that he committed no harmful error either in charging or in failing and refusing to charge. While some of the requests to charge might have been given in the language requested, they were substantially covered by the charge as given. The evidence warranted the verdict.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 738)

BRANAN v. NASHVILLE, C. & ST. L. RY. CO.

(Supreme Court of Georgia. March 7, 1904.)

PRODUCTION OF BOOKS AND PAPERS—NOTICE.

1. The notice which the plaintiff caused to be served on the defendant company, calling on it to produce at the trial numerous papers and documents, was, except as to certain writings actually produced, and a document which the court held should have been also tendered the plaintiff, altogether too vague, indefinite, and unreasonable in scope; and the trial judge committed no error in permitting the defendant to produce, in lieu of an original document specified in such notice, a duly certified copy of the duplicate thereof, which was by law required to be kept in the office of an official of the executive department of this state.

2. The plaintiff was not concerned as to the regularity of the steps taken by the court in making the officer whose return of service was traversed a party to the proceeding, and there was no merit in the plaintiff's motion to dismiss the traverse on the ground that it had not been filed by the defendant company before it interposed an answer to his petition.

3. The evidence adduced at the hearing demanded a finding in favor of the defendant as to the issue raised by the traverse, and the documentary evidence which the court declined to allow the plaintiff to introduce would not, had the same been admitted, have justified a different result.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by C. I. Branan against the Nashville, Chattanooga & St. Louis Railway Com-

pany. Judgment for defendant, and plaintiff brings error. Affirmed.

Mayson, Hill & McGill, for plaintiff in error. Payne & Tye, for defendant in error.

TURNER, J. C. I. Branan complained in his petition that the "Nashville, Chattanooga & St. Louis R. R. Co., lessees and operators of the Western & Atlantic R. R. Co.," had injured and damaged him in a large sum, alleging that he had stored with the defendant a large quantity of dried peaches which he had caused to be shipped to Atlanta over its road, that the peaches were negligently kept by the defendant in an improper place, and that in consequence the fruit became seriously damaged. The deputy sheriff made a return of his service of the petition and process on the 12th of February, 1901, which return was subsequently amended, by leave of the court, so as to read as follows: "Served the defendant, Nashville, Chattanooga & St. Louis R. R. Co., a corporation, by serving J. L. McCollum, Supt., by leaving a copy of the within writ and process with him in person, at the office and place of doing business of said corporation in Fulton county, Ga." At the appearance term of the case the defendant specially appeared, and, before pleading to the merits, filed a traverse to the return of the officer, on the ground that it was untrue, "because J. L. McCollum was not at the time of said service an officer or agent of defendant, Nashville, Chattanooga & St. Louis Railway, nor was said McCollum at the place or office of doing business of said defendant at the time of the alleged service." The defendant also, in said traverse, asked that A. J. Shropshire, the deputy sheriff, be made a party thereto, and that he be duly served.

It appears that the plaintiff had notified the defendant company to produce the following papers, etc., at the trial of said traverse: "(1) The claim filed * * * by plaintiff, together with all exhibits thereto. (2) All letters or notes received * * * from plaintiff with reference to all or any of the fruit, or the storage thereof, concerning which" the suit was brought, as well as "copies of all letters and memoranda sent to plaintiff by" the defendant company. "(3) Contract, agreement, or lease under which the W. & A. R. R. Co. is held and operated by" the defendant "company. Also all letters, memoranda, and other papers in [its] possession with reference to said lease, and the operation of the W. & R. R. Co. thereunder. Also all checks, receipts and vouchers sent" the defendant "by the W. & A. Division. Also all ledgers, cashbooks, records of transportation, and other memoranda or books showing business done by [defendant] company, especially that portion known as the W. & A. R. R. Division, for and during the past five years, up to the trial of said cause. (4) Also, contract or copy of contract,

or duplicate thereof, with J. L. McCollum for and during all or any part of the past five years, either as superintendent of the W. & A. R. R. or otherwise. Also all letters received * * * from said McCollum during the past five years, and copies of all letters sent to [him] during the same period. Also all letters and reports on file with" defendant "company from the W. & A. R. R. or any of the officers thereof, or J. L. McCollum, during the term of five years previous to the filing of said suit. (5) The minutes of" defendant "company for and during ten years previous to the filing of said suit, both of the stockholders and directors."

Upon a demand by the plaintiff for compliance with the notice, the defendant produced the claim and the exhibits attached thereto, as described in the first paragraph of the notice. The defendant answered that the lease called for was a public law, of which the court would take cognizance, and that the other portions of the notice, calling for various documents, were too indefinite and uncertain, and the bulk of the documents so called for was such that the defendant could not reasonably be expected to produce the same, especially as it was obvious that many, if not all, of them were wholly irrelevant and immaterial. The court held that the answer of the defendant as to the production of the lease was insufficient, whereupon counsel for the defendant stated that they had acted in perfect good faith in having the defendant answer that the lease was a public law, so believing themselves; but, since the court ruled otherwise, they asked for a brief time in which to produce the lease, explaining that the lease was executed in duplicate; that the defendant's duplicate was at Nashville, Tenn., the home of the defendant, which was a nonresident corporation, while the state's duplicate was in the capitol, in the city of Atlanta, in which city the case was being tried; and stated that, if given time, they would send to Nashville and get the defendant's duplicate, or produce a certified copy of the state's duplicate, as the court should direct. The court thereupon announced that, if counsel would produce a certified copy of the state's duplicate, this would be a sufficient compliance with the notice. The next morning, before the conclusion of the evidence, the defendant did produce a certified copy of the state's duplicate, and tendered the same to counsel for the plaintiff, who declined to accept it, insisting it was not what the plaintiff called for, not being the original. Defendant's counsel then offered it in evidence, whereupon counsel for the plaintiff objected on the ground that it was not the original. The court stated that, if it was objected to, the objection would be sustained on the ground that the evidence, coming from the defendant, was irrelevant to the issue being tried. The plaintiff then filed an affidavit as to the service of the notice, as to the materiality of the evidence sought,

as to the documents called for being in the possession, power, and control of the defendant, etc.; and counsel for the plaintiff moved the court for a rule against the defendant to show cause why judgment should not be rendered against it on the issue formed by the traverse. The court declined to grant this rule, and held that the answer made by the defendant to the notice served upon it was sufficient, except as to the lease called for, and that the production of a certified copy of the state's duplicate of this lease was all that could be required of the defendant. To this ruling the plaintiff excepted.

1. The lease act of 1889 (Acts 1889, p. 963) required that the contract of lease should be executed in duplicate, and there is no suggestion from counsel for the plaintiff that this requirement of the law was not fulfilled. It appears, indeed, that the state's duplicate was at the capitol, presumably in the proper custody. Being a paper which was required to be kept on file in the proper office of the executive department, a certified copy of it was primary evidence. Civ. Code 1895, §§ 5211, 5212. We therefore think the court below did not err in holding that the production of a certified copy of the state's duplicate was a substantial compliance with the notice, so far as this lease was concerned. At any rate, it was sufficient to avoid the harsh penalty which the plaintiff sought to invoke. And we cannot say that the court erred in holding that the notice, in so far as it related to other documents therein referred to, but which the defendant did not attempt to produce, was altogether too indefinite and unreasonably extensive. *Parish v. Weed Sewing Machine Co.*, 79 Ga. 682, 7 S. E. 138; *Hamby Mountain Gold Mines v. Findley*, 85 Ga. 431, 11 S. E. 775; *Georgia Iron Co. v. Etowah Iron Co.*, 104 Ga. 395, 30 S. E. 878.

2. The plaintiff moved to strike the traverse on the ground that no rule had been issued thereon, as required by law, directed to the deputy sheriff, and calling on him to show cause why he should not be made a party; and, further, because the traverse was filed at the same time the defendant filed an answer to the plaintiff's petition. In this connection, counsel for the plaintiff insisted that, the traverse having been signed, "Defendant's Attorneys," the same should have been stricken by the court, because a traverse to a return of service "must be filed before pleading to the merits, and when filed at the same time it is a contradiction of terms to say that the party who has filed an answer has not been served." Exception is taken to the overruling of this motion. It appears that the deputy sheriff duly acknowledged service, and made no objection to the manner in which he was made a party. As he could undoubtedly have expressly waived a rule nisi, if such a rule were necessary, we do not see why his implied waiver was not sufficient, as in any other case; nor do we see that the plaintiff was in any way concerned

as to the process by which the deputy sheriff was made a party. As to the other ground of the motion to strike the traverse, it is only necessary to say that while it is true that the defendant appears to have filed an answer on the same day on which the traverse was filed, yet it is recited in the traverse that the defendant specially appeared before pleading to the merits, in order to traverse the officer's return of service; and in the answer of the defendant is an express recital to the effect that, in thus pleading to the merits, the defendant is not to be understood as "waiving any of its rights in the premises."

3. On the trial of the traverse, McCollum, the person served, swore that he was the superintendent of the Western & Atlantic Railway Company, but had "no connection, as superintendent or in any other capacity, with the Nashville, Chattanooga & St. Louis Railway Company." He further testified that his books and papers and offices were those of the Western & Atlantic Railway Company, and that he held "no appointment as an employé of the" defendant company; that at the time the service was made upon him he occupied the same position he then held, and had held for several years prior thereto; that the books and accounts of the Western & Atlantic Railroad Company are kept separate from those of the Nashville, Chattanooga & St. Louis Railway Company; that the contracts he makes are made for the Western & Atlantic Railroad Company; that he made a lease of a warehouse in the Austell building, in the city of Atlanta, on July 19th, 1899, but he did so as the representative of the Western & Atlantic Railroad Company, and the defendant company had no interest in the warehouse as lessee. It further appeared from the testimony of McCollum that the Western & Atlantic Railroad Company generally used the blanks of the Nashville, Chattanooga & St. Louis Railway Company. Indeed, he testified with considerable detail as to the relations between the two companies, and as to their manner of doing business. He further stated that he was appointed by J. W. Thomas, who was the president of both companies, and that other officials of the defendant company were also general officers of the Western & Atlantic Railroad Company.

A lease covering the warehouse where the plaintiff's fruit was stored was put in evidence by the defendant, the material portion of which is as follows: "State of Georgia, Fulton Co. This indenture, made this 19th July, 1899, between Roby Robinson, Manager of Estate of Joseph Banigan (herein called the Lessor), party of the first part, and the Western & Atlantic Railroad Company (herein called the Lessee), party of the second part," etc., running for three years, and signed: "Roby Robinson, Manager [L. S.]; J. L. McCollum, Supt. for W. & A. R. R. [L. S.]"

Shropshire, the deputy sheriff, was sworn by the plaintiff, and stated that the return of service, as amended, was correct. The

witness further testified, however, as follows: "I have understood Mr. McCollum was superintendent of the Western & Atlantic Railroad, and the Nashville, Chattanooga & St. Louis leased the W. & A. I use the word 'superintendent' of the Western & Atlantic Railroad, as of that division leased by" the defendant company. "I think the Western & Atlantic Railroad is a corporation separate from the Nashville, Chattanooga & St. Louis. My entry of service referred to J. L. McCollum as superintendent of the Western & Atlantic Railroad Company, as leased by" the defendant company. "I served McCollum from the fact that he was superintendent of the Western & Atlantic Railroad, and we thought him the proper officer on whom to serve the paper in this case. I have seen him in the office, and have served a great many papers on him in the Austell building; never as superintendent of the Nashville, Chattanooga & St. Louis Railroad. I considered McCollum was the highest officer of this end of the line. In other words, he was the superintendent of the Western & Atlantic corporation. The place of business referred to in my return was the place of business of the Western & Atlantic Division. * * * By place of business, I mean Major McCollum's place of business. * * * I served Major McCollum at this place in the effort to serve" the defendant company through him. "I don't know whether they have signs of N. C. & St. L. on the door or not. I remember having seen the W. & A. sign on the doors in the Austell building."

The plaintiff also offered in evidence three postal cards, "headed Nashville, Chattanooga & St. Louis Railway, lessee of Western & Atlantic Railway, Office of Freight Agent, Atlanta, Ga.," addressed to the plaintiff, notifying him of the receipt of certain cars of dried peaches, and signed, "W. & A. R. R."; also a printed notice, likewise "headed," informing him of the receipt in Atlanta of another shipment; and also an "expense bill of freight received in Atlanta, headed Nashville, Chattanooga & St. Louis Railway, marked paid," and purporting to have been signed, "Nashville, Chattanooga & St. Louis Railroad, lessee of W. & A." The plaintiff also tendered in evidence a receipt, marked paid March 29, 1900, the same being in the following form: "Mr. O. I. Branan, Atlanta, Ga. Storage 10/21/99 to 3/27/00, to W. & A. * * * Dr. On S. P. 14940, contains dried peaches, * * * \$24.00," marked paid by "Nashville, Chattanooga & St. Louis Railway, lessee W. & A. Road, D. B. Carson, Agent." Similar receipts, specifying other carloads of fruit, were tendered by the plaintiff at the same time, "all the receipts being for the storage of the peaches in question."

The defendant company objected to the introduction of this documentary evidence, and presented to the court a motion to direct a verdict in its favor, on the ground that "the evidence disclosed that no service had been

made upon defendant." The court thereupon excluded the documentary evidence offered by the plaintiff, and directed the jury to return a verdict in favor of the defendant company. To the action of the court in thus disposing of the case, the plaintiff duly excepted.

It appearing, from the evidence, that the Nashville, Chattanooga & St. Louis Railway Company had leased the Western & Atlantic Railroad from this state under the lease act of 1889, it must be true, as matter of law, that under the terms of that act the lessee at once became a body politic and corporate, under the laws of Georgia, under the name and style of the "Western & Atlantic Railroad Company," and subject to suit in that name only. *Edwards' Case*, 91 Ga. 24, 16 S. E. 347. That act further provided that after the execution of the lease the lessee should have power to make all rules and regulations usual and proper for the working and management of the leased road, and not in conflict with the Constitution and laws of this state or of the United States; and that the principal office and place of doing business of such lessee should be in this state. The evidence introduced, when considered in connection with the provisions of the lease act just referred to, demanded a finding in favor of the defendant company on the issue formed by the traverse; and the documentary evidence excluded by the trial judge would not, had the plaintiff been permitted to introduce it, have justified a different result.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 632)

BURWELL et al. v. FARMERS' & MERCHANTS' BANK et al.

(Supreme Court of Georgia. March 3, 1904.)

TRUST DEED—POWER OF SALE—CONSENT OF BENEFICIARIES—CO-RECEIVERS—APPOINTMENT OF NONRESIDENT.

1. The supplementary decree of the United States court, made after the hearing before the trial judge, and before his decision, was not material to the decision of any question then before him.

2. Under Civ. Code 1895, § 3172, a trustee in whom is vested the legal title to land, but to whom the deed gives no power of sale, cannot, without an order of court, sell such land without the consent of all the beneficiaries.

3. Where, by a decree of a United States Circuit Court a commissioner is appointed, and directed to sell a certain manufacturing establishment, and before the sale certain bondholders of the corporation form a syndicate and appoint one of their number to purchase the property for them at the sale under the decree, and the person so appointed makes the purchase, and the commissioner conveys the property to him as trustee of the persons composing the syndicate, but the deed gives the trustee no power to dispose of the property, the power of sale cannot be ingrafted upon the deed because of a private understanding of the persons forming the syndicate or letters or agreements among them that the intention was that the purchaser should have power of sale, there being no prayer for a reformation of the deed.

4. Where the trustee under the deed above described sold the property without the consent of all the beneficiaries, and those who had not consented filed an equitable petition to set aside the sale, and for an accounting by the trustee, praying that a receiver be appointed to take charge of the property and sell it under direction of the court; and where the trustee, in his answer, prayed that, if he had no power to sell under the deed, the court grant him leave to sell the property; and where it appeared that the sale had been rescinded by the parties thereto—it was not an abuse of discretion for the trial judge to appoint him and another person as co-receivers, and direct them to sell the property subject to the confirmation of the court.

5. It is not an abuse of discretion to appoint a nonresident of the state a receiver when he has an interest in the property, and when a resident is appointed as co-receiver.

(Syllabus by the Court.)

Error from Superior Court, Washington County; B. D. Evans, Judge.

Action between A. Burwell and others and the Farmers' & Merchants' Bank and others. From the judgment, both parties bring error. Affirmed.

Burwell & Canaler, A. A. & E. L. Meyer, and Ross & Grace, for Burwell and others. Hardeman & Jones, Davis & Turner, and E. W. Jordan, for Farmers' & Merchants' Bank and others.

OANDLER, J. Judgment in each case affirmed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 576)

WEED et al. v. GAINESVILLE, J. & S. R. CO. et al.

(Supreme Court of Georgia. March 3, 1904.)

RAILROADS—COMPETING LINES—ULTRA VIRES CONTRACTS—RESTRAINT OF TRADE—MORTGAGES—POWERS OF TRUSTEES—ABATEMENT—FORECLOSURE—INDORSEMENT OF BONDS—MARSHALING ASSETS—TRIAL BY JURY—AUDITOR'S REPORTS—SUBSCRIPTIONS TO STOCK—LIMITATIONS.

Proceedings were begun in 1897 to foreclose on the Gainesville, Jefferson & Southern Railroad Company a mortgage securing an issue of \$245,000 of bonds. It appeared that \$83,500 of these bonds had been sold to the plaintiffs in error at from 75 to 85, and that the remaining \$161,500, together with \$130,000 of the Gainesville Company's capital stock, had been sold on March 31, 1883, to the Georgia Railroad Company for \$145,350. Some of the parties to the cases insisted that this was a sale of the stock at par, with the bonds as a bonus, and therefore usurious. Others contended that it was a sale of bonds at 90, with the stock as a bonus, and that therefore the purchaser was liable for \$130,000 as on an unpaid subscription. The purchaser contended that the sale was of the stocks and bonds, as a unit, to it, acting as a construction company, with a contemporaneous understanding under which it had expended \$107,000 additional in completing the Gainesville Railroad. The \$161,500 of bonds were indorsed by the Georgia Railroad Company, and sold to purchasers at 105; they having no notice of the terms of the original issue. Intervening bondholders contended that the \$83,500 of bonds should be first paid out of the proceeds of the mortgaged property, and that the pur-

chase of the stock was ultra vires and tended to lessen competition. They prayed for a marshaling of assets, and that the Georgia Company be required to account for profits made, for its management of the Gainesville Company. The latter company answered, and filed a plea of set-off for \$385,000. *Held*:

1. The completion of the Gainesville Road by the Georgia Company did not lessen or defeat competition, but created competition where none previously existed.

2. The state, the stockholders, and the parties alone could attack the contract as being ultra vires or in restraint of trade. Bondholders could not do so.

3. The trustees under the mortgage represent all the bondholders. Where bondholders were allowed to intervene to represent their special contentions, and one of the class dies before the decree, the case does not abate, nor is it necessary to have the deceased bondholder's representative made a party before the litigation can proceed.

4. It is not necessary to have all the bonds proved before decree of foreclosure, but proper provision can be made for proof thereof before the master in the order providing for the disposition of the proceeds of sale.

5. The fact that some of the bonds were indorsed did not make the rule of two funds applicable. The indorsement was not a lien, not equally accessible, and was not even a liability of the common debtor.

6. In actions at law the constitutional right to a trial by jury requires that exceptions of fact to an auditor's report shall be submitted to a jury.

7. There is no such provision as to equity cases, and, on exceptions of fact to an auditor's report therein, if there is evidence to sustain the finding, and the chancellor is satisfied therewith, he need not refer the exceptions to a jury.

8. If the evidence is so conflicting as to leave the chancellor in doubt, he may refer the exceptions to a jury.

9. If the chancellor is dissatisfied with the finding because it is without evidence or contrary to the evidence, the statute does not permit him to sustain the exception finally, but requires that it be submitted to a jury, even though he would feel bound to grant a new trial if the exception were not sustained by the verdict. Civ. Code 1895, § 4595.

10. In the present case there was evidence to support the auditor's report, and there was no error in overruling the exceptions to his findings of fact.

11. If the purchase price (\$143,500) was in payment of \$161,500 at 90, and the stock was a bonus, the liability of the original purchaser and subscriber as for unpaid subscriptions was barred by the statute, and the same would be true as to any claim of forfeiture for excessive interest. Civ. Code 1895, § 2891.

12. If the purchaser, on an accounting, was liable in any sum, it had a set-off against the Gainesville Company for \$365,000, and the plaintiff in error would have no right to a reversal under the prayer to marshal the assets, since on no theory of the evidence would the Georgia Company's liability exceed its set-off for \$365,000.

13. If the finding on the plea of set-off was too large, it was harmless as against intervening bondholders, who were entitled, under the decree, to payment of their first lien before anything could be received on the judgment for set-off.

14. An intervening bondholder could not object to a stockholder dismissing its exceptions to the auditor's finding, as to there being no usury, nor use the exception as the basis for an original assignment of error to this court.

(Syllabus by the Court.)

15. The decisions as to the effect of usury on negotiable instruments in the hands of bona

fide purchasers for value are based on *Bailey v. Lumpkin*, 1 Ga. 407, which construed a statute (Cobb's Dig. 393) expressly making all notes and bonds void as to excessive interest.

16. The present statute (Civ. Code 1895, § 2836) makes no such declaration, and under Civ. Code 1895, § 3694, the consideration must be both illegal and immoral, in order to prejudice the rights of a bona fide holder of negotiable paper. *Perkins v. Rowland*, 69 Ga. 664; *Rhodes v. Beall*, 78 Ga. 641.

17. The defense of usury is not good as against a bona fide purchaser of corporate bonds for value, without notice, and before maturity. Civ. Code 1895, § 3694.

Per Lamar, J.

Error from Superior Court, Hall County; J. J. Kimsey, Judge.

Suit by Alexander against the Gainesville, Jefferson & Southern Railroad Company and others, and by Brown, Barnes and Phinizy against the same defendants. Joseph D. Weed and others intervene. The cases were consolidated, and from the decree, interveners bring error. Affirmed.

The Gainesville, Jefferson & Southern Railroad Company (hereinafter referred to as the Gainesville Company) was incorporated by an act approved August 25, 1872 (Acts 1872, p. 333), to construct a railroad from Gainesville, by way of Jefferson, to some point to be selected by it on the Georgia Railroad. The minimum capital stock was \$250,000. The company was authorized by acts of August 3 and 4, 1881, to mortgage its property and franchises, and consolidate with connecting lines. Acts 1880-81, pp. 241, 242. The full capital stock required was not subscribed, and many of the subscriptions made were not paid in; but the company began the construction, and issued a mortgage to secure \$245,000 of bonds, of which \$83,500 were sold in open market at prices of from 75 to 85. These \$83,500 of bonds are referred to in the record as "unindorsed bonds"; the money derived from their sale and from stock subscriptions, including one for 500 shares from the city of Gainesville, being spent in the construction of about 15 miles and grading 23 miles out of a total of 65 miles of the road leading from Gainesville towards Monroe. In 1883, being entirely without funds, and unable to secure subscriptions to its stock, or to sell the remaining \$161,500 of first mortgage bonds, the company, through its president, A. D. Candler, entered into negotiations with the Georgia Railroad Company, lessee of the Georgia Railroad & Banking Company, with a view to procure funds to complete the road, and devise a plan for its successful operation thereafter. The contract of March 31, 1883, between the Gainesville Company and the Georgia Company, recited, that, in consideration of \$145,350 to be paid by the Georgia Company, the Gainesville Company sold, transferred, and delivered to the Georgia Company 2,600 shares (par \$50) of the Gainesville Company's capital stock, fully paid up, and \$161,500 of first mortgage bonds, the same to be paid in 14

installments, aggregating \$100,462.46, up to October 1, 1883, and the balance to be paid in the purchase of 1,100 or 1,200 tons of rails, to be charged to the Gainesville Company at cost. All unpaid subscriptions of the Gainesville Company were to be turned over to the Georgia Company to be used in the construction of the road. The stock was to be deposited with the cashier of the Georgia Railroad & Banking Company, to be held by him in escrow, and not to be delivered until the fulfillment of the undertaking by the Georgia Company, though in the meantime it was to have the right to vote the stock as if its title were complete. The bonds were also to be deposited with said cashier, and to be delivered to the Georgia Company at the rate of \$1,000 of bonds for \$900 of the payments stipulated; but the payments were to be applied first for the payment in full of the stock, and the overplus, after the stock was fully paid for, was to be in full for the purchase of the bonds. On each of the \$161,500 bonds the Georgia Company placed a written indorsement, guarantying the prompt payment of the principal and interest thereof, and agreeing to appropriate thereto the income from \$250,000 of Atlanta & West Point debentures, which accrued to the Georgia Company during the continuance of its 99 year lease of the Georgia Railroad & Banking Company.

It appeared that the city of Gainesville, as a stockholder of the Gainesville Company, filed a bill in 1884 attacking the contract of March 31, 1883. In this case, which was dismissed without a hearing, the Gainesville Company filed an answer which contained the following statement: "Defendant had failed to get the stock subscribed, and had for eighteen months vainly endeavored to negotiate any more bonds beyond the \$83,000 originally sold at a discount of \$12,350. Its floating debt had become urgent, the interest on its bonded debt accruing; and it had to choose between raising money by lawful means, on the one hand, or abandoning its enterprise, and losing all investments made, on the other. After most strenuous efforts, defendant found it could not have the stock subscribed for without offering special inducements to subscribers, nor could it dispose of its bonds, except in connection with a controlling interest in the stock, nor would any prudent purchaser take the stock, except as fully paid up." Under these circumstances, the defendant negotiated with its codefendant Green, who was the general manager of the Georgia Company, and the outcome was the contract for the sale of the stock and bonds. In this same suit of the city of Gainesville the Georgia Railroad Company, by Green, general manager, also filed an answer containing the following statement: "As a part of the transaction in which this defendant paid to its codefendant \$145,350, and received from it 2,600 shares of stock, fully paid up, and \$161,500 face value bonds,

was the understanding on the part of this defendant, not expressed in the instrument of March 31, 1883, but implied from the nature and necessity of the case, and since steadily acted on, that this defendant would go on and complete codefendant's railroad, and equip it, without any reference to the question whether the resale of the bonds would furnish enough money for the purpose or not. It has been in pursuance of such implied undertaking of this defendant that the sum of \$92,600 has already been expended, and the further sum of \$15,000, or more, if needed, will be expended." \$161,500 bonds at 90 amount to \$145,350, the contract price for stock and bonds set out in the contract of March 31, 1883. In a letter dated May 12, 1883, from John M. Green, general manager of the Georgia Railroad & Banking Company, who signed the contract, to T. M. Cunningham, cashier of the Central Railroad & Banking Company, then one of the lessees of the Georgia Railroad Company, appears the following, as indicative that the Georgia Railroad & Banking Company considered that it was paying 90 for the bonds: "We have acquired \$66,000 par value of bonds of the G., J. & S. R. R.; cost of same \$59,400." A. D. Candler, president of the Gainesville Company, testified before the auditor that the reasons which "led me to sell the stock and bonds to the Georgia Railroad were, I was trying to build to a connection with it in order to secure Gainesville the benefit of competition in freight. I only had \$70,000 to begin with, and expended that, and issued a first mortgage for \$245,000. The broker sold \$85,000 of these unindorsed. I put that in the construction of the road, and could go no further. The company owed \$40,000, with nothing to pay it. I tried to effect some arrangements with the Central, and could not do so, and it was suggested that I see the Georgia Road, and this arrangement was made with it. I could not find anybody who would furnish the money to complete the road, unless I gave with the bonds a controlling amount of the stock. The contract was all one transaction with the Georgia, and the bonds and stock were sold together, and that is what I meant by calling it a 'lumping trade.' The arrangement was called to the attention of the Gainesville Company and ratified before the stock was transferred, so as to make the Georgia a majority stockholder. At that time 15 miles of the road was finished, 23½ miles graded. We had on hand, for which we were indebted, rails for 14 miles, and had 15 miles still to grade. There was a branch road which was partially completed. Every dollar of the money was used in completing the road. It could not have been completed without it, and we could get it from nobody else. The lessees also guarantied to Gainesville rates of freight from the East and West as favorable as Athens and Atlanta enjoyed. That was a verbal understanding between myself

and Major Green at the time the transaction was had. The completion of the road resulted at once in decreasing the rates to Gainesville. Rates of freight have been lower ever since."

None of the holders of the \$161,500 "indorsed" bonds were parties to the present suit, except as represented by the trustees named in the mortgage. The Georgia Railroad Company, being the majority stockholder, elected its own general manager as president of the Gainesville Company, and proceeded to complete the road to Monroe, where it connected with the Walton Railroad, which was a narrow-gauge road. In 1884 the Walton Railroad was consolidated with the Gainesville Company, its gauge being made standard, and the entire road from Social Circle through Monroe to Gainesville was operated through officers elected by the Georgia Railroad Company. The \$145,000 stipulated in the contract not being sufficient to equip the Gainesville Railroad, the Georgia Railroad Company advanced further sums, issuing a second mortgage of \$75,000, taking the bonds thus secured at par; and the management of the road not being successful, and not earning the interest on the bonds, the Georgia Company from year to year advanced additional sums on said operating and interest account, which at the time of the hearing amounted to \$365,000, and for which the auditor rendered judgment in favor of the Georgia Company. On February 15, 1897, the Georgia Railroad Company notified the Gainesville Company that the earnings of the latter company had been insufficient to pay its operating expenses and fixed charges; that the annual deficit had been met by advances made by the Georgia Railroad, which was the majority stockholder; and that after March 15, 1897, the Georgia Railroad Company would decline to make further advances, and the Gainesville Company must look to its own earnings to meet its obligations. In the petition to foreclose, filed by Alexander, holding undorsed bonds under the first mortgage, he prayed that the bonds held by petitioner and other holders of bonds secured by said mortgage be decreed to be a valid and binding debt of the company to the amount of the principal and interest thereof, and be secured by, and entitled to the security of, the said mortgage. In its answer the company raised no issue as to the validity of the bonds secured by the mortgage, but, in reply to the charge of waste and mismanagement, stated that the 2,600 shares of stock, of the par value of \$130,000, and \$161,500 of the bonds, had been already sold to the Georgia Railroad Company, "in a lumping trade," for the purpose of completing the road to Monroe, in Walton county. In the bill brought by Brown, Barnes, and Phizly, trustees under the mortgage, they also prayed that the mortgage be foreclosed, and the proceeds be prorated with the several bondholders upon their several bonds, and, having alleged that

the Georgia Company had been in the management of the property, and made the Georgia Company a party defendant, they prayed that it be made to account for its management of the road, and for the income and property, over all securities received by it. The Gainesville Company answered, adopting the answer already filed in the Alexander case. The Georgia Company likewise answered, admitting its willingness to account, and averring that, while it was a majority stockholder, and had control of the election of officers, it had in no other way operated the Gainesville Road, but setting up that it had paid the interest on the bonds and supplied the deficiency, and that the annual deficit arising from the operation of the Gainesville Road had been met by advances made to it by the Georgia Railroad Company as majority stockholder. The intervention of Weed and the holders of other undorsed bonds to the amount of \$83,500 recited the filing of the two suits to foreclose, and asked to be made parties so as to enforce their rights as such bondholders and creditors of the Gainesville Company; "the rights of petitioner being different from, and in some respects antagonistic to, other bondholders secured by the mortgage." They prayed that the receiver be instructed to institute an action against the several directors personally, who entered into and carried out the transaction with the Georgia Railroad Company, March 31, 1883, which is set out in the answer of the railroad company to have been a lumping trade of \$161,500 bonds, with \$130,000 of common stock of the company, for \$145,350, thereby aiding in diverting the property of the corporation, to the injury of these interveners, as creditors, and had with a company which had no right to enter into any such contract to acquire the control and become the owner of the majority of the stock of the railroad company; that the auditor be required, in marshaling the assets, to ascertain all the facts, and particularly the character of the contract of March 31, 1883; and that the same, if found illegal, be declared to be null, unconstitutional, and void, and the Georgia Railroad Company be required to account for and pay over all the property which came into its hands under and by virtue thereof. No proceedings were ever begun against the directors. This intervention was allowed on April 2, 1897. On the same day the suits by Alexander and by the trustees were consolidated and ordered to proceed as one case.

By an amendment filed June 3, 1897, Weed and his co-intervenors recited the sale to the Georgia Company of 2,600 shares of stock, and \$161,500 first mortgage bonds; that after receipt of the bonds the Georgia Company guaranteed the same, and afterwards sold the same above par; and the subsequent consolidation of the Gainesville Company and the Walton Company. This interven

tion was referred to the auditor, with liberty to the Georgia Company to amend its pleadings in answer thereto. Thereafter Alexander, as a bondholder, and the trustees under the mortgage, petitioners in the consolidated cases, reciting the contract by which the Georgia Railroad Company had purchased the bonds and stock, alleged that the Georgia Company had complete dominion and control of the railroad, had wasted and mismanaged its property, and had purchased from the Gainesville Company certain locomotives and cars, subject to the lien of the mortgage, and prayed that the Georgia Railroad be required to account for the amount of assets and interest coupons received without adequate consideration, as aforesaid, and to account for the earnings of the Gainesville Company; that the sale of the rolling stock be set aside; and that the rent of all the rolling stock be charged against the Georgia Railroad Company. The Georgia Company answered the original petition, amendments, and intervention; admitted making the contract; averred that it was in good faith, for full value, and in the interest of the Gainesville Company; denied that it had operated the road, but alleged that the operation had been by the officers of the Gainesville Company, who had been elected by it as a majority stockholder; and denied all waste and mismanagement, but, on the contrary, alleged that the same had been to the best interest of the company, and with results far better than could have been secured in any other way. It denied that there had been any discrimination against the Gainesville Company, and alleged that, while rolling stock had been transferred in payment of advances made, it had never been off the line of the Gainesville Company, and had been constantly for its benefit. It averred that a deficit of \$362,000 had been met by advances made by the Georgia Railroad, for which it prayed judgment. Thereafter Brown, Phinzy, and Barnes, trustees under the second mortgage to secure \$75,000 of the bonds, intervened and prayed for a foreclosure of such second mortgage. Subsequently the original petitioners averred the consolidation with the Walton Railroad, and claimed that the lien of their mortgage extended thereto, as after-acquired property of the Gainesville Company; averred that the road could not be sold in sections without irreparable damage; asked for a sale of the entire line, and that the property be administered as a whole, and, when sold, that the proceeds be distributed between the creditors and bondholders of the two companies in proportion to their respective claims. Subsequently certain stockholders of the Gainesville Company intervened and attacked the validity of the sale of the stock and bonds to the Georgia Company, and prayed that the bonded indebtedness of the company be reduced to the true amount for which said company is legally bound and equi-

itably liable. The Gainesville Company amended its answer, alleging that the open account indebtedness to the Georgia Railroad was barred by the statute of limitations.

After the report of the auditor, and before it was recommitting, the city of Gainesville, as a stockholder owning \$50,000 of the capital stock of the Gainesville Company, intervened, and attacked the sale of the bonds to the Georgia Company as having been usurious, and for a grossly inadequate sum; that bonds to the amount of \$161,500 were sold to various parties to interveners unknown, and they were represented by the trustees; that it would be inequitable and illegal to allow the usurious bonds to be collected, or to allow a judgment therefor; that the Gainesville Company is not attacking the transaction as usurious, although intervenor has called upon and demanded of the officers that they should so attack the same. It prays that the trust deed be set aside for usury; that the bonds secured thereby be declared usurious; that the sale of bonds and stock to the Georgia Company be declared illegal; that the bonds be purged of usury, and the trustees of the bondholders be not allowed to collect more than the amount actually paid for the bonds, with interest at 7 per cent. The Gainesville Railroad Company thereupon abandoned its former position that the sale was a lumping trade, and pleaded usury. This intervenor and the amendment of the city were met by answer of the Georgia Company, setting up the same facts, substantially, as set out in its former answers, and further averring that "any right to recover any usurious payments from this defendant or the bondholders has long since been barred by the statute of limitations."

The auditor, H. H. Perry, filed a report, in which he found: "(11) That, under and in pursuance of the contract of March 31, 1883, the Georgia, Jefferson & Southern Railroad Company sold to the Georgia Railroad Company bonds of the first-mentioned road amounting to \$161,500 for the sum of \$15,350, and said bonds were delivered to the Georgia Railroad Company, and said sum of \$15,350 paid therefor to the Georgia, Jefferson & Southern Railroad Company. (12) I find that at the time of the above sale the Georgia Railroad Company was not a stockholder of the Georgia, Jefferson & Southern Railroad Company. (13) I find that the foregoing sale was duly authorized by the directors of the Georgia, Jefferson & Southern Railroad Company, by resolution of March 17, 1883. (14) I find that, in said transaction by which the Georgia, Jefferson & Southern Railroad Company transferred to the Georgia Railroad Company the aforesaid bonds, there was no intention on the part of either company of the contracting companies to evade the usury laws, and that the same was not a device to evade said laws. (15) I find that the aforesaid transaction did

not contemplate, and was not, in contemplation of law, a loan by the Georgia Railroad Company to the Georgia, Jefferson & Southern Railroad Company of the sum of \$15,350, or any other sum, but a sale of its bonds, as authorized by the Acts of 1881, p. 242, approved August 4, 1881. (16) I find that said bonds, after the same were sold to the Georgia Railroad Company, were by it put on the market and sold to various parties, and that those who now hold said bonds are bona fide holders for value. (17) I find, as a matter of law, that there was no usury in the transaction aforesaid, under and by virtue of which said title to said bonds was obtained. (18) I find further, as a matter of law, that the trustee for the bondholders is entitled to recover the full face value of said bonds, and interest thereon, in the decree of foreclosure, for the benefit of said bonds, as heretofore found. (19) I find, as a matter of law, that no part of the account of the Georgia Railroad Company against the Georgia, Jefferson & Southern Railroad Company for payment of coupons on the aforesaid bonds for the Georgia, Jefferson & Southern Railroad Company, up to the time of the appointment of the receiver, should be diminished on the grounds of usury. (20) I find, as a matter of fact, that the aforesaid payments of said coupons were made by said Georgia Railroad Company with an understanding between said companies that said Georgia Railroad Company should pay said coupons as they fell due, and charge said payment to the account of the Georgia, Jefferson & Southern Railroad Company, and that no notice was ever given by the said Georgia, Jefferson & Southern Railroad Company to the Georgia Railroad Company, up to the time of said payment or payments, of any intention to set up the defense of usury. (21) I find, therefore, as a matter of law, that, even if there had been usury in the original transaction, the said Georgia, Jefferson & Southern Railroad Company cannot set up the question of usury as a defense to the repayment of said amounts to the Georgia Railroad Company. I recognize it as a correct principle of law that in the case of an ordinary note or bond, between private parties, and perhaps private corporations, strictly so called, one cannot sell his own note to another at a discount, and evade the usury laws. The law will consider the transaction a loan, and, if the discount is sufficient to make the ultimate sum to be paid amount to more than the sum received, with legal interest added for the time the note or bond is to run, it will be usury. But there is a distinction between transactions of this kind and the sale of public securities, such as the bonds of municipalities, counties, railroads, and other quasi public corporations. It grows out of the character which modern usage has stamped upon such bonds. Bonds of this kind were not negotiable at common law, but their negotiable character was acquired by cus-

tom and usage, and recognized by the courts by a long course of decisions. The same usage and customs have given such securities the character of chattels. They are in reality a species of property, and not merely choses in action. As said by Justice Miller in an opinion in a case in the Supreme Court of the United States, one-half of the wealth of the country is invested in government and corporation bonds. Such bonds, as in this case, are usually made payable to bearer, and are intended to, and do, pass from hand to hand. A number of states have enacted laws prohibiting the defense of usury to corporation bonds. These statutes are based upon the existence of a distinction between such bonds and ordinary private loans. But the distinction exists in principle, and arises from the fact that universal custom and usage have given them the character of chattels. Their widespread circulation, the manner in which they pass by delivery from hand to hand, give them also a similitude to bank notes. The same sound reason which would forbid the defense of usury to bank notes would apply in a large measure to such bonds. To put upon each purchaser the duty of inquiry as to the original consideration received would destroy their utility. In this case the pleadings in no case speak of the transaction in which the Georgia Railroad Company received these bonds as a loan, but always as a sale. The statute authorizing their issue authorizes the company to issue and sell their bonds. Thus the language used bears witness to the character of such transactions. Certainly, in the hands of bona fide holders for value, the defense of usury should not avail in the case of such securities. I will content myself with referring to the reasoning of the court in *Griffith v. Burden*, 35 Iowa, 143, which is based upon principle, and not upon statute, and refer also to the following authorities: *White Water Valley Canal Co. v. Vallette*, 21 How. 414, 16 L. Ed. 154; 27 Am. & Eng. Enc. Law (1st Ed.) 1029; *Morris Canal & Banking Co. v. Fisher*, 9 N. J. Eq. 698, 64 Am. Dec. 423; *Memphis & L. R. R. Co. v. Dow*, 120 U. S. 287, 7 Sup. Ct. 482, 30 L. Ed. 595; *Ayer v. Tilden*, 15 Gray (Mass.) 182, 183, 77 Am. Dec. 355; *City of Memphis v. Brown*, 11 Am. L. T. 424; 6 West. Jur. 495; *Memphis v. Bethel* (Tenn.) 17 S. W. 191; *City of Austin v. Nalle*, 85 Tex. 520, 550, 22 S. W. 668, 900; *Traders' Nat. Bank v. Lawrence*, 96 N. C. 298, 3 S. E. 363; *White v. Railroad Co.*, 21 How. 575, 16 L. Ed. 221. If there was no express contract, [the Georgia Company] was virtually compelled to make large additional advancements in order to complete the road, amounting at the beginning to between \$70,000 and \$80,000, and did advance, to keep up the road and to keep up its credit, sometimes during long periods of depression, all told, over \$365,000, for which it has nothing to show, except an open account of very doubtful value, in addition to the amount

originally paid for stock and bonds. In view of this, it can hardly be said that the directors acted unwisely, or to the real injury of any one interested in the road, either as a stockholder or bondholder. I do not think there is any reason why the transaction should now be set aside. It might almost with propriety be said that the Georgia Railroad Company practically occupied the position of a construction company in acquiring these bonds. (23) I find specially that as to the Georgia, Jefferson & Southern Railroad Company, the only party in this case setting up usury in the aforesaid transaction, that the \$161,000 par value of bonds, together with the 2,600 shares of the common stock of said company, was sold by said company to the lessees of the Georgia Railroad Company on March 31, 1883, for \$145,350, in a lumping trade; the company having so alleged in its answer in this case, filed April 1, 1897. * * * (24) That the amount of capital stock of the Georgia, Jefferson & Southern Railroad Company, as authorized by its charter, to wit, \$250,000, was never fully subscribed for, nor scrip issued therefor, until pursuant to the contract of March 31, 1883, with the Georgia Railroad Company, when all unpaid subscriptions to the capital stock already subscribed for, and all subscriptions thereafter obtained to the capital stock, were agreed to be turned over to the lessees of the Georgia Railroad & Banking Company, to be used in the construction of the road."

To the auditor's final report the city of Gainesville excepted on the ground that the purchase of the \$161,350 of the first mortgage bonds of the Gainesville Company was usurious. After argument, and after the court had announced that it would hold that the transaction was usurious, but before the decree was signed, the city of Gainesville dismissed its exception. Weed and the other holders of unindorsed bonds amounting to \$83,000 also filed exceptions to the auditor's report, but, while attacking the legality of the contract between the Gainesville Company and the Georgia Company, did not except to so much of the auditor's report as held that the contract by which the stock and bonds had been conveyed to the Georgia Company was free from usury, though they did object to the court allowing the city of Gainesville to dismiss its exceptions to the finding that the sale of the bonds was free from usury. By final decree the court ordered the sale of the property, fixing \$3,000 a mile as the upset price. The only parties plaintiff in error are the holders of the \$83,000 unindorsed bonds, who assign error on the decree as a whole, and on the failure of the judge to sustain their exceptions to findings of fact and rulings of law made by the auditor.

Frank H. Miller and W. A. Charters, for plaintiffs in error. Jas. B. & Bryan Cumming, W. I. Pike, H. H. Dean, E. T. Brown,

A. S. Erwin, W. K. Miller, W. H. Barrett, B. Phinzy, and H. A. Alexander, for defendants in error.

LAMAR, J. The Gainesville, Jefferson & Southern Railroad Company was authorized to issue \$250,000 of stock and \$245,000 of first mortgage bonds. It obtained subscriptions for \$120,000 stock, and sold \$83,500 of bonds. With the proceeds it constructed about one-half of its road. Its funds being then exhausted, and it being unable to sell the remaining bonds, or to secure subscriptions to the balance of the capital stock, its officers were advised to interest the lessees of the Georgia Railroad in the completion of the work. After many negotiations a contract was made, March 31, 1883, by which, in consideration of \$145,350, to be paid in installments, it sold to the Georgia Railroad Company \$130,000 of the Gainesville Company's capital stock, "fully paid up," and \$161,500 first mortgage bonds, to be left with a depository until performance of the undertakings by the Georgia Railroad Company; but bonds to be delivered at the rate of \$1,000 of bonds for \$900 cash paid, "the payments to be applied first in payment in full of the stock and the overplus to be in full for the bonds." On the \$161,500 bonds thus acquired the Georgia Railroad placed an indorsement guaranteeing the payment of the principal and interest. Thus indorsed they were sold in open market. By virtue of the ownership of \$130,000 of capital stock, the Georgia Railroad Company elected the officers of the Gainesville Company, and proceeded to build the road, advancing \$107,000, in addition to the purchase price, under the contract of March 31, 1883. During the 15 years of its management the Georgia Company made advances aggregating \$365,000, much of which went to pay the coupons on the mortgage bonds. Default was made in 1897. There were two bills—one by a bondholder and one by the trustees—to foreclose the first mortgage on the Gainesville Road; another to foreclose the second mortgage; and still another to foreclose a mortgage of the Walton Road, which had been merged with the Gainesville Company. These four cases were consolidated. There were interventions by a stockholder and by the holders of \$83,500 unindorsed bonds, contending that the purchase of the majority of the Gainesville stock by the Georgia Company was ultra vires and in restraint of trade; attacking the contract of March 31, 1883; and claiming that the present owners of the \$161,500 bonds sold thereunder to the Georgia Company at less than par were not entitled to share equally in the proceeds of the sale of the mortgaged property. The Georgia Company was made a defendant, and there were prayers that it should account for its management of the Gainesville Company, for all profits made by it on a resale of the bonds bought at 10 and resold at 105, and

for general relief. The Georgia Company answered, and filed a counterclaim for \$365,000 against the Gainesville Company. There was an immense mass of evidence, a report by the auditor, a recommitment, another report, and many exceptions. This resulted in a record exceedingly voluminous. The court overruled all the exceptions to the auditor's report, and decreed that the road be sold, and that all the bonds should share equally in the proceeds. The holders of the \$83,500 of undorsed bonds filed a bill of exceptions to this court. The assignments of error may be so grouped as to somewhat shorten what would otherwise be an exceedingly lengthy opinion. All those in reference to the allowance for fees for the receiver and attorneys were abandoned. Those relating to exceptions to the auditor's findings of fact are sufficiently dealt with in the head notes. Civ. Code 1895, §§ 4594, 4595, 4596, 5876.

The construction of the Gainesville Railroad did not lessen or increase competition, but created competition where none previously existed. But if the geographical situation or character of business transacted had made the Georgia and the Gainesville competing roads, the state, the stockholders or the parties alone could have attacked the contract of March 31, 1883, as being ultra vires, or in restraint of trade. Bondholders are not authorized to act as guardians for the public or the parties, in having such a contract set aside or declared to have been illegal—certainly not in a case where the bondholder prays that the subscriber to the stock under such contract be held liable for the unpaid subscription. Civ. Code 1895, §§ 5800, 3668. The trustees under the mortgage represent all of the bondholders. And where bondholders are allowed to intervene pro inter esse suo, the death of one of a class will not cause the suit to abate, nor will it be necessary to have the representative bondholder made a party; her interest being represented by the trustee and the other bondholders making the same contention as that on which she relied. The fact that the trustee represented all bondholders also makes it unnecessary for the bonds to be proved before final decree of foreclosure. Here all the pleadings admitted that the entire issue of bonds had been sold, and, if any question as to ownership is raised, the court can frame an order to have the same determined by reference to a master, and by proper provision in the order of distribution. Civ. Code 1895, §§ 4842, 4853, 4856.

The holders of the \$83,500 undorsed bonds insist that, on the doctrine of two funds, those holding the \$161,500 of bonds, indorsed by the Georgia Company, and the indorsement secured by the pledge of Atlanta & West Point stock, should be required to exhaust this source of payment before being allowed to participate in the proceeds of the sale of the mortgaged property. But the indorsement was not a lien, and was not equal-

ly accessible. The indorsement was not a liability, and the collateral was not the property, of a common debtor. In no sense does the case come within the provisions of Civ. Code 1895, § 2691, that "a creditor having a lien on two funds of the debtor, equally accessible to him, will be compelled to pursue the one on which other creditors have no lien." The main contentions relate to the attack on the contract of March 31, 1883, which recited that the Gainesville Company sold to the Georgia Company \$161,500 of bonds, and \$130,000 of fully paid up stock for \$145,350, payable in installments; the stock and bonds to be deposited in escrow, and the Georgia Company to receive \$1,000 in bonds for every \$900 in cash paid, but the installments to be applied first to the payment of fully paid up stock, and the balance to be in full payment for the bonds. There was no objection to the introduction of parol evidence seeking to show that the paper did not set forth the real consideration; and the holders of the undorsed bonds, amounting to \$83,500, insisted (a) that this was a sale of bonds at 90, with the stock as a bonus, and that therefore the Georgia Railroad Company was liable as for an unpaid subscription of \$130,000; (b) the city of Gainesville, an intervening stockholder, insisted that it was a sale of stock at par, and of bonds at 10 cents on the dollar, in consequence of which the bonds were infected with usury; (c) the Gainesville Company, in its original answer, contended that the stock and bonds had been sold in a "lumping trade"; and the Georgia Railroad, uniting in this line of defense, also insisted (d) that the sale was made to it as a construction company on the further agreement that it was to advance what other sum might be needed to complete the road; that it had actually advanced \$107,000 additional, besides complying with its agreement to reduce freight rates. The uncontradicted evidence may probably have been sufficient to base a finding on this last theory. But the auditor found that it was a sale of stock at par, and of \$161,500 of bonds at 10 cents on the dollar. For the reasons set out in his report, he held that this transaction was not usurious, because the law applicable to loans of ordinary paper did not apply to a sale of corporate bonds. The city of Gainesville excepted to this ruling, and, over the objections of the intervening bondholders, withdrew the exceptions before the decree. As to which we hold that where there are various and independent parties to the litigation, and one files exceptions, the others have no vested interest therein; that the exception may be withdrawn, and other parties to the record cannot complain of the dismissal, or use the original exceptions as a basis for the assignment of error here. Civ. Code 1895, §§ 4845, 4908. The case might be different if the trustees or other representatives of parties who had intervened had filed an exception, and his beneficiaries had relied thereon, and fail-

ed on that account to make an independent exception. But here there was no such relation between the intervening bondholders and those who originally complained of the auditor's finding on the subject of usury.

It is not necessary to elaborate the proposition that if the contract of March 31, 1883, should be construed as a sale of bonds at 90, and the stock as a bonus, there was no usury. If so, then nothing which thereafter occurred rendered invalid that which was valid in its inception. If the Georgia Railroad improperly included the \$107,000 advanced by it as a construction company, as an item in the set-off, or if it took second mortgage bonds for a part thereof, this might affect that company's right under the second mortgage, and it might reduce the amount of the judgment to which it was entitled on the set-off; but it could not be effective to invalidate bonds now in the hands of innocent third persons.

If the contract was a sale of bonds at 90, and the stock was a bonus, the liability of the unpaid subscription was barred in six years. *Georgia Manufacturing Co. v. Amls*, 53 Ga. 228. But whether barred or not would be immaterial to the plaintiffs in error because a liability for \$130,000 would not exhaust, but only reduce, the judgment for set-off of \$365,000. Or, if the Georgia Company was liable on its stock subscription of \$130,000, for the profit made on the resale of the bonds; for the \$75,000 secured by the second mortgage, for waste and mismanagement, or other act done by it as a majority stockholder; and if it be conceded that such claims are not barred, and if the intervening bondholders, as creditors, had the right to enforce such cause of action, and if the pleadings warranted a judgment on any or all of these claims—yet it appears that the Georgia Company has a claim for \$365,000 cash advanced to the Gainesville Company, much of which went to pay the coupons, including those held by the complaining interveners. And unless the claims against the Georgia Company exceeded the amount of the set-off, the plaintiffs in error have no cause to complain, since they must be paid in full on their first lien before the Georgia Company can get anything on the judgment for \$365,000.

The auditor, however, did not predicate his finding that there was no usury upon the idea that the Georgia Company, as a construction company, had advanced a sum sufficient to remove any taint of usury, nor did he sustain the contention of the plaintiff in error that the bonds had been sold at 90, with the stock as a bonus; but he put his decision squarely on the proposition that a corporation may lawfully sell its bonds at a discount greater than 8 per cent. If this question was one between the Georgia Company and the Gainesville Company, the original parties to the transaction, we would be called upon to determine the point. But these bonds are in the hands of innocent third persons, who purchased the same at 105 from the Georgia

Railroad Company, and the contest is between bondholders over the proceeds of the road. The majority of the court are of the opinion that the question of usury and the effect thereof is not presented by any of the assignments of the plaintiff in error. The writer is of the opinion that it is presented, because of the assignment on the court's ruling that all of the bonds should share equally, and yet the result would not be changed. And speaking for myself, and not for the court, whether there was usury or no usury in the original sale of the bonds, subsequent bona fide holders before the bonds were due, and without notice of any usury, are all entitled to share alike out of the property mortgaged to secure the entire issue. All of the decisions in this state apparently to the contrary are predicated upon *Bailey v. Lumpkin*, 1 Ga. 407. But that case is in perfect harmony with the uniform current of authorities, being put, as it was, upon the express language of the act of 1829 (*Cobb's Dig.* 393), which declared that any note or bond infected with usury was void both as to the usury and legal interest. The bona fide holder of a negotiable instrument is protected from the defense of usury, since the present statute not only does not make such contract void, but section 3694 requires both an "illegal and immoral consideration" in order to affect such paper in the hands of an innocent purchaser. Contracts to pay usury are unlawful, but only as to the usurious interest, but mere illegality in the consideration is not sufficient to defeat the right of an innocent holder. In *Rhodes v. Beall*, 73 Ga. 641, the common-law authorities were recognized; but the court there, in considering a contract which by act of Congress was even declared void, said: "The statute which makes such contract illegal and void must also make the same a crime, or the act itself must be immoral and contra bonos mores, to affect the bona fide holder of negotiable paper." "A contract may be illegal without being immoral but the consideration to make the defense available must be both immoral and illegal." *Perkins v. Rowland*, 69 Ga. 664.

Many courts, in construing the statute of usury, have recognized that, if the instrument thus infected is declared to be void, it obtains no validity by being transferred to an innocent third person. If the contract is merely declared to be unlawful or illegal, and the act is not made a crime, then an innocent purchaser takes the same free from the defense of usury. Thus Judge Story, in *Fleckner v. United States Bank*, 8 Wheat. 338, 5 L. Ed. 631, says: "The statutes of usury of the states, as well as of England, contain an express provision that usurious contracts shall be utterly void; and, without such an enactment, the contract would be valid, at least in respect to persons who are strangers to the usury." And in *Converse v. Foster*, 32 Vt. 828, cited and followed in the carefully considered case of *Lynchburg National Bank*

v. Scott, 91 Va. 656, 22 S. E. 499, 29 L. R. A. 827, 50 Am. St. Rep. 890, it was held that "the English statute against usury * * * not only imposes a penalty for such illegal act, but expressly declares that all notes, bonds and other securities given for such illegal consideration shall be utterly void. All the cases * * * turn upon this very distinction and difference between the statutes. In those cases in which the Legislature has declared that the illegality of the contract or consideration shall make the security void, the defendant may insist on such illegality, though the plaintiff took the same bona fide and gave a valuable consideration for it. But unless it has been so expressly declared by the Legislature, illegality of consideration would be no defense to an action at the suit of a bona fide holder for value without notice of the illegality." See, to same effect, Webb on Usury, § 159, and authorities cited. The law is opposed to usury, but it favors bona fide holders of negotiable paper. In protecting such innocent holders, it is not considering solely the rights of the respective parties to the litigation, but serving public policy, to protect the innocent purchaser, on the one hand, and, on the other, to enable owners of a valid paper to sell the same without the delay which would be inevitable if the purchaser in each instance was required to make an investigation of the consideration on which the negotiable instrument issued. If there is no consideration whatever, and the paper thereafter comes into the hands of an innocent purchaser, he would be entitled to recover the face value. Why, then, should it be that he would be liable if he received nothing, and not liable when he received something, unless that something was both illegal and immoral, and therefore by statute unenforceable? Bonds like these are now universally held to be negotiable, and pass by delivery. As in the present instance, they may be sold by the company to one purchaser at one price, and to another at another price. Or, as appears here, they may be held in this country and in Europe. To require each separate purchaser, at the point of issue, or at a distance, to make an independent investigation as to the consideration for which each separate bond was originally put upon the market, would be to establish a rule which, if it did not absolutely prevent the sale of such security, would disastrously affect a borrower's right to use his credit. A subsequent purchaser would have to make the investigation where the bonds were issued at par, as well as when they were sold at a usurious rate. The innocent borrower would thus suffer with the guilty. Consequently, and in pursuance of an imperative public policy, many states whose statutes would admit of such a defense against ordinary negotiable paper have enacted provisions preventing corporations from setting up the defense of usury when sued on corporate bonds. Others have de-

clared by statute that the plea of usury should not be available against a bona fide holder of negotiable paper. Other courts, without statute, have declared that this defense was not available in a suit on bonds. Others (Junction R. R. v. Bank of Ashland, 12 Wall. 223, 20 L. Ed. 335) have preserved this policy by holding that a sale of bonds was not a loan. Contra, Schermerhorn v. Talman, 14 N. Y. 93. And our statute (Civ. Code 1895, § 3694) has prevented such defense against bona fide purchasers by declaring that illegality of consideration shall not prejudice a bona fide holder of negotiable instruments unless the consideration is both illegal and immoral.

Cited by plaintiffs in error: Purchase of stock ultra vires: Central R. Co. v. Collins, 40 Ga. 582; Nashville R. Co. v. Commonwealth of Kentucky, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849; Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. Ed. 950; Oregon Ry. Co. v. Oregonian R. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837; Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55. Right of bondholders to sue: Cook, Corp. §§ 735, 816; Fouché v. Merchants' Nat. Bank, 110 Ga. 839, 36 S. E. 256; 2 Elliott, Railroads, §§ 378, 379; Lloyd v. Preston, 146 U. S. 631, 13 Sup. Ct. 131, 36 L. Ed. 1111; Pool v. Calhoun, 88 Ga. 471, 14 S. E. 867. Competition: Thomas v. R. Co., 101 U. S. 71, 25 L. Ed. 950; Branch v. Jesup, 106 U. S. 468, 478, 1 Sup. Ct. 495, 27 L. Ed. 279; Pennsylvania R. Co. v. Pullman Palace Car Co., 139 U. S. 24, 48, 11 Sup. Ct. 478, 35 L. Ed. 55; Civ. Code 1895, § 2983; Conley v. State, 85 Ga. 348, 11 S. E. 659; Importers' Bank v. McGhees, 88 Ga. 702, 16 S. E. 27; Gilmarlin v. Middle Georgia R. Co., 101 Ga. 570, 29 S. E. 189; Wilkinson v. Bertock Co., 111 Ga. 187, 36 S. E. 623. Two funds: Civ. Code 1895, § 2983; Conley v. State, 85 Ga. 348, 11 S. E. 659; Importers' Bank v. McGhees, 88 Ga. 702, 16 S. E. 27; Gilmarlin v. Middle Georgia R. Co., 101 Ga. 570, 29 S. E. 189; Wilkinson v. Bertock, 111 Ga. 187, 36 S. E. 623; National Bank v. Exchange Bank, 110 Ga. 697, 36 S. E. 265; Pacific R. Co. v. Ketchum, 101 U. S. 292, 25 L. Ed. 932.

Cited by defendant in error: Embarrassed corporation may sell stock at less than par: Cook, Stock & Stockholders (3d Ed.) p. 53; Van Cott v. Van Brunt, 82 N. Y. 535; Clark v. Bever, 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88; Coit v. Gold Co., 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420; Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; Morrow v. Nashville Co., 87 Tenn. 262, 10 S. W. 495, 3 L. R. A. 37, 10 Am. St. Rep. 658; Railroad Co. v. Dow, 120 U. S. 287, 7 Sup. Ct. 482, 30 L. Ed. 595; Stein v. Howard, 65 Cal. 616, 4 Pac. 662. Two funds: Civ. Code 1895, § 2691; Carter v. Neal, 24 Ga. 346, 71 Am.

Dec. 117; Vance v. Roberts, 86 Ga. 457, 12 S. E. 653.

Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

(119 Ga. 652)

HILTON & DODGE LUMBER CO. v. INGRAM.

(Supreme Court of Georgia. March 4, 1904.)
INJURY TO EMPLOYE—FELLOW SERVANT—SELECTION BY AGENT—PRESUMPTIONS.

1. When the master performs the duty imposed by law of employing competent servants, and a fellow servant of the plaintiff, without the master's knowledge or authority, selects from the competent servants thus employed one who is unsuited for the special task created by an emergency, and transfers him from work he can do to work he cannot do, the act of thus assigning him is not the act of the master, but that of a fellow servant.

2. The duty of selection need not always be performed by the master himself. In the nature of things, in the case of corporations, such selection must be by agents.

3. If the one to whom this duty has been committed is negligent, it is treated as the negligence of the master.

4. If the agent making the selection was diligent, it is to be treated as the diligence of the master.

5. If the record is silent as to whether the agent making the selection and transferring the servant from one department to another was negligent or diligent, then the record is to be treated as likewise silent as to the master's conduct in transferring him from one task to another.

6. There is no presumption in such a case against the master, nor does any arise from the mere happening of a subsequent injury.

7. It must appear that the master, or the person authorized to make the assignment, knew or was negligent in failing to learn of the unfitness of the servant to perform the new duties to which he was assigned to meet an emergency.

8. A fellow servant, without the master's knowledge, cannot, by an assumption of authority, convert himself into a vice principal or alter ego of the master.

9. If the person making the assignment to the new duty was not authorized to employ or discharge, and made such assignment without the master's knowledge or consent, and if he was a co-employee with the injured plaintiff, then the case falls within the doctrine of fellow servants.

10. But if the person making such assignment to the new duty was authorized to employ and discharge, and to make such assignment to meet the emergency, and if he knew of the incompetency of the servant to perform the new task, his negligence would be treated as the negligence of the master. And if the other facts entitling the plaintiff to recover are established to the satisfaction of the jury, they would be authorized to find in his favor.

11. Where the defendant denied liability, and offered evidence to show that the injury was the result of an accident, the defendant was entitled to a charge adjusted to this theory, even without a special request therefor.

(Syllabus by the Court.)

Error from Superior Court, Glynn County; T. A. Parker, Judge.

Action by W. H. Ingram against the Hilton & Dodge Lumber Company. Judgment

for plaintiff, and defendant brings error. Reversed.

Lumber, as sawed, was trucked along an elevated platform or "brow," and thence lowered to a pile on the ground. Dudley was inspector on the brow. The regular truckman was absent. There is a conflict in the evidence as to who selected Anderson to act as a substitute. Anderson says that he was directed to leave his work on the ground by Wiles, the general superintendent, and that at the time he objected, saying that "he could not do the work, and had never done that sort before." Dudley says that he applied to Wiles, who was in charge of the men in the yard, to send up a man to take the absent truckman's place, and that he sent Anderson. There is no evidence that either Dudley or Wiles had the right to employ or discharge, or that they had the right to assign employees engaged in one department to work in another; and there is no evidence that either knew that Anderson was inexperienced, incompetent, or unable to truck lumber on a two-wheeled truck, and no evidence that the master knew of the absence of the regular truckman, or that Anderson had been assigned to the new work.

Wiles, the general superintendent, was dead at the time of the first trial. There was evidence that Ingram, the plaintiff, had originally employed Anderson for the company when Anderson was a boy of about 14 years; that afterwards Ingram had promoted Anderson to a man's work and pay; that Anderson had been with the company for 3 or 4 years, engaged at different classes of work, and had trucked lumber on the ground with a four-wheeled truck; that he had sometimes worked on the brow, but not with a two-wheeled truck; that during the morning of the day of the injury another employee assisted Anderson with the two-wheeled truck; that in the afternoon, while Anderson alone was pushing the lumber, the truck "got away from him," and a stick of lumber fell through a hole on the edge of the platform, striking Ingram, who was inspecting lumber underneath. The plaintiff insists that the company was negligent in allowing Anderson, an incompetent and inexperienced boy, to engage in the work, and was also negligent in allowing the hole to remain in the platform. The company insists that Anderson was competent to perform the work, which required strength, but no special skill; that the lumber fell while being placed sidewise on the pile on the ground; that it did not fall through the hole; and that the injury was occasioned either by the negligence of a fellow servant of the plaintiff, or as the result of an accident for which no one was to blame. Among other grounds of the motion for a new trial, it was alleged that the court erred in failing to charge on the theory that the plaintiff's injuries were occasioned by an accident, and in charging that, "whether Anderson was assigned to work on the brow

¶ 3. See Master and Servant, vol. 24, Cent. Dig. § 241, 420, 473.

by the general superintendent, or the inspector, Dudley, then they would be the alter ego of the defendant, and any negligence in this respect, if any be shown, would be attributable to the company." The plaintiff in error assigns as error that this charge was unauthorized by the evidence, and was in direct conflict with the further charge of the court that the inspector, Dudley, the truckman, Anderson, and the plaintiff were all fellow servants, and that, under the testimony, Dudley was under the jurisdiction and subject to the control of the superintendent, Wiles—not an alter ego of the defendant, but a fellow servant of the plaintiff.

W. E. Kay and W. G. Brantley, for plaintiff in error. D. W. Krauss and Toomer & Reynolds, for defendant in error.

LAMAR, J. There was evidence from which the jury could have found that Anderson was transferred from the work on the ground, for which he was competent, to work with a two-wheeled truck on the elevated platform, for which he was alleged to be incompetent. This assignment to a new department of work was by the concurrent action of Wiles, who was in charge of the hands in the yard, and Dudley, who was inspector of lumber on the elevated platform. All three were fellow servants of the plaintiff, Ingram. The record presents the question as to the responsibility of the master for injuries inflicted by Anderson upon Ingram; Anderson being competent for the work for which he was selected, and alleged to be incompetent for the new task to which he had been assigned, to fill a vacancy caused by temporary absence of the regular truckman. The master is bound to furnish safe material and safe appliances with which, and competent servants by whom, his work is to be carried on. If, however, he complies with this requirement of the law, and a fellow servant of the plaintiff, out of proper instrumentalities and agencies, makes an improper selection, the employer is not liable to a co-employee injured as a result thereof. If the master supplies the proper material, and the plaintiff's fellow servant selects, from the mass of good lumber supplied, a piece which is too small, or puts it together so unskillfully as to construct an unsafe ladder, staging, or scaffold, in consequence of which the same falls, the resulting injury is referable to the negligence of the fellow servant in making an unfit selection, or in improperly putting together the proper material furnished. By parity of reasoning, when the master performs the duty imposed by law of employing competent servants, and a fellow servant of the plaintiff, without the master's knowledge or authority, selects, from the competent servants thus employed, one who is unsuited for the special task, and transfers him from work he can do to work he cannot do, the act of thus assigning him

is not the negligence of the master, but that of a fellow servant. It was therefore error to charge that whether the servant alleged to be incompetent was assigned to the task by the general superintendent, or by the inspector, in either case they would be the company's alter ego, and negligence by either would be attributable to it. A fellow servant, without the master's knowledge, cannot, by an assumption of authority, convert himself into a vice principal or alter ego.

Treating the assignment of Anderson to the new duty as the equivalent of an original employment for that purpose, the result is not different. The duty of selection need not always be performed by the master himself. In the nature of things, in the case of corporations such selection must be by agents. If the one to whom this duty has been committed is negligent, it is treated as the negligence of the master. On the other hand, if the agent making the selection was diligent, it is to be treated as the diligence of the master. If the record is silent as to whether the agent making the selection was negligent or diligent, then it is the same as though the record were silent as to the master's conduct in transferring Anderson from one task to another. There is no presumption in such a case against the master, nor does any presumption arise from the happening of the injury; but it must appear that the master, or the person authorized to make the selection, knew, or negligently failed to learn, of the incompetency of the person selected. *McDonald v. Eagle & Phenix Co.*, 68 Ga. 842. There is here neither evidence nor presumption that Dudley himself was incompetent, or that he knew, or was negligent in failing to know, that Anderson was unsuited for the work of trucking on the elevated platform.

One would suppose that there were many cases in which the question presented by the charge here had been discussed and decided, but, after diligent search, we have found few bearing on the point. In *Norfolk R. Co. v. Thomas' Adm'r* (Va.) 17 S. E. 884, 44 Am. St. Rep. 909, it was raised, but left open. In other cases, where a fireman had been permitted to do the work of an engineer, the company was held liable to the injured plaintiff; it appearing that the conductor who made the assignment was authorized so to do by the company, and knew of the incompetency of the fireman, or else that the defendant knew of the custom to permit firemen to perform such duties. *Harper v. Indianapolis R. Co.*, 47 Mo. 507, 4 Am. Rep. 353; *O. & M. Ry. Co. v. Collarn*, 73 Ind. 261, 38 Am. Rep. 134; *McElligott v. Randolph*, 61 Conn. 157, 22 Atl. 1094, 29 Am. St. Rep. 181; *Henry v. Brady*, 9 Daly, 142; *Fraser v. Schroeder*, 163 Ill. 459, 45 N. E. 288. Compare *Blackman v. Thomson-Houston Co.*, 102 Ga. 69, 29 S. E. 120. There are, however, a few cases directly in point, from which we quote. In *Felch v. Allen*, 98 Mass. 572, it was held that if, without authority from the master in whose

warehouse they are engaged in the same work, one of two servants directs the other to use in the work an elevator in a dangerous and improper manner, for which it was not intended, and the master had no reason to believe that it would be so used, and such other, in complying with this direction, is injured by a fall caused by a defect in the elevator, the master is not liable in damages for the injury. In *Greenwald v. Marquette R. R.*, 49 Mich. 199, 18 N. W. 513, an engineer allowed a fireman to operate the engine. Without warning, he backed the train; and the court held that the plaintiff was not entitled to recover, as the injury was occasioned by the negligence of the fireman, who was a fellow servant. See, also, *Thompson v. Lake Shore R. Co.*, 84 Mich. 281, 47 N. W. 584. In *Houston & Texas Central R. Co. v. Myers*, 55 Tex. 110, the engineer was competent, but was not on the engine, which was being operated by the fireman, who backed rapidly without giving the signal. The court said: "Conceding that it was an act of negligence upon the part of the engineer to leave the engine in the hands of the fireman, to be operated by him, and that it was an act of negligence for the fireman to attempt to operate the same, still the testimony shows that the engineer selected by the company and placed in charge of the engine was a good and competent man for the business, and that this is the isolated act of negligence shown by the record, upon his part. Neither is there any complaint but that the fireman was a good and competent man for the business for which he had been selected, and to which he had been assigned by the company. If, as claimed by appellee, the injury was the direct result of negligence of the engineer and fireman, then he not only failed to show the use of [want of] reasonable care upon the part of the company in selecting and retaining such servants, but he affirmatively shows that the engineer is a good and competent man for the business. Upon clear and well-established principles of law, appellee could not recover for the injury on account of the neglect of his fellow servants, under the facts and circumstances of this case." In *Core v. Ohio River Railroad Co.*, 38 W. Va. 468, 18 S. E. 600, where a brakeman was injured by the alleged negligence of a fireman who had been permitted by the engineer to operate the locomotive, the court held that it was necessary for the plaintiff to show that the fireman was incompetent, that he was negligent, that the defendant knew he was unskilled, that the plaintiff did not know it, that the fireman was managing the engine, and "that the defendant permitted, either expressly or impliedly, the fireman to manage the engine." Compare *Wright v. N. Y. Central R. Co.*, 25 N. Y. 562, which, however, has been criticised because there the inexperienced engineer was assigned to duty by the superintendent, whose negligence was that of the company.

There was evidence to warrant the conten-

tion on the part of the defendant that the injury was the result of an accident, and it was entitled to a charge adjusted to that theory, without a special request therefor.

The foregoing conclusion requires the grant of a new trial, and it is unnecessary to consider in detail the other grounds of the motion.

Cited by the plaintiff in error: On the failure to charge as to accident, *Phenix Ins. Co. v. Hart*, 112 Ga. 785, 38 S. E. 67; *Whedon v. Knight*, 112 Ga. 639, 37 S. E. 972. On the charge as to alter ego, *Blackman v. Electric Co.*, 102 Ga. 64, 29 S. E. 120; *Dunn v. State*, 82 Ga. 27, 8 S. E. 806, 8 L. R. A. 199; *McDonald v. Manufacturing Co.*, 67 Ga. 762; *Gunn v. Willingham*, 111 Ga. 427, 36 S. E. 804; *Brush Electric Light & Power Co. v. Wells*, 110 Ga. 192, 35 S. E. 365; *Ingram v. Lumber Co.*, 108 Ga. 196, 33 S. E. 961; *Krogg v. Railroad Co.*, 77 Ga. 214, 4 Am. St. Rep. 77; *White v. Kennon*, 83 Ga. 343, 9 S. E. 1082; *Keith v. Coal Co.*, 81 Ga. 49, 7 S. E. 166, 12 Am. St. Rep. 206; *Ellington v. Lumber Co.*, 93 Ga. 57, 19 S. E. 21.

Cited by defendant in error: On failure to charge as to accident, *Southern Ry. Co. v. Coursey*, 115 Ga. 602, 41 S. E. 1013. As to master's duty to employ competent servant, *Ocean S. S. Co. v. Matthews*, 86 Ga. 418, 12 S. E. 632; *Waycross Lumber Co. v. Guy*, 89 Ga. 149, 15 S. E. 22; *Schmidt v. Block*, 76 Ga. 823; *Wabash Ry. Co. v. McDaniels*, 107 U. S. 457, 2 Sup. Ct. 932, 27 L. Ed. 605; *Harpur v. Indianapolis & St. L. R. Co. (Mo.)* 4 Am. Rep. 353; *Ingram v. Lumber Co.*, 108 Ga. 196, 33 S. E. 961; *Austin v. Appling*, 88 Ga. 56, 13 S. E. 955.

Judgment reversed. All the Justices concurring, except SIMMONS, C. J., absent on account of sickness.

(119 Ga. 395)

CAWTHON v. STATE.

(Supreme Court of Georgia. Feb. 12, 1904.)

CRIMINAL LAW—NEW TRIAL—DIRECT BILL OF EXCEPTIONS—BRIEF OF EVIDENCE—OTHER CRIMES—OBJECTIONS TO EVIDENCE—TRIAL—RECEPTION OF VERDICT—PRESENCE OF ACCUSED.

1. Prior to 1898 any criminal case might be carried to the Supreme Court on a direct bill of exceptions specifying the errors of law complained of, without making a motion for a new trial.

2. Act Dec. 20, 1898 (Acts 1898, p. 92; Van Epps' Code Supp. § 6241), authorizing the Supreme Court to consider assignments of error in a direct bill of exceptions, where no motion for a new trial is made, is simply declaratory of the law as it existed at the date of the passage of the act, and is not exhaustive of the right of this court to entertain jurisdiction of direct writs of error.

3. This court cannot consider as a brief of evidence a document appearing as such in a record or bill of exceptions, unless the record or bill of exceptions affirmatively shows that the document has been approved as correct by the trial judge; and this is true, even in a case where counsel agree in the Supreme Court that the document is a correct brief of the evidence and may be considered as such.

4. Evidence of the commission of a crime oth-

er than the one charged is generally not admissible.

5. "To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor, by a connection which shows that he who committed the one must have done the other."

6. "If the evidence be so dubious that the judge does not clearly perceive the connection, the benefit of the doubt should be given to the prisoner, instead of suffering the minds of the jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt."

7. Where the court, over objection, admits certain evidence, with the statement that the objection will be passed upon at a later stage of the trial, it is incumbent upon the objecting party, if the evidence be inadmissible, to direct the court's attention thereto, either before or at the close of the testimony, and to move to exclude it; and upon his failure to do this he will be held to have waived his objection.

8. Even if an attorney, by virtue of the relation of attorney and client existing between himself and one charged with a felony, has no implied authority to waive the right of his client to be present at the reception of the verdict, if the attorney makes an express waiver to this effect in the presence of the client, who does not at the time repudiate the action of his counsel, a verdict afterwards received, in the absence of the accused and in consequence of the waiver, will not be held to be invalid at the instance of the accused, seeking, after the reception of the verdict, to repudiate the action of his counsel in making the waiver.

9. Before a verdict received in the absence of the accused will be held to be invalid, it is incumbent upon the accused to show that he was in custody of the law at the time the waiver was made, that he made no waiver of his right to be present, and that he did not authorize his counsel to make such waiver for him, and, if an unauthorized waiver has been made by counsel, that he has not ratified the same, or allowed the court to act upon the waiver of counsel after he has notice that the same has been made.

(Syllabus by the Court.)

10. This case having been brought to the Supreme Court by a direct bill of exceptions, no motion for a new trial having been made, and it appearing, in my opinion, that no ruling or order of the trial judge upon which error was assigned necessarily controlled the verdict rendered, it follows that, under the act of 1898 (Van Epps' Code Supp. § 6241) and the former adjudications of this court, such rulings and orders cannot be reviewed. *Taylor v. Reese*, 108 Ga. 379, 33 S. E. 917; *Smith v. Smith*, 112 Ga. 351, 37 S. E. 407; *Wright v. Hollywood Cemetery Co.*, 112 Ga. 894, 38 S. E. 94, 52 L. R. A. 621 (6); *Ocean Steamship Co. v. Hamilton*, 112 Ga. 901, 38 S. E. 204; *Ray v. Morgan*, 112 Ga. 923, 38 S. E. 335; *Darien Bank v. Clarke Lumber Co.*, 112 Ga. 951, 38 S. E. 363; *Parker v. Medlock*, 117 Ga. 813, 45 S. E. 61; *Binion v. Georgia Southern & Fla. Ry. Co.*, 118 Ga. 282, 45 S. E. 278; *Cable Co. v. Parantha*, 118 Ga. 913, 45 S. E. 787.

Per Fish, P. J., dissenting.

11. Since the passage of the act approved December 20, 1898 (Acts 1898, p. 92), "to dispense with a motion for new trial and filing brief of the evidence, and to authorize a direct bill of exceptions, in certain cases," to authorize the reversal of a judgment on a bill of exceptions sued out directly to this court, without any mo-

tion for a new trial having first been filed in the court below, it must appear that "the judgment, decree, or verdict has necessarily been controlled by one or more rulings, orders, decisions, or charges of the court," complained of in the bill of exceptions. The present case, in my opinion, does not come within this requirement of the law.

12. Error will never be presumed, but must be clearly shown. Hence, where there is before this court no brief of evidence which it is authorized to consider, the judgment of the court below should not be reversed because the judge admitted evidence of an alleged independent crime; there being nothing before this court to show whether the transaction as to which the evidence objected to was admitted was or was not connected with the crime of which the accused was charged.

13. On the trial of one indicted for murder, evidence of a former attempt by the accused to kill the deceased is admissible, even though it should incidentally develop that in such unsuccessful attempt another person, with whose murder the accused was not charged, was killed.

Per Candler, J., dissenting.

Error from Superior Court, Dodge County; D. M. Roberts, Judge.

R. D. Cawthon was convicted of murder, and brings error. Reversed.

Chas. W. Griffin and Goodwin, Anderson & Hallman, for plaintiff in error. J. F. De Lacy, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

COBB, J. Cawthon was convicted of murder, and sentenced to death. He made no motion for a new trial, but brings his case by a direct writ of error, alleging that certain errors prejudicial to him were committed at the trial.

1, 2. The Attorney General suggests in his brief that this court has no jurisdiction to pass upon any question made in the bill of exceptions, for the reason that the verdict was not necessarily controlled by any of the rulings, decisions, or charges complained of, within the meaning of the act of December 20, 1898. See Acts 1898, p. 92; *Van Epps' Code Supp.* § 6241. In order to determine the true interpretation to be placed upon the act of 1898, it is necessary to consider the practice as it existed in this court at the date of and prior to the passage of that act. The act establishing this court declared that "any criminal cause may be carried up to the Supreme Court on a bill of exceptions, in writing, specifying the error or errors of law complained of," and that "any cause of a civil nature, either on the law or equity side of the superior court, may, in like manner, be carried to the Supreme Court on a bill of exceptions specifying the error or errors complained of in any decision or judgment." See 1 Ga. vi, vii. The first criminal case brought to this court was *Sealy v. State*, 1 Ga. 213, 44 Am. Dec. 641, and the second was *Reynolds v. State*, 1 Ga. 222. *Hines Holt* and *Henry L. Benning* represented the plaintiff in error in each case. In the first no motion for a new trial was made, but the case was brought to this court upon a

15. See Criminal Law, vol. 14, Cent. Dig. §§ 823, 824.

bill of exceptions assigning error upon a ruling refusing to continue the case, upon rulings made while the jury was being impaneled, and upon rulings made on the admission and rejection of evidence. The court entertained jurisdiction of the writ of error, and reversed the judgment. In *Reynolds v. State* the bill of exceptions assigned error upon various rulings at the trial, upon the overruling of a motion to arrest the judgment, and upon the overruling of a motion for a new trial. The court entertained jurisdiction of this writ of error, and awarded a new trial. While no question was made in either case, or directly passed upon by the court, as to what was the proper practice to be pursued, or what was the proper construction of the act organizing the court, the practice followed by lawyers of the standing of those who represented the plaintiffs in error, and acquiesced in by such lawyers as Levi B. Smith, E. H. Worrill, and Absalom H. Chappell, who represented the state in the respective cases, is entitled to very grave consideration, when it is to be determined what was the opinion of the profession at that time as to the practice to be pursued in bringing cases to this court. An examination of the records of this court in the earlier volumes will show that the practice above indicated was followed generally by the profession throughout the state; that is, the losing party determined for himself whether he would bring an error of law to this court by direct bill of exceptions, or embody it in a motion for a new trial, if the ruling was of such a character as could be properly made the ground of such a motion. That part of the act of 1845 (Laws 1845, p. 18) establishing the Supreme Court which declared what causes should be brought before it was carried into the Code of 1863 in the following language: "Either party in a civil cause, and the defendant in any criminal proceeding in the superior courts of this state, may except to any sentence, judgment, decision, or decree of such court, or of the judge thereof in any matter heard at chambers. Such bill of exceptions shall specify plainly the decision complained of, and the alleged error, and shall be signed by the party, or his attorney or solicitor." Code 1863, § 4160. So much of the provision just quoted as relates to criminal cases is embodied in Pen. Code 1895, § 1070, in the same language. In the early history of this court many cases, both civil and criminal, in which verdicts were rendered, were brought to this court by direct writ of error, without motions for new trials having been made. In the later history of the court, especially in the more recent years, the practice of making a motion for a new trial, in all cases where such a remedy was appropriate, has prevailed; the bill of exceptions bringing the case to this court assigning error upon the judgment overruling the motion. Prior to 1898 there was no leg-

islation having the effect to change or modify the practice as it existed in the early history of the court. The practice act passed in that year (Acts 1898, p. 92) is in the following language:

"An act to dispense with a motion for new trial and filing brief of evidence, and to authorize a direct bill of exceptions, in certain cases.

"Be it enacted, * * * that in any case now or hereafter brought, where the judgment, decree, or verdict has necessarily been controlled by one or more rulings, orders, decisions, or charges of the court, and the losing party desires to except to such judgment, decree or verdict, and to assign error on the ruling, order, decision, or charge of the court, it shall not be necessary to make a motion for new trial, nor file a brief of the evidence, but the party complaining shall be permitted to present a bill of exceptions containing only so much of the evidence or statement of facts as may be necessary to enable the Supreme Court to clearly understand the ruling, order, decision, or charge complained of."

This act came before this court for construction for the first time in *Taylor v. Reese*, 108 Ga. 379, 33 S. E. 917, which was an application for a mandamus to compel Judge Reese to sign a bill of exceptions tendered to him in a criminal case in which no motion for a new trial had been filed, and which he had refused to certify solely upon the ground that in his opinion he had no authority to do so. This case was thoroughly and carefully considered, and the conclusion was reached that the accused had a right to bring his case to this court in the manner above indicated. In the course of the opinion Mr. Presiding Justice Lumpkin says: "The act of 1898 simply gives in explicit terms a right of which parties litigant frequently availed themselves before its passage." And several cases are cited to illustrate the correctness of this statement. The number of cases in which parties have availed themselves of this right since the establishment of the court could be largely increased by an examination of the records on file in the office of the clerk, as well as the reports of the cases in the published volumes. The learned Presiding Justice further says: "There is enough in each of the bills of exceptions tendered to the judge to enable this court to clearly understand and pass upon the rulings complained of; and, if the positions taken by counsel for the accused are well founded, it was the right of the accused to have the jury determine the question whether or not they were guilty of a lower grade of homicide than murder. If the judge committed the errors alleged, they were deprived of this substantial right, and the verdicts actually rendered were necessarily so far controlled by the judge's action as to necessitate a new trial." In the light of what is said in the opinion in the mandamus case, it is impor-

tant now to look to the opinion in the criminal case, when it finally reached this court (Taylor v. State, 34 S. E. 2), to see what were the assignments of error therein raised. One of the assignments of error was upon the refusal of the judge to charge, in substance, that if, at the time of the killing, Taylor was a member of a chain gang, of which Dennard, the deceased, was a guard, and that if Dennard endeavored to whip him, before they could find that the attempted punishment was lawful, they must believe from the evidence that the chain gang was a legal one, and the burden was on the state to prove that it was. Another assignment of error was upon the refusal of the judge to charge that if the evidence failed to show that the weapon used was one in its nature calculated to produce death, and they further believed that the person striking the blow did not in fact intend to kill Dennard, nevertheless the blow was unlawful, and they would be justified in finding that the accused was guilty of involuntary manslaughter in the commission of an unlawful act. Another assignment of error was upon the refusal of the judge to charge the law of involuntary manslaughter, though requested in writing to do so. The bill of exceptions also assigns error upon the failure of the judge to charge upon the subject of voluntary manslaughter. Each of these assignments of error was passed upon by this court.

It is now contended that, since the passage of the act of 1898, this court has no jurisdiction to entertain a direct bill of exceptions, in any case where a verdict has been rendered and a motion for a new trial would be an appropriate remedy, until such a motion has been made and passed upon by the trial judge, except in those cases where it appears distinctly from the bill of exceptions and the record that the ruling complained of was of such a character as to constrain the jury to find the verdict rendered; that is, the ruling must be of such a character that no jury could have legally rendered any other verdict than the one complained of. It is claimed that the effect of the act of 1898 is to abolish altogether the right of this court to review by direct writ of error any other rulings than those of the character above indicated, and that the effect of the act was to work a radical change in the practice which was more or less followed from the time the court was established down to the passage of the act of 1898, and even since that date. This court has on many occasions commended the practice of making a motion for a new trial before filing a bill of exceptions, thus giving to the trial judge an opportunity to review his rulings which are complained of. This court has never held, so far as we are advised, that it was absolutely necessary to make a motion for a new trial, in order to give it jurisdiction to review an error of law in a ruling made in the trial of a case. If the

act of 1898 be construed as contended for by counsel for the state, it would be applicable to very few cases; and if it be given the construction which we give it, it preserves to litigants a right which has existed ever since the establishment of the court. We do not think it was the purpose of the General Assembly to abolish this long-established practice; nor do we think the language of the act, properly construed, has this effect. We did not think so when the case of Taylor v. Reese was before us. The language of Mr. Presiding Justice Lumpkin, above quoted, who was speaking for the entire court, after a careful investigation, both individually and collectively, indicates that it was our opinion at that time that the act of 1898 was only declaratory of existing law, being a recognition of the practice which had long been followed, with the approval of the bar and without the disapproval of the bench. It is impossible for any one to carefully examine the assignments of error which were dealt with in Taylor v. State, and reach the conclusion that the act of 1898 was then construed as is now contended for by counsel for the state. None of the rulings which were considered and passed upon in that case were of such a character as to constrain the jury to find the verdict rendered. The alleged errors were, as held in Taylor v. Reese, simply of such a character as deprived the accused of a substantial right, and, using the language of the learned justice who wrote the opinion, "the verdicts actually rendered were necessarily so far controlled by the judge's action as to necessitate a new trial." A careful consideration of the opinion in Taylor v. Reese, as well as that in Taylor v. State, cannot lead to any other conclusion than that it was the opinion of the court, for whom the author of those opinions was speaking, that under the act of 1898 the accused in a criminal case could by a direct bill of exceptions complain of any error committed during the progress of the trial which deprived him of a substantial right and required a reversal of the judgment of the trial court. These opinions were concurred in by six justices.

It is claimed now that in subsequent opinions a different rule is laid down. Any ruling or language, which is in conflict with the ruling in Taylor v. Reese, that may be contained in the case of Ocean Steamship Company v. Hamilton, 112 Ga. 901, 38 S. E. 204, Ray v. Morgan, 112 Ga. 923, 38 S. E. 335, and Darien Bank v. Clarke Lumber Company, 112 Ga. 951, 38 S. E. 363, cannot be treated as modifying the decision in Taylor v. Reese, for the reason that none of the decisions named were concurred in by six justices: the last being concurred in by only four justices, and the other two by five. There is nothing in Parker v. Medlock, 117 Ga. 813, 45 S. E. 61, to conflict with the view now presented, for the reason that it was simply ruled in that case that a direct bill of excep-

tions would lie in a case where the ruling complained of controlled the verdict. This was true before the passage of the act of 1898. If there is anything said or ruled in *Smith v. Smith*, 112 Ga. 351, 37 S. E. 407, or in *Cable Company v. Parantha*, 118 Ga. 913, 45 S. E. 787, which is in conflict with *Taylor v. Reese*, these decisions must yield to the earlier ruling.

3. There appears in the record what purports to be a brief of the evidence in the case; but it does not appear, either from the record or the bill of exceptions, that it has ever been approved by the trial judge. There are certain recitals in the bill of exceptions from which it might be inferred that it was possible that the alleged brief of evidence had been approved. Before this court can consider a document as a brief of evidence, it must appear affirmatively, from the record or the bill of exceptions, that the document has been approved as a brief of the evidence introduced on the trial of the case. *Massey v. Pitts*, 48 Ga. 124; *Spencer v. Railroad Co.*, 55 Ga. 584; *Porter v. State*, 56 Ga. 530; *Stephens v. Woolbright*, 60 Ga. 322; *Harrison v. Hall Safe Co.*, 64 Ga. 558. It is to be said, to the credit of the able and conscientious public officers who represented the state, that the Solicitor General stated in open court that the document appearing in the record was in fact a correct brief of the evidence, and that both he and the Attorney General consented that it should be so treated by this court. We cannot, however, do this, notwithstanding this consent. It is the approval of the brief of evidence by the trial judge which gives this court jurisdiction to consider it. Without such authentication this court has no authority to accept it as a correct transcript of the evidence introduced on the trial; and no consent of parties or counsel can confer jurisdiction to do so. See *Massey v. Pitts*, 48 Ga. 124; *Porter v. State*, 56 Ga. 530; *Stephens v. Woolbright*, 60 Ga. 322; *Harrison v. Hall Safe Co.*, 64 Ga. 558; *Hicks v. Brantley*, 75 Ga. 885 (a). Some of the earlier decisions contained intimations that consent of counsel would dispense with the necessity of an approval by the trial judge; but in none of these, so far as we can ascertain, was the point expressly adjudicated, and the decisions above cited settle the rule as we have announced it. It has also been held that consent of counsel cannot dispense with the requirements of the law as to the manner in which briefs of evidence shall be prepared. *Augusta Southern R. Co. v. Williams*, 99 Ga. 75, 24 S. E. 852. We shall therefore deal with the case without reference to the alleged brief of evidence appearing in the record.

4, 5, 6. As the document purporting to be a brief of the evidence in the case cannot be considered, we must look alone to the bill of exceptions, and decide the assignments of error entirely with reference to what is therein contained. Some of these assign-

ments can be properly decided from the recitals in the bill of exceptions. Cawthon was indicted for the murder of Tucker; it being alleged that his death was brought about by poisoning, the article used being strychnine. Tucker died on the 21st of July, 1903. The court allowed the state, over objection of counsel for the accused, to prove that, 10 days before the death of Tucker, Joel Horne, a neighbor, died on the way home from Tucker's house, within an hour or less after taking a drink of peach brandy given to him at that house, and that the symptoms manifested while dying, and the condition of Horne's body after death, indicated that his death resulted from strychnine poisoning. The court also allowed proof by the state chemist that he had found strychnine in a few drops of brandy taken from the bottle from which Horne was alleged to have drank. There was no evidence that the accused ever handled or saw the brandy at any time before the death of Horne. The only evidence connecting the accused with the bottle of brandy was the testimony of the daughter of Tucker, to the effect that after the death of Horne the accused poured out the brandy left in the bottle from which Horne was shown to have drank. This evidence was objected to on the ground that it was evidence of an independent crime not connected with the offense for which the accused was being tried, was irrelevant, and exceedingly prejudicial to the accused. When one is on trial, charged with the commission of a crime, proof of a distinct and independent offense is never admissible, unless there is some logical connection between the two, from which it can be said that proof of the one tends to establish the other. While this rule is general, and subject to few exceptions, still there are some exceptions, as when the extraneous crime forms part of the res gestæ, or is one of a system of mutually dependent crimes, or is evidence of guilty knowledge, or may bear upon the question of the identity of the accused or articles connected with the offense, or is evidence of prior attempts by the accused to commit the same crime upon the victim of the offense for which he stands charged, or where it tends to prove malice, intent, motive, or the like, if such an element enters into the offense charged. See *Gillett on Ind. & Col. Ev.* § 57; *Whart. Crim. Ev.* (9th Ed.) § 80 et seq.; *Kerr's Law of Homicide*, § 469; *McKelvey on Ev.* §§ 156-157; *Underhill's Crim. Ev.* § 87 et seq.; 1 *Bish. New Crim. Proc.* § 1120 et seq.; 1 *Gr. Ev.* (15th Ed.) § 53; 1 *Crim. Law Mag.* 29; *Farmer v. State*, 100 Ga. 41, 28 S. E. 26 (2). In order to justify the admission of evidence relating to an independent crime committed by the accused, it is absolutely essential that there should be evidence establishing the fact that the independent crime was committed by the accused, and satisfactorily connecting that crime with the offense for which the accused is indicted.

Even if the evidence establishes the commission by the accused of the independent offense, it is inadmissible, until it be shown satisfactorily that that crime had some connection with the transaction then under investigation.

Let it be conceded for the moment that the evidence offered in the present case was sufficient to show that Horne died from the effects of poison which had been prepared by the accused for the purpose of bringing about the death of Tucker; is there evidence so connecting the death of Horne with the death of Tucker as that the murder of Horne by the accused in the manner indicated would throw any light upon the question as to whether Tucker came to his death as a result of a poison administered by the accused with murderous intent? If Horne's death resulted from the drink of brandy given to him by Tucker, then the only connection which the accused was shown to have had with Horne's death was that shown by the evidence of Tucker's daughter, to the effect that she saw the accused pour the brandy from the bottle from which Horne drank. The evidence did not show that Tucker's death resulted from drinking any of the brandy contained in the bottle just referred to. In the case of *Shaffner v. Commonwealth*, 72 Pa. 60, 13 Am. Rep. 649, it is said that, in order for one crime to be evidence of another, there must be a connection between them in the mind of the criminal, or it must be necessary to identify the accused as the person who committed both crimes; and Agnew, J., in the opinion, says: "If the evidence be so dubious that the judge does not clearly perceive the connection, the benefit of the doubt should be given to the prisoner, instead of suffering the minds of the jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt." Mr. Underhill, in his work on Criminal Evidence (section 88, p. 110), says: "This connection must clearly appear from the evidence. Whether any connection exists is a judicial question. If the court does not clearly perceive it, the accused should be given the benefit of the doubt, and the evidence should be rejected. The minds of the jurors must not be poisoned and prejudiced against the prisoner by receiving evidence of this irrelevant and dangerous description"—citing the language of Agnew, J., above quoted. See, also, Gillett on Ind. & Col. Ev. § 57, p. 81, where the language of Agnew, J., is also referred to with approval. Applying this rule, we do not think the evidence offered for the purpose of connecting the two crimes alleged to have been committed by the accused was sufficient to authorize evidence of the independent crime.

We have so far dealt with the question as if the evidence was sufficient to show that the accused was guilty of the murder of Horne. Even if it be conceded as established that Horne died from the effects of strychnine poisoning administered with felonious

intent, the evidence relied upon to show that the accused was guilty of the murder of Horne is far from satisfactory. The circumstances are such as to raise a grave suspicion, but nothing more than this. The harmful effect of the evidence can readily be seen, when it is considered how slightly the two offenses are connected with each other, if there were really two offenses, as well as how little evidence there was to establish the independent crime, evidence of which was offered for the purpose of throwing light upon the question of the guilt or innocence of the accused of the crime charged in the indictment. It is apparent from the recitals in the bill of exceptions that the accused was on trial as much for the murder of Horne as he was for the murder of Tucker; and, as there was no sufficient connection between the two deaths to authorize proof of the homicide of Horne, we feel constrained to reverse the judgment. The accused was entitled to be tried for the offense charged in the indictment, independently of any other offense not connected with the transaction upon which the indictment was based.

7. The state proved by a witness, who was a physician, that he tasted the contents of the bottle from which the state claimed that Horne drank poisoned brandy, and that in his opinion it contained strychnine. This testimony was objected to; the court stating that it would not rule upon the question at that time, but would allow the evidence to come in for the present. It does not appear that the attention of the court was called at any subsequent stage of the case to the condition upon which this testimony was admitted, or that any motion was made to exclude it. Under the ruling in *Stone v. State*, 118 Ga. 705, 45 S. E. 680, this affords no cause for a new trial.

8, 9. The accused excepted to the action of the court in receiving the verdict in his absence; the assignment of error in the bill of exceptions being in the following language: "After the evidence, statement of prisoner, the argument of counsel, and the charge of the court had been concluded, and while the jury were out considering their verdict in the case, the presiding judge, with the consent of the defendant's counsel, and in the interest of the safety of the prisoner and the preservation of order, sent the defendant back to jail, and the verdict finding him guilty of murder was received in the absence of the prisoner, who was in jail under this charge, and could not control his own movements; and such reception of the verdict in the absence of the defendant, being also with the consent of defendant's counsel, who stated that they would take no exception thereto, and in the interest of the prisoner's safety and of the preservation of order. The defendant excepts to the receiving of the verdict finding him guilty of murder in his absence, as being illegal and in violation of his constitutional and statutory right to be present in the court-

room when the verdict was received, and says that his counsel, though acting in the most perfect good faith and in the interest of his personal safety, had no legal authority to waive his right to be present, and he says that for this reason the verdict in this case and the sentence based on said verdict should be held to be illegal and set aside." Where the accused is in custody, and does not consent that the verdict shall be received in his absence, the reception of the verdict while he is thus involuntarily absent will render the same illegal. *Nolan v. State*, 53 Ga. 187, s. c. 55 Ga. 521, 21 Am. Rep. 281; *Rose v. State*, 20 Ohio, 81; *People v. Perkins*, 1 Wend. 91; *State v. Ford*, 30 La. Ann. 311. It is settled in this state that the voluntary absence of the accused at the time the verdict is received will not vitiate the verdict. *Barton v. State*, 67 Ga. 653, 44 Am. Rep. 743; *Robson v. State*, 83 Ga. 167, 9 S. E. 610 (9). This doctrine finds support in other states. See *Fight v. State*, 28 Am. Dec. 626, and notes on page 630; *Price v. State*, 36 Miss. 531, 72 Am. Dec. 195. This view is, however, opposed by the decisions in *Andrews v. State*, 2 Sneed, 550, and *Sneed v. State*, 5 Ark. 431, 41 Am. Dec. 102. By the great weight of authority the accused may himself waive his right to be present, and there are but few decisions to the contrary. Some of the cases both for and against the rule may be found in the note to *Fight v. State*, 28 Am. Dec. 630. In *State v. Kelly*, 97 N. C. 404, 2 S. E. 185, 2 Am. St. Rep. 299, the court draws a distinction between capital and lesser felonies, holding that in capital felonies the prisoner must be present at all stages of the trial, while in others he may waive his right to be present. See, also, in this connection, *Prine v. Com.*, 18 Pa. 103, 105. In *Smith v. State*, 59 Ga. 513, 27 Am. Rep. 393, it was held that, notwithstanding the accused may be in custody, he may consent that the verdict shall be received in his absence, and that a verdict received in his absence in pursuance of such consent is valid, notwithstanding he was at the time confined in jail. This case was not a capital felony, but we are unable to perceive any sound distinction with reference to the prisoner's right to waive his presence between this class of felonies and any other. The law is as careful not to deprive a man unjustly of his liberty as it is of his life, and fairness and regularity is required equally in both classes of cases. Without reference to whether the accused in a felony case can waive his right to be present during the progress of the trial between arraignment and verdict, it may be taken as settled that he may make an express waiver of his right to be present at the reception of the verdict, and that a waiver will be implied from his voluntary absence when he is out on bail. The open question in this state is whether his counsel can make the waiver for him. There is an intimation in *Robson v. State*,

83 Ga. 167, 9 S. E. 610 (9), that counsel might make an express waiver; but the point was not directly involved. In *Mitchum v. State*, 11 Ga. 630, Judge Nisbet thus speaks of the relation which an attorney bears his client: "He represents his client. He is the substitute of his client. Whatever the client may do in the conduct of his cause, therefore, his counsel may do." The weight of authority in other jurisdictions seems, however, to be that counsel cannot waive the right of the accused to be present. See *Rex v. Streak*, 2 Car. & P. 413, 12 E. C. L. 646; *Fight v. State*, 28 Am. Dec. 630 (notes); *State v. Kelly*, 97 N. C. 407, 2 S. E. 185, 2 Am. St. Rep. 299, and cases cited. In *Rose v. State*, 20 Ohio, 84, it was held that counsel could not make an implied waiver by simply failing to object to the reception of the verdict, and that it was doubtful whether he could make an express waiver. These decisions seem to draw no distinction between a waiver made by counsel in the presence of his client and one made in his absence. While counsel may have no implied authority, growing out of the relation of attorney and client, to make a waiver of this character for his client in his absence, we can see no good reason why the accused would not be bound by an express waiver made in his presence. Such a waiver is to all intents and purposes the waiver of the client. It would be trifling with the court to allow it to act upon a waiver thus made, and then impeach its action on the ground that counsel had been guilty of an unauthorized act; and while we recognize fully that there are limitations upon the authority of counsel, the client, even though he be charged with a capital felony, should not be allowed to impeach the authority of his counsel, when he acts in his presence, unless he promptly repudiates the unauthorized act before the court bases action upon it.

Speaking for myself, I am inclined to the opinion that the right to make the waiver resides in the counsel, whether the accused be present or not at the time of the waiver; his authority arising from the mere relation of attorney and client. The reasoning of the courts that hold to the contrary is not, in my opinion, satisfactory or by any means conclusive. Counsel is generally much better able to take care of the rights of the accused than he is himself, and the accused is better protected from improvident waivers by his case being left to the control of his counsel than if he were to take charge of the same in his own behalf. But under the facts of this case it is not necessary for a direct ruling to be made upon this point, as, in our opinion, a waiver by counsel in the presence of the accused, unrepudiated by him at the time of the waiver, is so binding as to make valid any action of the court based thereon. When it appears that a verdict has been received, the presumption is that it was received in the manner and under the circumstances authorized by law, and it is incum-

bent upon him who attacks it to show reasons why it is invalid. The record in the present case discloses that the accused did not himself make an express waiver of his presence. It also appears that his counsel did make an express waiver, but it does not appear that the accused was absent when this waiver was made. It is incumbent upon him to show in his assignment of error that he was absent when this express waiver was made; for if he was present, and did not object to its reception, he would be bound by it. This waiver by counsel appears to have been made after the charge was concluded, and while the jury were considering their verdict, and in consequence of this waiver the judge "sent the defendant back to jail." It is therefore to be inferred that the accused was present in the courtroom at the time of the waiver. In any event, when the accused shows that his counsel had made an express waiver of his right to be present, and had agreed with the judge that no exception would be taken to the reception of the verdict in his absence, it will be presumed that the accused was present when the waiver was made, in the absence of a showing to the contrary; and especially would there be such a presumption if, as claimed, counsel had no implied right to make the waiver.

Judgment reversed. All the Justices concurring, except FISH, P. J., and CANDLER, J., who dissent.

CANDLER, J. "Hard cases make bad law," and it is because I believe that this maxim is about to be demonstrated in the present case that I feel constrained to dissent from the judgment rendered by the majority.

1. Unquestionably there were instances, prior to the passage of the act of 1898, where this court entertained jurisdiction of bills of exceptions brought directly to various rulings of the trial court without any motion for a new trial having been made; but there is not, so far as I am aware, any case in our Reports which rules that this was the proper practice, or in which the correctness of the practice was called in question. It will be observed that the only cases cited on this subject in the majority opinion are the first two criminal cases ever brought to this court, and presumably, long before the act of 1898 was passed, the practice had fallen into disuse. At all events, the cases cited are at best mere physical precedents, and contain no ruling of benefit in arriving at what the law then was. The General Assembly seems to have realized the need of legislation in order to enable dissatisfied parties to bring cases to this court, under certain circumstances, without first filing a motion for a new trial; and by the act of 1898 they "authorized" the practice, first throwing around it well-defined restrictions. Of all the legislation relating to the bringing of bills of exceptions to this court, this was the first act bear-

ing on this particular practice. How, then, can it be said that the act of 1898 was merely declaratory of existing law?

The case of Taylor v. Reese, 108 Ga. 379, 33 S. E. 917, so confidently relied on in the opinion of the majority, I do not think has any bearing upon the case now under consideration. That was a mandamus to require a judge of the superior court to certify a bill of exceptions. Bolled down, the holding of this court was nothing more nor less than that the reason given by the judge for refusing to certify, viz., that no motion for a new trial had been made, was insufficient in view of the act of 1898, and that there was enough in the bill of exceptions tendered the judge to enable this court to clearly understand and pass upon the rulings complained of. A construction of the act of 1898 was not called for, and the statement that that act "simply gives in explicit terms a right of which parties litigant frequently availed themselves before its passage" is purely obiter. I am not willing to concede, however, that Mr. Presiding Justice Lumpkin used the language quoted in the sense given it in the majority opinion. That he meant to recognize that the practice of bringing cases to this court by direct bill of exceptions without a motion for a new trial had been indulged in before the passage of the act of 1898 seems clear; but that it was in his mind to hold, as is now held by the majority, that that act "is not exhaustive of the right of this court to entertain jurisdiction of direct writs of error," I cannot bring myself to believe, in view of the fact that he delivered the opinion in the subsequent case of Smith v. Smith, 112 Ga. 351, 37 S. E. 407, where for the first time the construction of the act of 1898 was directly involved, and where it was held in unmistakable language that since its passage "such rulings only as necessarily controlled the verdict or judgment rendered" can be properly brought to this court by direct bill of exceptions, without a motion for a new trial having been first filed in the court below. That the interpretation now given by the majority to the ruling in Taylor v. Reese is forced and utterly unwarranted seems to me to be conclusively demonstrated by the fact that not only was the opinion in Smith v. Smith written by the same learned justice who spoke for the court in Taylor v. Reese, but Taylor v. Reese is actually cited in the Smith Case as authority for the position which I now maintain, and in direct connection with the language which I have just quoted. There are other cases which follow the last cited, not one of which is sought to be overruled, and some of which have been decided by this court as now constituted. See Binlon v. Ga. So. R. Co., 118 Ga. 282, 45 S. E. 276; Cable Co. v. Parantha, 118 Ga. 913, 45 S. E. 787. I conclude, therefore, that in the present state of the law, where no motion for a new trial has been filed in the court below, a bill of exceptions to this court

must, in order to authorize a reversal of the judgment, or indeed to enable this court to consider the questions sought to be made, show that "the judgment, decree, or verdict has necessarily been controlled by one or more rulings" complained of, and that, unless the present bill of exceptions comes within that rule, there is no warrant for reversing the judgment of the court below. However true it may be that laws do not always express their meaning, I am willing to give this one the benefit of the doubt, and to believe that it means what it says.

2. I fully concur in the opinion of the majority that there is before this court no legal brief of evidence, and that we have no power to act on the suggestion of counsel, and consider the unapproved document appearing in the transcript of the record and purporting to be a brief of the evidence introduced on the trial in the court below. It follows that whatever rulings are made by us depending on a knowledge of the evidence must be made solely on the strength of what appears in the bill of exceptions. That document does not undertake to set out verbatim the testimony of any witness, or to quote in any way from what counsel agreed was a correct brief of the evidence. It complains in general terms that the court allowed the state to prove the death of Horne after drinking from a bottle of peach brandy belonging to Tucker, and also that the accused was seen to pour out what remained of the brandy in the bottle, and that a few drops of that brandy, when analyzed, were found to contain strychnine. It does not appear that at the time this evidence was offered it was objected that there was nothing to connect the death of Horne with that of Tucker. The objection made to it seems to have been that the accused was not put on notice by the indictment that such evidence would be introduced, and that it was not shown that prior to the death of Horne the accused ever had possession of the brandy. The bill of exceptions does not even state that there was no other evidence to connect the two occurrences. It is a part of the a, b, c of the law that error will not be presumed, but must be clearly shown; and I cannot consent to hold, where no brief of evidence is before this court, that it was error for the court to admit certain evidence complained of in the bill of exceptions, on the ground that the remaining evidence, which is not here, and of which we are judicially in complete ignorance, failed to connect it with the crime of which the accused stood charged. I am equally unwilling to hold, as must be done in order to say that the ruling complained of constrained the verdict, that the jury were compelled as matter of law to believe these witnesses, or that without their testimony the accused might not legally have been convicted.

3. While I freely admit that evidence of the poisoning of Horne as an independent

crime would not be admissible to prove that the accused killed Tucker, I maintain that evidence of a previous attempt by the accused to kill Tucker was admissible, and that its admissibility was not affected by the fact that it incidentally developed that in the attempt mentioned Horne lost his life. And where, as was done in this case, the trial judge especially instructed the jury that they were not to consider the evidence as going to prove that the accused was guilty of an independent crime, I insist that the admission of the evidence was not erroneous. It was shown that Horne died under suspicious circumstances after drinking Tucker's brandy, which the accused had had an opportunity to poison, and that immediately thereafter the accused was seen to pour out the brandy that remained in the bottle. It was also shown that a few drops of brandy sticking to the sides of the bottle contained strychnine. The jury might well have inferred that the pouring out of the brandy by the accused was done for the purpose of concealing the fact that it had been poisoned; and this, in my opinion, furnished a sufficient link to connect the so-called independent crime with the one of which the accused was charged. On the trial of A. for shooting and killing B., evidence that, some time previously to the transaction under investigation, A. had shot and killed C., would not, without more, be admissible; but there could be no objection to showing that, in an attempt to kill B., A. had shot at him, but missed him, and killed C. Of like character, in my opinion, is the evidence in the present case of the death of Horne.

I can see no warrant for reversing the judgment on anything appearing in the present bill of exceptions.

(103 Va. 625)

GADDESS et al. v. NORRIS' EX'RS et al.
(Supreme Court of Appeals of Virginia. March 24, 1904.)

WILLS—CONSTRUCTION—PARTIES.

1. In an action to construe a will, where the issue was distinctly made as to the validity of the will, and the question whether or not the grandchildren of testator have an interest in the subject-matter of the litigation, and, if so, the extent of their interest, depends on the determination of that question, they are necessary parties.

Appeal from Circuit Court, Fauquier County.

Bill by Norris' executors and others against Gaddess and others, to construe a will. Decree for plaintiffs, and defendants appeal. Reversed.

Moore & Keith and Henry E. Davis, for appellants. Munford, Hunton, Williams & Anderson, for appellees.

WHITTLE, J. This is an appeal from a decree of the circuit court of Fauquier coun-

ty, construing the will of Henry De Butt Norris, late of that county, deceased.

The will is as follows:

"I, Henry De Butt Norris, of the County of Fauquier and State of Virginia, do make this my last will and testament.

"Item 1st. I bequeath the following legacies to servants or employes now in my service, to-wit:—to Ellen Flynn the sum of five hundred dollars, and to Lewis Fletcher, Sallie Braxton, and Adeline Wright, each the sum of one hundred dollars, provided they continue in my service till my death; but should either of them be not then in my employ and service, this legacy to him or her shall be void and lapse.

"Item 2nd. I desire that the farm where I now reside known as 'Barrymore,' including that portion bought of Margaret A. Wright and Martha Emma Wright, and containing in all four hundred and one acres, more or less, shall pass to the trustees hereinafter appointed, for the use and benefit of my son Henry C. Norris, subject to the same trusts and limitations as hereafter mentioned in clause fourth; and I therefore request my children in whom the title has been vested, at my request by deed from Chas. R. Flinch to Mrs. Edna Norris, to convey the said tract or tracts of land to said trustees to be held by them in and on the trusts aforesaid (as presently recited) for the use and benefit of said Henry C. Norris, and should any of my children fail or refuse to unite in conveying said property to said trustees, as herein requested, then the devise and bequest hereinafter made in his or her favor shall be rescinded and void as to him or her thus failing or refusing, and the same shall pass and be held by said trustees for the use and benefit of said Henry C. Norris; and in the event of all of my children failing or refusing to make said conveyance, then the whole of my estate hereinafter devised and bequeathed shall be held by said trustees for Henry C. Norris, as the sole beneficiary of the trust.

"Item 3d. I bequeath to the said Henry C. Norris all my furniture, books, paintings and household effects, and all live stock and farming implements on said farm of 'Barrymore' as a gift, and not subject to the limitations and trusts as set forth in clause fourth.

"Item 4th. I devise and bequeath to the said trustees hereinafter named all the rest and residue of my property, both real and personal, to be divided into six equal shares or parts, and one share each shall be allotted and held for my six children—Golda Calhoun Saunders, Alexander J. Norris, Marie A. Saunders, Emma P. Norris, Virginia G. Norris and Dudley Norris—during their respective lives in and upon the following trusts: That said trustees shall collect and receive the rents, issues, interests and profits of said properties both real and personal, and after adding one per cent. of said income yearly to the capital shall pay and apply the

balance to the use and benefit of said children respectively during their lives. The shares of my daughters and the income thereof to be for their sole and separate use, free from any control of their husbands or liability to be in any way pledged for their debts or obligations; that said trustees shall have power to sell and reinvest any of said properties or securities and shall keep a separate trust account of each share; and that each of said children shall have power of appointment, that is to dispose of his or her share by will in favor of any of his or her issue; and in case of any of my said children dying and leaving issue without having made a will, then his or her share shall pass to his or her issue; and in case any of my said children should die without issue or intestate, then his or her share shall be divided among his or her surviving brothers and sisters, to be held by said trustees upon the same trusts.

"But said trustees shall permit my son Henry C. Norris to occupy and use the property devised and bequeathed for his use and benefit in the second clause above without accountability for the rents, profits or income thereof, and furthermore, they may keep any real estate that may pass to them under the fourth clause above, intact and undivided if in their judgment it be best to do so, until it can be divided or sold, and re-invested to advantage, dividing the rents and profits among the several shares as above provided.

"Item 5th. Anything that I may have given, or may in my life time give, to any of my children, is a gift, and shall not be treated as a debt or advancement, nor be deducted from any of the devisees or bequests herein made.

"Item 6th. I hereby nominate and appoint Henry C. Norris, Alexander J. Norris and my son-in-law William H. Saunders, the executor of this will, and trustees for the trusts herein provided; and if in the event of a vacancy by reason of death or otherwise, I nominate and appoint Dudley Norris as an executor and trustee to fill such vacancy when he shall have become twenty-one years of age. And I request that they shall be allowed to qualify without security.

"Item 7th. Should any difference of opinion occur between my said executors or trustees as to the holding and retaining or re-investing of property or securities or otherwise in the discharge of their duties, then, so long as there shall be three of them acting, the decision of two of them shall be conclusive; and in the event there be only two of them acting, then the opinion of Henry C. Norris shall prevail."

"(Codicil)

"I, H. D. B. Norris, of Marshall, Fauquier county, Virginia, do make this my codicil to my will dated the 25th day of November, 1893, and I hereby expressly confirm my

said will, excepting so far as the disposition of my property is changed by this codicil.

"I desire that my dear friend Alexander J. Morrison, of London, England, in whose judgment and sense of justice I have full confidence, shall make settlement of all matters of business between my estate and my son-in-law W. H. Saunders, both as to our personal accounts and the real estate business of W. H. Saunders & Co. in the manner following: I do not desire any public appraisal of the business or the property owned by the said firm, but it is my will that our personal accounts and the accounts of the said firm be submitted to the executors of my will and that they furnish Mr. Morrison with such statements and information as may be necessary to a settlement as aforesaid:

"I direct also, that my said son-in-law shall have such time as he may desire to make payment of any money that may be due my estate by him at the time of my death, such time not to exceed five years after my decease.

"If my said son-in-law do not concur in the aforesaid manner of settlement between him and my estate, or if my said friend Alexander J. Morrison be not living at the time of my death, then I direct that my executors make settlement with my son-in-law as to said private and firm accounts relying on their discretion and fairness to all concerned."

It is conceded that there were grandchildren of the testator living at the commencement of this litigation, who are yet living, and who are not parties to the proceeding. The issue as to the validity of the will is distinctly made by the pleadings, and the question whether or not the grandchildren have an interest in the subject-matter of the litigation, and, if so, the extent of their interest, depends upon the determination of that question. This being the case, it is plain that the rights of the grandchildren are directly involved in the controversy, and must be affected by any decree that may be pronounced. They are therefore indispensable parties to the suit.

The principle is fundamental, and lies at the foundation of the administration of justice, that every person whose interests are immediately involved in a cause must be made a party, and afforded an opportunity to assert or defend his rights. Calvert on Parties to Suits in Equity, p. 2, upon a review of the authorities, concludes that "all persons having an interest in the object of the suit" are necessary parties.

In 1 Daniell's Chy. Pr. p. 244, the rule is stated thus: "A person may be affected by the demands of the plaintiff in a suit, either immediately or consequentially. Where an individual is in the actual enjoyment of the subject-matter, or has an interest in it, either in possession or expectancy, which is likely either to be defeated or diminished by the

plaintiff's claim, in such case he has an immediate interest in resisting the demand, and all persons who have such immediate interests are necessary parties to the suit."

And Mr. Barton says: "It is a general rule in equity that all persons interested in the subject-matter of the bill, and which is involved in and to be affected by the proceedings and result of the suit, should be made parties, however numerous they may be." 1 Bar. Chy. Pr. (2d Ed.) p. 141, and authorities cited; *Turner v. Barraud*, 102 Va. —, 46 S. E. 318; *Lloyd v. Lloyd's Ex'r*, 102 Va. —, 46 S. E. 687.

It follows from these views that the circuit court erred in passing the decree appealed from in a suit to which the grandchildren of the testator were not parties, and for that error the decree must be reversed, and the cause remanded for further proceedings to be had therein in accordance with this opinion.

CALDWELL, J., absent.

(102 Va. 623)

MORIEN v. NORFOLK & A. TERMINAL CO.

(Supreme Court of Appeals of Virginia. March 24, 1904.)

NEW TRIALS—VERDICT—PREPONDERANCE OF EVIDENCE—INSUFFICIENCY OF EVIDENCE.

1. A verdict cannot be set aside where the preponderance of the evidence is against it, but only where there is a palpable insufficiency of evidence to sustain it.

Error from Court of Law and Chancery of City of Norfolk.

Action by one Morien against the Norfolk & Atlantic Terminal Company. Judgment for defendant, and plaintiff brings error. Reversed.

W. S. Hillyer and Thos. H. Wilcox, for plaintiff in error. H. L. Lowenburg, for defendant in error.

HARRISON, J. This action was brought to recover damages for injuries suffered by the plaintiff, which she alleges were caused by the negligence of the defendant company.

At the first trial there was a verdict of \$2,000 in favor of the plaintiff, which was set aside, and at the second trial no evidence was introduced, and judgment was given for the defendant.

Was it error to set aside the first verdict? This is the sole question presented for our consideration.

The plaintiff was a passenger upon the electric street car of the defendant company, and alleges that at her destination, for the purpose of allowing her to get off, the car stopped, and that, while she was in the act of alighting, the car was violently and sud-

denly started, whereby she was thrown with great force and violence to the ground, thereby sustaining the injuries complained of.

The contention of the defendant company is that the injury sustained by the plaintiff was the result of her own negligence in alighting from the car while it was in motion and slowing down to stop. The clearly defined issue of fact, therefore, submitted to the jury, was, had the car stopped, or was it still moving, when the plaintiff attempted to alight?

The evidence on behalf of the plaintiff, if the jury believed it, fully sustained her contention that the car had stopped; and the evidence of the defendant was ample, if the jury believed that, to sustain its contention that the car was still in motion when the plaintiff attempted to alight. The jury accepted as true the evidence on behalf of the plaintiff, and returned a verdict in accordance therewith.

This court has so frequently and so recently dealt with the power of courts to disturb the verdicts of juries, where the issue determined was a pure question of fact, that it is wholly unnecessary to again elaborate the subject. Under repeated decisions of this court, the verdict of a jury cannot be set aside unless there is a palpable insufficiency of evidence to sustain it. Nor is interference with a verdict authorized where the court merely doubts its correctness, or would itself have found a different verdict. The admissibility of evidence is with the court, but its weight is wholly with the jury. *Kimball & Fink v. Friend's Adm'r*, 95 Va. 125, 143, 27 S. E. 901; *Reusens v. Lawson*, 96 Va. 285, 31 S. E. 528; *Marshall's Adm'r v. Valley R. Co.*, 99 Va. 798, 34 S. E. 455.

In the light of these well-established principles, we are of opinion that it was error to set aside the verdict found by the jury on the first trial. The judgment complained of must therefore be reversed, and judgment entered here in favor of the plaintiff in error in accordance with the first verdict found by the jury.

CARDWELL, J., absent.

(102 Va. 590)

LYNCHBURG COTTON MILLS v. STANLEY.

(Supreme Court of Appeals of Virginia. March 24, 1904.)

BILLS OF EXCEPTIONS—SIGNING—INJURY TO INFANT EMPLOYE—WARNINGS—DAMAGES.

1. Under the act of February 15, 1901 (Acts 1901, p. 186, c. 172), bills of exceptions may be signed within 30 days from the adjournment of the term of the court at which the final judgment is rendered.

2. The law presumes that an infant between 7 and 14 years of age cannot be guilty of contributory negligence, and in an action by such

infant the burden is on the defendant to overcome this presumption by proof of intelligence and capacity.

3. A master who employs children must warn them against dangers to which their work exposes them, and must put this warning in such plain language as to be sure that they understand and appreciate the danger. It is not enough that he should do his best to make children understand; they must understand in fact.

4. Where a child has neither natural nor legal guardian, in estimating the damages for a personal injury received by him he may receive compensation for loss of time.

Error from Circuit Court of City of Lynchburg.

Action by Fitzhugh Stanley, by his next friend, against the Lynchburg Cotton Mills. Judgment for plaintiff, and defendant brings error. Affirmed.

P. H. O. Cabell and Horsley & Blackford, for plaintiff in error. Don P. Halsey and A. W. Nowlin, for defendant in error.

HARRISON, J. This action was brought by Fitzhugh Stanley, suing by his next friend, to recover damages from the Lynchburg Cotton Mills for injuries sustained by the plaintiff in consequence of the alleged negligence of the defendant.

There was a demurrer to the evidence, which was overruled by the circuit court, and judgment given in favor of the plaintiff for \$5,000, the damages ascertained by the jury. It is insisted that bills of exception Nos. 1, 2, and 3, taken by the defendant, are not parts of the record, because the bills were not signed within 30 days from the adjournment of the term of the court at which the decisions were rendered to which they object. Acts 1901, p. 186, c. 172.

This position is not tenable. The objections were taken and overruled at the November term, 1902. Upon the demurrer to the evidence the court took time to consider, and did not render its judgment until the next term. Within 30 days from this last-named term, at which the final judgment was rendered, the bills of exception in question were signed. As the law stood prior to the act relied on, the bills of exception could have been signed at the April term, 1903, at which the final judgment was entered. *Hudgins v. Simon*, 94 Va. 659, 27 S. E. 606. The act cited, of February 15, 1901, was intended to extend the time within which bills of exception could be tendered and signed. Until the final judgment is rendered, the case is open for the purpose of perfecting exceptions duly taken to rulings during the trial. The act extends the time in which they may be perfected for 30 days beyond the final judgment, or until such time as the parties shall agree, of record, to extend it. If

¶ 3. See Master and Servant, vol. 24, Cent. Dig. § 217.

the contention now made were to prevail, the result would be that the act which was plainly intended to enlarge the time, would be converted into a means of curtailing such rights by giving litigants less time in which to perfect their bills of exception than they had before the act was passed.

For convenience, we will consider the bills of exception in their inverse order.

The fourth bill of exceptions presents the real question in the case, to which the arguments, both written and oral, have been almost exclusively devoted; that is, whether or not the court erred in overruling the demurrer to the evidence. At the time of the injury complained of, the plaintiff was a boy not quite 12 years of age. He was employed by the defendant company to work in its bagging room as a "doffer"—that is, work on the spinning frames in taking off and putting on bobbins—and had been engaged in this and other employment for several weeks. Adjacent to the bagging room was a large carding room in which 51 carding machines were operated. These carding machines were located in rows, with alleys between each row, and a space 7 feet 8 inches wide around the entire room next to the walls. It was necessary for the employees in the bagging room to go through the carding room to reach the water-closet, and the route usually taken for this purpose was around the walkway next to the walls. On the occasion of the accident the plaintiff was pursuing this route on his way to the water-closet, when he came upon several small boys, his companions from the bagging room, who were playing with the belt of one of the carding machines by throwing it off and on the revolving wheels. The plaintiff had never engaged in such sport, but it appealed to his childish instincts, and he stopped, and began to engage in the performance himself. He had hardly begun to do so when his arm was caught between the belt and the pulley, and so seriously injured that it had to be amputated above the elbow. It is further shown that it was a common thing for the boys about the mill to play with the belts, and that this fact was known to those in charge of the machinery and other departments. It is established by the testimony of the plaintiff, which, under the demurrer to the evidence, must be taken as true, that he had frequently seen boys play with the belts as on this occasion; that he did not know it was dangerous; and that he had never at any time been warned against doing so, or received instruction of any sort with respect to the dangers surrounding him. There must have been a peculiar fascination in throwing the belts off and on as these boys were doing, for the superintendent of the mills testifies that he had seen grown men play with the belts.

The law presumes that an infant between 7 and 14 years of age cannot be guilty of contributory negligence, and in an action by

such infant the burden is on the defendant to overcome this presumption, by proof of intelligence and capacity. *Roanoke v. Shull*, 97 Va. 419, 34 S. E. 34, 75 Am. St. Rep. 791. The defendant made no effort to overcome this presumption. Indeed, as said by the learned judge of the circuit court, "so far as any conclusion as to the plaintiff's intelligence can be drawn from his testimony, it is of an unfavorable character." The single inquiry here is, therefore, was the defendant guilty of negligence in the discharge of its duty to this little boy? The degree of care due by the master to an infant employé of tender years is much greater than is due to an adult. That course of conduct which would be ordinary care when applied to persons of mature judgment and discretion might be gross, and even criminal, negligence toward children of tender years. The same discernment and foresight that older people and experienced persons habitually employ in discovering dangers cannot be reasonably expected of children of tender years, and therefore the greater precaution should be taken where children are exposed to such dangers. Under the head of "Special Duties of Masters to Minors," the duty of one who employs young persons is thus stated in section 219 of *Shearman and Redfield on Negligence*, by the learned authors of that valuable work: "It is the duty of one who employs young persons in his service to take notice of their apparent age and ability, and to use ordinary care to protect them from risks which they cannot properly appreciate, and to which they ought not to be exposed. This is a duty which cannot be delegated; and any failure to perform it leaves the master subject to the same liability, with respect to such risks, as if the child were not a servant. For this purpose the master must instruct such young servants in their work, and warn them against the dangers to which it exposes them, and he must put this warning in such plain language as to be sure that they understand and appreciate the danger. For it is not enough that he should do his best to make children understand. They must not be exposed to dangers which they do not fully understand in fact. Bearing in mind the natural forgetfulness of youth, he must renew this warning from time to time, as may be reasonably necessary. And if the servant has not capacity enough to understand the warning and appreciate the danger, or for any other reason does not in fact understand it, the master will be liable for any injury which such servant may suffer in consequence, if continued at such work. But the master is not required to point out dangers which are known, or must be obvious to and fully appreciated by, the servant, after making due allowance for his youth. Generally, this question is for the jury."

In *Thompson on Neg.* 978, it is said: "The law puts upon a master, when he takes an

infant into his service, the duty of explaining to him fully the hazards and dangers connected with the business, and of instructing him how to avoid them. Nor is this all. The master will not have discharged his duty in this regard unless the instructions and precautions given are so graduated to the youth, ignorance, and inexperience of the servant as to make him fully aware of the danger to him, and to place him, with reference to it, in substantially the same state as if he were an adult."

In *Bailey on Per. Inj.* § 2766, it is said: "Persons who employ children to work with dangerous machinery or in dangerous places should anticipate that they will exercise only such judgment, discretion, and care as is usual among children of the same age under similar circumstances, and are bound to use due care, having regard to their age and inexperience, to protect them from dangers incident to the situation in which they are placed; and as a reasonable precaution in the exercise of such care in that behalf it is the duty of the employer to so instruct such employes concerning the dangers connected with their employment, which dangers, from their youth and inexperience, they may not comprehend or appreciate, that they may, by the exercise of such care as ought reasonably to be expected of them, guard against and avoid injuries arising therefrom." And further adds that an infant who, by reason of his youth and inexperience, is injured, when not properly instructed and warned as to the dangers incident to his work, may recover therefor.

In *Watson on Per. Inj.* § 114, it is said: "The defendant will be liable if negligent, though it is the act of the child injured which is proximate to his own injuries, if such act is of a character naturally to be expected of a child, and in accordance with the usual indiscretions and errors of judgment characteristic of immature years."

The statement of the law by these authors of acknowledged accuracy and ability is sustained by numerous decisions of the courts of last resort throughout the country. *Sullivan v. India Mfg. Co.*, 113 Mass. 399; *Rock v. Orchard Mills*, 142 Mass. 528, 8 N. E. 401; *Glover v. Dwight Mfg. Co.*, 148 Mass. 22, 18 N. E. 597, 12 Am. St. Rep. 512; *Ogley v. Miles* (Sup.), 8 N. Y. Supp. 270; *Hickey v. Taaffe*, 105 N. Y. 28, 12 N. E. 286; *Smith v. Irwin*, 51 N. J. Law, 507, 18 Atl. 852, 14 Am. St. Rep. 699; *Rolling Mill v. Cooper*, etc., 161 Ind. 363, 30 N. E. 294; *Hinckley v. Horadowsky*, 133 Ill. 359, 24 N. E. 421, 8 L. R. A. 490, 23 Am. St. Rep. 618; *Harris v. Shebek*, etc., 151 Ill. 287, 37 N. E. 1015; *Fisk*, etc., v. R. R. Co., 72 Cal. 38, 13 Pac. 144, 1 Am. St. Rep. 22; *Cotton Seed Oil Co. v. Hale*, 56 Ark. 232, 19 S. W. 600; *Fitzgerald v. Furniture Co.*, 131 N. C. 636, 42 S. E. 946; *Cleveland Rolling-Mill Co. v. Corrigan*, 46 Ohio St. 283, 20 N. E. 466, 3 L. R. A. 385.

The rule established by the authorities

cited is both just and humane. Children of tender years are often employed about factories filled with complicated and dangerous machinery, where they will be exposed to revolving wheels, belts, and pulleys, where any one may know that, by reason of inexperience and immature judgment, they are liable to be killed or maimed. In the case under consideration there are, as shown by the record, employed in the mills of the defendant company 75 children under 14 years of age, of which number 45 are under the age of 12 years. If it is to the interest of manufacturing establishments to employ infants of such tender years, with their immature judgment and lack of experience, not only the dictates of humanity, but public policy, demands that they should be held to the highest degree of responsibility for their care and protection. They must take knowledge of their childish disposition to play, and to play with fire, and of their inability to recognize danger, although open and obvious to those of riper years. They must instruct them as to the many dangers with which they are surrounded, and the way to avoid such dangers; and they must continue to repeat such instruction until they know the danger is fully understood and appreciated. And, in view of the proneness of children to forget, they must from time to time renew these instructions, warnings, and cautions. Of the existence of the rule requiring these duties of the master, and of its pre-eminent justice, there can be no doubt, and we are of opinion that the case at bar is clearly within its influence. The plaintiff was an ignorant child, less than 12 years of age, without father, mother, or legal guardian. In these cotton mills he was surrounded by innumerable dangers. He was put to work in a position where, upon every call of nature, he was compelled to pass through a large carding room filled with machinery, with its countless revolving wheels and belts. He was subjected to all these perils without instruction or warning from his employers with respect to such dangers, or how to act in order to avoid them. He was left to his own resources and immature judgment, with the natural result that, in ignorance of the danger, he was guilty of an act which brought upon him a calamity that compels him to a maimed and comparatively helpless life. Such want of care and watchfulness over the immaturity of tender years by the master renders him liable under the rule of duty that we have seen he must observe.

The third bill of exceptions is to the action of the court in giving an instruction which provided that the jury might, in estimating the plaintiff's damage, take into consideration, among other things, his loss of time, and any other elements of damage necessarily occasioned by or growing out of said injury.

The plaintiff had neither a natural nor legal guardian who was entitled to his wages, and, so far as the record throws any light

on the subject, he was working for his living and receiving his own wages. Under these circumstances his time was his own, and he was entitled to compensation for its loss. As to the second ground of objection, the language expressly limits the recovery to the elements of damage necessarily occasioned by or growing out of the injury, and there was no error in its use.

The second and first bills of exception are to the action of the court in admitting certain evidence tending to establish negligence on the part of the defendant in not having fenced the machinery off, the objection being that the evidence was immaterial, and the witnesses deposing on the subject not experts.

In the conclusion we have reached this evidence has played no part, and therefore the defendant has suffered no prejudice by its introduction, even if it was inadmissible, as to which we express no opinion.

For these reasons the judgment of the circuit court must be affirmed.

CARDWELL, J., absent.

(102 Va. 599)

ATLANTIC COAST LINE RY. CO. et al. v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. March 24, 1904.)

CORPORATION COMMISSION—VALIDITY OF REGULATIONS—WHEN DETERMINED—POLICE POWER—REGULATION OF INTERSTATE AND FOREIGN COMMERCE.

1. A state may make valid enactments, in the exercise of its police power, to promote the welfare and convenience of its citizens, though such laws, in their operation, incidentally interfere with interstate and foreign commerce.

2. The rules prescribed by the corporation commission pursuant to the authority of Const. 1902, § 155, and Act May 16, 1903 (Acts 1902-04, p. 392), with reference to storage, demurrage, car service, and car detention charges, are not void because in their operation they affect incidentally interstate and foreign commerce.

3. Const. 1902, § 156, subsec. "b," providing that the right of any person to institute in the courts any action against any transportation company shall not be impaired by reason of any fine or penalty which the corporation commission may impose on such company for its failure to comply with any order of the commission, but in no proceeding against such corporation shall the reasonableness or validity of any rate, charge, rule, etc., prescribed by the commission within the scope of its authority be questioned, does not prevent the question of the validity of any regulations of the commission under the federal or state Constitutions from being inquired into in an action based on such regulations.

4. The validity of the rules prescribed by the corporation commission pursuant to the authority of Const. 1902, § 155, and Act May 16, 1903 (Acts 1902-04, p. 392), with reference to storage, demurrage, car service, and car detention charges, so far as they in their operation unlawfully interfere with interstate and foreign commerce, or deprive transportation companies of their property without due process of law, may

be raised and determined in any particular case in which the question can be raised and determined.

Appeal from the State Corporation Commission.

Proceedings to test the validity of regulations prescribed by the corporation commission. From the action of the commission the Atlantic Coast Line Railway Company and others appeal. Affirmed.

By section 155 of the Constitution, which went into effect July 10, 1902, a permanent commission is created, to be known as the "State Corporation Commission." By subsection "a" of section 156 it is declared that, "subject to the provisions of this Constitution and to such requirements, rules and regulations as may be prescribed by law, the State Corporation Commission shall be the department of government * * * through which shall be carried out all the provisions of this Constitution, and of the laws made in pursuance thereof, for the creation, visitation, supervision, regulation and control of corporations chartered by, or doing business in, this state." Subsection "b" of that section provides that: "The commission shall have the power, and be charged with the duty, of supervising, regulating and controlling all transportation and transmission companies doing business in this state, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies; and to that end the commission shall, from time to time, prescribe, and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities and conveniences, as may be reasonable and just, which said rates, charges, classifications, rules, regulations and requirements, the commission may, from time to time, alter or amend. * * * Before the commission shall make or prescribe any general order, rule, regulation or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation or requirement shall first be published in substance, not less than once a week for four consecutive weeks in one or more of the newspapers of general circulation published in the city of Richmond, Virginia, together with notice of the time and place, when and where the commission will hear any objections which may be urged by any person interested, against the proposed order, rule, regulation or requirement; and every such general order, rule, regulation or requirement, made by the commission, shall be published at length, for the time and in the manner above specified, before it shall go into effect, and shall also, as long as it remains in force, be published in each subsequent annual report of the com-

¶ 1. See Commerce, vol. 10, Cent. Dig. § 7.

mission. The authority of the commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges and classifications of traffic, for transportation and transmission companies, shall be paramount; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the superior authority of the General Assembly to legislate thereon by general laws. * * *

By subsection "d" of that section it is provided that: "From any action of the commission prescribing rates, charges or classifications of traffic, or affecting the train schedule of any transportation company, or requiring additional facilities, conveniences or public service of any transportation or transmission company, or refusing to approve a suspending bond, or requiring additional security thereon or an increase thereof, as provided for in subsection 'e' of this section, an appeal (subject to such reasonable limitations as to time, regulations as to procedure and provisions as to costs, as may be prescribed by law) may be taken by the corporation whose rates, charges or classifications of traffic, schedule, facilities, conveniences or service, are affected, or by any person deeming himself aggrieved by such action, or (if allowed by law) by the commonwealth." That subsection further provides that such appeal shall be as of right, and to the Supreme Court of Appeals only.

Subsection "f" of that section, after providing how the record for an appeal shall be made up, and that the commission shall file with it, and as a part thereof, a written statement of the reasons upon which the action appealed from was based, which statement shall be read and considered by this court upon disposing of the appeal, provides that this court "shall have jurisdiction, on such appeal, to consider and determine the reasonableness and justness of the action of the commission appealed from, as well as any other matter arising under such appeal: provided, however, that the action of the commission appealed from shall be regarded as prima facie just, reasonable and correct. * * *"

By an act approved May 16, 1903 (Acts 1902-03-04, p. 392), the corporation commission was required to fix and prescribe storage, demurrage, and car-service charges which may be collected by railroad and other transportation companies on freight transported or to be transported by them, and to be paid by them on freight delayed and cars not promptly furnished or placed by them, with rules and regulations governing the same.

By virtue of the authority conferred by the Constitution and the Act of Assembly, the corporation commission, after notice and hearing as provided by the Constitution, prescribed and fixed certain rules and regulations for the government of transportation

companies and shippers doing business in this state, and which are as follows:

"All storage, demurrage and car service charges, and all car detention charges, shall be as prescribed in these rules. Nothing in these rules shall apply to shipments of live stock and perishable freight, which shipments shall be governed by the statutes now in force, with such additional requirements as may be ordered by the commission from time to time. In all computation of time under these rules, Sundays and legal holidays are to be excluded.

"Rule I. When a shipper makes a verbal or written application to a railroad company for a car or cars, to be loaded with any kind of freight embraced in the tariff of said company, stating in said application the character of the freight, and its final destination, the railroad company shall furnish same within four days from seven o'clock a. m. the day following such application.

"Or, when the shipper making such application specifies a future day on which he desires to make a shipment, giving not less than four days' notice thereof, computing from seven o'clock a. m. the day following such application, the railroad company shall furnish such car or cars on the day specified in the application.

"For failure to comply with this rule, the company so offending shall forfeit and pay to the shipper applying the sum of \$1.00 per car per day, or fraction of a day's delay after expiration of free time, upon demand in writing, made within thirty days thereafter by the shipper:

"Provided, however, that this rule shall not apply to shipments of coal and coke from mines and ovens.

"Rule II. When freight in carloads or less is tendered to a railroad company, and correct shipping instructions given, the railroad agent must immediately receive the same for shipment, and issue bills of lading therefor, and whenever such shipments have been so received by any railroad company, they must be carried forward at the rate of not less than fifty (50) miles per day of twenty-four hours, computing from seven o'clock a. m. the day following receipt of shipment, and for failure to receive and transport such shipments, within the time prescribed, the railroad company so offending shall forfeit and pay to the shipper the sum of \$10.00 per car per day, or fraction thereof, on all carload freight, and one cent per hundred pounds per day, or fraction thereof, on freight in less than carloads, with minimum charge of five (5) cents for any one package, upon demand in writing by the shipper, or other party whose interest is affected by such delay: provided, that in computing the time of freight in transit, there shall be allowed twenty-four hours at each point where transferring from one railroad to another, or re-handling of freight, is involved.

"The period during which the movement

of freight is suspended on account of accident, or any cause not within the power of the railroad company to prevent, shall be added to the free time allowed in this rule, and counted as additional free time.

"Rule III. Railroad companies shall, within twenty-four hours after arrival of shipments, give notice, by mail or otherwise, to consignee, of the arrival of shipments, together with the weight and amount of freight charges due thereon, and where goods or freight in carload quantities arrive, such notice shall contain also identifying numbers, letters, and initials of the car or cars, and if transferred in transit, the number and initials of the car in which originally shipped. Any railroad company failing to give such notice shall forfeit and pay to the shipper, or other party whose interest is affected, the sum of \$1.00 per car per day, or fraction of a day's delay, on all carload shipments, and one cent per hundred pounds per day, or fraction thereof, on freight in less than carloads, with minimum charge of five (5) cents for any one package, after the expiration of the said twenty-four hours: provided, that not more than one dollar per day be charged for any one consignment not in excess of a carload.

"(a) This rule is applicable also to steamboat and steamship lines.

"Rule IV. Railroad companies shall deliver freight at their depots or warehouses, or, in case of shipments for track delivery, shall place loaded cars at an accessible place for unloading within twenty-four hours after arrival, computing from 7 o'clock a. m. the day following arrival of same. Except that carload shipments for track delivery at local stations having not more than one team track, shall be placed at an accessible point for unloading by the conductor of the train on which the car arrives. The shipper or consignee shall be paid \$1.00 per car per day for each day, or fraction of a day, such delivery is so delayed.

"Rule V. All carload freight, or freight carried at carload rates, and all freight in cars, whether full carload or not, taking track delivery, shall be subject to the demurrage, or car service charges prescribed in these rules.

"Rule VI. A shipper, on whose order a car or cars have been placed for loading, shall be allowed forty-eight hours for the loading of such car or cars, computing time from seven o'clock a. m. the day after such car or cars have been placed subject to the order of shipper, and thereafter a demurrage charge of not more than \$1.00 per car per day, or fraction of a day, may be assessed and collected on all such cars as have not been tendered to the railroad company with shipping instructions within said forty-eight hours: provided, however, that should the shipper fail to begin loading within forty-eight hours after the expiration of free time, the railroad company shall consider the car or cars released, and may assess and collect

\$2.00 on each car, covering the demurrage then due.

"Railroad companies shall not be compelled to furnish cars for future shipments to parties in default as to the payment of the demurrage charges, herein last provided for, until such demurrage charges have been paid.

"If, after placing the car or cars as required by this rule, the railroad company shall, during or after free time, temporarily remove all or any of them, or in any way prevent, obstruct or delay the loading of same, the shipper shall not be chargeable with the delay caused thereby.

"When, by reason of delay or irregularity on the part of the railroad company in filling orders, cars are bunched in excess of the ability of the shipper to load, as indicated in his applications, the shipper shall be allowed separate and distinct periods of free time within which to load the car or cars specified in each separate application.

"Rule VII. A car or cars detained or held at point of shipment for want of proper shipping instructions, or by reason of imperfect or excessive loading, where loading is done by shipper, shall be subject to a demurrage charge of \$1.00 per car per day, or fraction of a day, said car or cars are so detained or held. In cases of imperfect or excessive loading the shipper shall be notified thereof as early as practicable after said car or cars have been received from him, in which case car service charges shall begin at the time of notification.

"Rule VIII. Legal notice, as referred to in these rules, may be either actual or constructive. Where the consignee or his agent is personally served with notice of the arrival of freight at or before 6 p. m. of any day, free time begins at seven o'clock a. m. on the day after such notice has been given. Constructive notice referred to consists of posting notice by mail to consignee. Where this mode of giving notice is adopted there shall be twenty-four hours' additional free time: provided, however, that when, in any case where notice of arrival is given by mail, the consignee shall make oath that neither he, his agents, nor employees, have received such notice then he will be held not to have received legal notice by reason of posting of said notice by mail.

"Rule IX. All package freight unloaded by railroad companies in their depots or warehouses, and all freight which, in order to release cars, is unloaded in the yard space of a railroad company, which is not removed by the owners thereof from the custody of the railroad company within forty-eight hours, computing from seven o'clock a. m. of the day following legal notice of arrival, may be subject to the charge of storage for each day, or fraction of a day, it may remain in the custody of the railroad company, as follows:

"In less than carloads, not more than one cent per hundred pounds per day, or fraction thereof; in carload quantities, not more than

ten cents per ton of 2,000 pounds per day or fraction thereof, but not exceeding \$1.00 per car per day, or fraction of a day: provided that in no case shall the amount so collected for storage of a less than carload shipment exceed the amount authorized to be charged as storage or demurrage on a carload of similar freight for the same length of time when not unloaded from car, as provided by the demurrage rules.

"(b) This rule shall apply also to steamboat and steamship companies unloading package freight in their warehouses, except that one hundred and twenty (120) hours of free time shall be allowed instead of forty-eight.

"Rule X. Loaded cars containing fertilizers, hay, coal, coke, brick, and lumber in covered cars, and the following articles in bulk: Meat, potatoes, grain, and grain products, cotton seed, and cotton seed hulls, taking track delivery, which are to be unloaded by consignee, but are not unloaded within seventy-two hours, computed from seven o'clock a. m. the day following the day legal notice of arrival is given (having been placed at an accessible point for unloading) may be subject thereafter to a charge for demurrage of \$1.00 per car for each day, or fraction of a day, that they may remain loaded in possession of the railroad company. All other loaded cars, taking track delivery, to be unloaded by consignee, shall be limited to forty-eight hours of free time: provided, however, that if, after placing a car or cars, as required in this rule, the railroad company shall, during or after free time, temporarily remove all of them, or in any way obstruct the unloading of same, the consignee shall not be chargeable with the delay caused thereby.

"Provided, that when, on account of delay or irregularity in transportation, cars are bunched in transit and delivered to consignee in numbers beyond his reasonable ascertained ability to unload within the free time prescribed in these rules, he shall be allowed by the carrier such additional time as may be necessary to unload cars so in excess by the exercise of due and usual diligence on the part of consignee.

"Rule XI. Whenever the weather, during the period of free time, is so severe, inclement, or rainy that it is impossible or impracticable to secure means of loading or unloading freight, or when, from the nature of the goods, loading or unloading would cause injury or damage, such time shall be added to the free period, and no demurrage charges shall be allowed for such additional free time. This rule applies to the state of the weather during business hours.

"Rule XII. A consignee or consignor five miles or more from the depot, and whose freight is destined to or from his place of business or residence so located, shall not be subject to storage or demurrage charges allowed in the foregoing rules until a sufficient time has elapsed after notice for said consignee or consignor to remove or load

said goods by the exercise of ordinary diligence. But the time limit for loading or unloading shall not exceed five days.

"Rule XIII. On carload freight originating in Virginia, and shipped on local bills of lading to a terminal point at a port within this state, there shall be allowed ten days' free time, computing from seven o'clock a. m. the day after arrival of car or cars, before application of storage or demurrage charges: provided the consignee, within forty-eight hours after the arrival of such car or cars, notifies the delivering line at such terminal point that it is intended for further movement.

"Rule XIV. Incoming carload freight, coming under the provisions of rules XI and XII, may be stored by railroad companies in depots or warehouses at the expense of owner, if same is not removed before demurrage charges attach: provided, that daily storage charge on such freight shall not exceed the demurrage allowed under these rules.

"Rule XV. If the consignee shall refuse to accept freight tendered in pursuance of the bill of lading, the carrier charged with the duty of delivery shall give legal notice to the consignor of such refusal; and if he shall not, within three days thereafter, give direction for the re-shipment or unloading, or other disposition of such goods, he shall thenceforth become liable to such carrier for storage on such goods, or demurrage upon the car or cars in which they are stored, to the same extent, and at the same rates as such charges are now, under like circumstances, by the rules of this commission, imposed upon consignees who neglect or refuse after notice of arrival, to remove freight of like character from the depots or cars of a carrier. A consignee who has once refused to accept a consignment of goods shall not thereafter be entitled to receive the same, except upon payment of all charges for storage or demurrage which have accrued; and if the consignee of freight in carloads, or less than carloads, shall fail or neglect to remove such freight within three days after the expiration of free time, then the carrier shall, through the agent at point of shipment, so notify the shipper, unless the consignee has signified his acceptance of the property. Said notice may either be served personally or given by mail.

"Rule XVI. When consignors ship goods consigned to order, but express in their bills of lading or shipping directions, the name of a person at destination to notify, it shall be the duty of the railroad, or other transportation company, to give legal notice to such party in the same way, and under the same rule, as if the shipment had been made direct to him. But when the consignors do not comply with this condition, the railroad, or other transportation company, shall give such notice only to such consignors; except,

that in shipments of grain or hay, notice shall also be given to the local exchanges; provided, that at the expiration of free time the carrier shall give notice thereof to the consignor.

"Rule XVII. Railroads shall not discriminate between persons or places in storage or demurrage charges. No rebate, drawback, or other similar device will be allowed: provided, that this rule shall not apply to package freight received in less than car-load lots and unloaded in depots and warehouses.

"Rule XVIII. No demurrage shall be charged on private cars standing on private tracks, when both cars and tracks are owned by the same person. Where the cars are not owned by the owner of the tracks, no demurrage shall be charged: provided, the person owning the tracks shall furnish to the delivering railway satisfactory evidence that the owner of the cars releases both him and the delivering road from the payment of demurrage.

"Rule XIX. Nothing in the foregoing rules shall be construed to prohibit railroad companies from contracting with shippers and consignees on terms of mutual convenience in the matter of furnishing and discharging cars: provided, that such contracts shall be so drawn as to give to either party the right to cancel same on ten days' notice, and thereafter demand the application of these rules.

"Rule XX. The commission reserves the right on its own motion to suspend the operation of these rules, or any one or more of them, in whole or in part, whenever it shall appear that justice demands such action, and the commission will, upon complaint, hear and act upon applications for a like suspension.

"The commission further reserves all of its powers under the Constitution and laws of the state to impose fines and penalties upon transportation companies persistently disregarding these rules, or failing to furnish reasonable transportation facilities."

From the action of the corporation commission prescribing said rules, the appellants took this appeal.

Alexander Hamilton, H. T. Wickham, Thos. H. Willcox, J. Allen Watts, E. Randolph Williams, A. P. Thom, Leake & Carter, and John G. Wilson, for appellants. William A. Anderson, Atty. Gen., A. C. Braxton, and Jeffries & Lawless, for the Commonwealth.

BUCHANAN, J. (after stating the facts). The errors assigned upon this appeal are as follows:

First. That the commission did not sustain the objections made by each of the appellants at the hearing that each of said rules, regulations, and requirements applies to and attempts to regulate or control interstate commerce, and, in so far as it does so, is in excess of the powers of the commission.

Second. That the commission did not sustain the objection made by each of the appellants that the said rules, regulations, or requirements apply to and attempt to regulate or control foreign commerce, and, in so far as they do, are in excess of the powers of the commission.

Third. That the said commission did not sustain the objections made by each of the appellants to each of the rules numbered, respectively, 6, 8, 9, 10, 11, 12, 13, 14, 15, and 16, that said rules attempt to give to the patrons of each of the transportation companies the use of its property without compensation, for the time indicated in the said rules, respectively.

No objection is made here to the reasonableness or justness of the rules, but their validity is attacked upon the ground that each and all of them, so far as they apply to interstate and foreign commerce, are in violation of the commerce clause of the Constitution of the United States, and the acts of Congress passed pursuant thereto, and that certain of the rules make requirements which will deprive the appellants of the use of their property without due process of law, and are therefore in violation of the fourteenth amendment of the Constitution of the United States.

The questions raised on this appeal, which have been discussed at length, and very ably, both in writing and in oral argument, are of great importance. They involve the right of the state, under its reserved power, whether that power be called police, governmental, or legislative, to regulate the relative rights and duties of persons and corporations within its jurisdiction, so as to provide for the public good and the public convenience, by laws which are not inconsistent with the Constitution of the state, and which do not, by their operation, directly intrench upon the authority of the United States, or violate some right protected by the federal Constitution. To draw the line between the two fields of jurisdiction, and to define and declare when a state regulation is an unconstitutional encroachment upon federal power, is often a question very difficult to solve, even in a concrete case. But that difficulty is greatly increased and rendered well-nigh impossible when a court is called upon to pass upon a body of rules and regulations like those now under consideration, and to declare whether or not they, or any of them, in their operation, will directly intrench upon the authority of the United States, or violate some right protected by the federal Constitution.

The validity of the rules and regulations in question, so far as they apply to interstate commerce, is not denied, except so far as they may, in their operation, deprive the appellants of the use of their property without compensation; but it is insisted that they are wholly invalid so far as they apply to interstate commerce and foreign com-

merce, upon the ground that that subject is wholly within the jurisdiction of the federal government.

That this contention is not true, to the extent claimed, is well settled by numerous decisions of the Supreme Court of the United States.

In the case of *Lake Shore, etc., R. Co. v. Ohio, etc.*, 173 U. S. 285, 297, 19 Sup. Ct. 465, 470, 43 L. Ed. 702, Mr. Justice Harlan, speaking for the court, said that the cases of that court recognize "the fundamental principle that outside of the field directly occupied by the general government, under the powers granted to it by the Constitution, all questions arising within a state that relate to its internal order, or that involve the public convenience or the general good, are primarily for the determination of the state, and that its legislative enactments relating to these subjects, and which are not inconsistent with the state Constitution, are to be respected and enforced in the courts of the Union, if they do not by their operation directly trench upon the authority of the United States, or violate some right protected by the national Constitution. The power here referred to is, to use the words of Chief Justice Shaw, the power to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. *Com. v. Alger*, 7 Cush. 53, 85.

"Mr. Cooley well said, 'It cannot be doubted that there is ample power in the legislative department of the state to adopt all necessary legislation for the purpose of enforcing the obligations of railway companies, as carriers of persons and goods, to accommodate the public impartially, and to make any reasonable provision for carrying with safety and expedition.' *Cooley's Const. Law* (6th Ed.) p. 715.

"It may be that such legislation is not within the 'police power' of a state, as those words have been sometimes, although inaccurately, used. But, in our opinion, the power, whether called police, governmental, or legislative, exists in each state, by appropriate enactments, not forbidden by its own Constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good. This power in the state is entirely distinct from any power granted to the general government, although when exercised it may sometimes reach the subjects over which national legislation can be constitutionally extended."

In the case of *Cleveland, etc., Ry. Co. v. Illinois*, 177 U. S. 514, 516, 20 Sup. Ct. 722, 44 L. Ed. 888, it was said that "few classes of cases have become more common of recent

years than those wherein the police power of the state over the vehicles of interstate commerce have been drawn in question. That such power exists, and will be enforced, notwithstanding the constitutional authority of Congress to regulate such commerce, is evident from the large number of cases in which we have sustained the validity of local laws designed to secure the safety and comfort of passengers, employes, persons crossing railway tracks, and adjacent property owners, as well as other regulations intended for the public good.

"We have recently applied this doctrine to state laws requiring locomotive engineers to be examined and licensed by the state authorities (*Smith v. Alabama*, 124 U. S. 465, 31 L. Ed. 508, 8 Sup. Ct. 564); requiring such engineers to be examined from time to time with respect to their ability to distinguish colors (*Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. Ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. 28); requiring telegraph companies to receive dispatches and to transmit and deliver them with due diligence, as applied to messages from outside the state (*Western U. Tele. Co. v. James*, 162 U. S. 650, 40 L. Ed. 1105, 16 Sup. Ct. 934); forbidding the running of freight trains on Sunday (*Hennington v. Georgia*, 163 U. S. 209, 41 L. Ed. 166, 16 Sup. Ct. 1086); requiring railway companies to fix their rates annually for the transportation of passengers and freight, and also requiring them to post a printed copy of such rates at all their stations (*Chicago & N. W. R. Co. v. Fuller*, 17 Wall. 560, 21 L. Ed. 710); forbidding the consolidation of parallel or competing lines of railway (*Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. Ed. 849, 16 Sup. Ct. 714); regulating the heating of passenger cars, and directing guards and guard posts to be placed on railroad bridges and trestles and the approaches thereto (*New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. Ed. 853, 17 Sup. Ct. 418); providing that no contract shall exempt any railroad corporation from the liability of a common carrier or a carrier of passengers, which would have existed if no contract had been made (*Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. Ed. 688, 18 Sup. Ct. 289); and declaring that, when a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless at the time of such acceptance such carrier be released or exempted from such liability by contract in writing, signed by the owner or his agent (*Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.*, 169 U. S. 311, 42 L. Ed. 759, 18 Sup. Ct. 335). In none of these cases was it thought that the regulations were unreasonable, or operated in any just sense as a restriction upon interstate commerce."

And in one of the most recent decisions of that court (Pennsylvania R. Co. v. Hughes [decided December last] 24 Sup. Ct. 132, 48 L. Ed. —) it was held that the refusal of a state court to limit the liability of a common carrier for its negligence in the execution of a contract for interstate carriage to the valuation agreed upon does not contravene the various provisions of the interstate commerce act enacted by Congress, making it obligatory upon carriers to provide proper facilities for interstate carriage of freight, and preventing them from obstructing continuing shipments on interstate lines. In delivering the opinion of the court in that case, Mr. Justice Day said, "It is well settled that the state may make valid enactments in the exercise of its legislative power to promote the welfare and convenience of its citizens, although in their operation they may have an effect upon interstate traffic."

It is impossible for us, on this appeal, to make a wholesale exposition of the constitutionality of the rules and regulations in question, so far as they may, in their varied application and enforcement, affect the rights of persons and corporations engaged in interstate and foreign shipments and transportation, or violate rights protected by the federal Constitution. To hold that they are invalid so far as they apply to interstate and foreign commerce, as the appellants insist should be done, might have the effect of depriving the state of her undoubted right, under her reserved powers, to make provisions for the purpose of enforcing the obligations of transportation companies to accommodate the public, and for regulating the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good, when such regulations are in aid of, or only incidentally affect, interstate commerce, and do not violate any right protected by the Constitution of the United States.

To hold, on the other hand, that the rules would not, in their operation, directly trench upon the authority of the United States, nor violate any right protected by the federal Constitution, might result in our denying transportation companies and others their just rights under the Constitution and laws of the United States, and drive them to the federal courts for the assertion and maintenance of rights which ought to be guarded and enforced by the courts of the state whose government they support, and from which they are entitled to protection. For these and other reasons which might be given, we are of opinion that we ought not, upon this appeal, to attempt to decide to what extent, if at all, the said rules and regulations, in their operation, may directly infringe upon the commerce clause of the Constitution of the United States, or violate any right of the appellants under that instrument, and that the decision of those questions can only be prop-

erly made as they arise in concrete cases, and upon the particular facts of each case.

It is insisted by the appellants' counsel that if no relief is given them upon this appeal, as to the validity of the rules in question, their validity is by the express terms of the Constitution made conclusive, and cannot be questioned in an action or suit based upon the rules, and that no other provision is made by the Constitution by which their validity can be questioned, except in quasi criminal proceedings, which the commission is authorized to institute against them for the alleged violation of said rules and regulations. The provision of the Constitution relied on to sustain this contention is subsection "h" of section 156, and is as follows:

"The right of any person to institute and prosecute in the ordinary courts of justice, any action, suit or motion against any transportation or transmission company, for any claim or cause of action against such company, shall not be extinguished or impaired, by reason of any fine or other penalty which the commission may impose, or be authorized to impose, upon such company because of its breach of any public duty, or because of its failure to comply with any order or requirement of the commission; but in no such proceeding by any person against such corporation, nor in any collateral proceeding, shall the reasonableness, justness or validity of any rate, charge, classification of traffic, rule, regulation, or requirement, theretofore prescribed by the commission, within the scope of its authority, and then in force, be questioned: provided, however, that no case based upon or involving any order of the commission shall be heard, or disposed of, against the objection of either party, so long as such order is suspended in its operation by an order of the Supreme Court of Appeals as authorized by this Constitution or by any law passed in pursuance thereof."

The subsection quoted does not prevent the validity of any rule or regulation prescribed by the commission from being inquired into upon the trial of a cause of the kind mentioned in said subsection, if such rule or regulation, in its application to the facts of the case, violates any right of the defendant protected by the Constitution of the United States, for such rule or regulation is, to that extent, not within the scope of the authority of the commission, but in excess of its powers, and invalid not only because it is in violation of the Constitution of the United States, but also because in conflict with section 153, art. 12, of the Constitution of the state—the article creating the corporation commission, and defining its powers and duties, which expressly declares that "the provisions of this article shall always be so restricted in their application as not to conflict with any of the provisions of the Constitution of the United States, and as if the necessary limitations upon their interpretation had been herein expressed in each case."

There being no objection made here to the reasonableness or justness of the rules and regulations in question, and their validity being attacked only to the extent of their application to interstate and foreign commerce, and in so far as they may deprive the appellants of the use of their property without due process of law, we are therefore of opinion that the said rules and regulations are reasonable, just, and valid, except in so far as they may in their operation directly trench upon the commerce clause of the Constitution of the United States, or violate some right of the appellants protected by that instrument; and we are further of opinion that the question of their validity, so far as affected by the Constitution of the United States, may be raised and determined in any case in which that question could be raised and determined if the rules and regulations in question had been enacted as statutes by the General Assembly, except as prohibited by subsection "d" of section 156 of the Constitution.

(55 W. Va. 191)

WAID v. DIXON.

(Supreme Court of Appeals of West Virginia.
March 1, 1904.)

ASSUMPSIT—DECLARATION—PROMISE OF PAYMENT.

1. A declaration purporting to be a declaration in trespass on the case in assumpsit, which fails to aver any promise of payment on the part of the defendant, is demurrable.

2. In assumpsit the gist of the action is the promise of payment on the part of the defendant, which must be clearly averred.

3. Such promise of payment may be either express, or implied by law. Whether express or implied, the averment thereof may be in the same form or language.

(Syllabus by the Court.)

Error to Circuit Court, Greenbrier County; J. M. McWhorter, Judge.

Action by William S. Waid against John T. Dixon. Judgment for plaintiff, and defendant brings error. Reversed.

H. L. Van Sickler and Williams & Dice, for plaintiff in error. J. W. Arbuckle and Preston & Wallace, for defendant in error.

DENT, J. John T. Dixon, defendant, complains of a judgment of the circuit court of Greenbrier county in favor of William S. Waid for the sum of \$362.50, rendered the 4th day of May, 1903.

The first error relied on is the overruling of the demurrer to the declaration, and each count or allegation thereof. The declaration is as follows, to wit:

"The State of West Virginia. In the Circuit Court of Greenbrier County, to wit: Wm. S. Waid complains of John T. Dixon, defendant, of a plea of trespass on the case, for this, to wit: That whereas, on the day of January, 1899, the defendant, John

T. Dixon, then and still a resident of the said county and state, was the owner of large tracts of timbered lands lying in the county of Buchanan and Russell, in the state of Virginia, and also the owner of a valuable steam engine, sawmill, and fixtures complete and ready for sawing and manufacturing logs into lumber. That on the 19th day of January, 1899, aforesaid, the said defendant induced said plaintiff to agree to go upon said tracts of land and saw and manufacture all the logs put to said sawmill into lumber, and entered into a contract with plaintiff by which defendant leased or hired his said sawmill and fixtures, engine, etc., to said plaintiff for twelve months at the price of eleven hundred dollars, and on the same day the said defendant, John T. Dixon, through his agent, and in the name of his agent, John C. Hunter, entered into a contract with this plaintiff whereby plaintiff agreed to saw and stack all the oak and poplar timber bought of Albert Pack, trustee, and others, and located on Gresson creek, in Buchanan county, Virginia, for said defendant, John T. Dixon, at the price of \$3.50 per M for common and better oak, \$2.75 for common and better poplar, and \$1.38 for poplar culls, to be paid by the defendant to the plaintiff each month on the 20th of the month following that on which the lumber was sawed. That said contracts were made and entered into at Ronceverte, in the county of Greenbrier, aforesaid. That under the contract aforesaid with said defendant the said steam engine, sawmill, and fixtures were to become the property of plaintiff at the expiration of the said twelve months. That said plaintiff, in pursuance of said contract, at great cost and expense to him, went at once and took possession and control of said engine, sawmill, and fixtures, and set the same as directed by the defendant on defendant's land at Grisson creek, in the county of Buchanan, as aforesaid, and sawed at the least five hundred thousand feet of lumber of the classes and grades set forth in said contract, and as ordered and directed by defendant. That in May, 1899, plaintiff in pursuance of the order and direction of defendant, moved his said engine, sawmill, and fixtures to a second set on said land on Grisson's creek, and at said second set sawed for defendant at the least six hundred thousand feet of lumber of the classes and grades set forth in said contract, and as directed by the defendant, and at his request. That about the 1st of September, 1899, and while plaintiff was sawing at said second set with hands employed, said defendant ordered the sawing to stop, and the mill to be closed for two months, without the consent and over his protest, and to his injury, loss, and damage. That in November, 1899, the defendant ordered the engine, sawmill, and fixtures to be moved and set up at Bartontown, or near there. That plaintiff, at heavy costs, moved

¶ 2. See Assumpsit, Action of, vol. 5, Cent. Dig. § 88.

the said engine, sawmill, and fixtures in pursuance of said directions, and at the request of said defendant, and set the same up at the place near said Bartontown, where he operated until April, 1900, sawing at this set at least five hundred thousand feet of lumber of the classes and grades set forth in said contract, and as directed and requested by said defendant. That in April, 1900, at the request and directions of said defendant, plaintiff again moved said engine, sawmill, and fixtures, at great cost and expense, to Hart creek, in Russell county, Virginia, and then again set up the same at defendant's land, and operated until July, 1900, and at this set sawed at the least two hundred and fifty thousand feet of lumber of the classes and grades named in said contract, and as directed and requested to do by said defendant. That at all of said sets, and at each one of them, plaintiff sawed the lumber and trimmed the same in a workmanlike manner, and as required by his contract, and in every way complied with his contract, but the defendant did not in any instance comply with his part of the contract. Plaintiff further avers: That about the last of July, 1900, said defendant stopped logging the mill, and ordered said sawing to stop, and said sawmill to be closed down, at a time when plaintiff had men employed and at work, without plaintiff's consent or agreement, and refused to allow plaintiff to complete the job at that set, estimated at one million feet of lumber, to the great injury, loss, and damage to plaintiff. Plaintiff further avers that at the expiration of the twelve months set out in the said contract, to wit, on the 19th day of January, 1900, he, by and with the consent of said defendant, took complete possession and control of said steam engine, sawmill, and fixtures, and absolute ownership of the same. That when said defendant ordered the work to stop and the mill closed in July, 1900, he represented to plaintiff that the work would only be stopped about two months, and then resumed. That defendant would see and undertook that the steam engine, sawmill, and all the machinery and fixtures attached and belonging thereto would be properly and safely taken care of and kept in good condition and ready for work when the work began at the expiration of said two months. That at the expiration of said time plaintiff was ready to resume the work of sawing, but defendant refused to permit plaintiff to resume work, and refused to do anything to carry out his part of the contract. Plaintiff further avers: That the defendant failed, neglected, and refused to furnish plaintiff means to carry on his work of sawing under the contract, as defendant was bound and agreed to do; and in consequence of said neglect, failure, and refusal of said defendant to furnish plaintiff with such means plaintiff, in order to carry on the work for defendant, was compelled to seek credit to meet his expenses, and to mortgage the

said steam engine, sawmill, machinery, and fixtures by giving deed of trust thereon, and that said steam engine and sawmill was sold away from plaintiff to meet the debts so incurred at the price of \$300. That said defendant, instead of seeing that said steam engine, sawmill, machinery, and fixtures were well cared for and protected, and kept safe and in good condition, as he agreed to do, permitted, as plaintiff is informed, John Hunter and David Gambell to use and occupy the mill and saw with, and permitted said engine, sawmill, machinery, and fixtures to stand out in the weather unprotected, so that the belting and many valuable parts of the mill and machinery were carried away, stolen, and destroyed, to such an extent that the whole that was left thereof was sold at said sum of \$300; and all this entailed heavy loss, injury, and damage to plaintiff, to wit, \$3,000. Plaintiff avers that he kept and performed his contract in every particular, and was always ready and willing to fulfill his part of the contract in every particular; that the lumber he sawed was taken by defendant and placed upon the market, or taken into the possession of said defendant; that said defendant kept monthly estimates of the lumber; and, although plaintiff sawed nearly two millions of feet of lumber for defendant, defendant has not settled for the same, or accounted to plaintiff, although often requested to do so. Yet the said defendant, so being informed of the amount and value of the lumber sawed by plaintiff, and of his obligations under said contract to plaintiff, and utterly disregarding the rights of plaintiff in neglecting, refusing, and failing to furnish plaintiff means to carry on his work under said contract, and in refusing to permit plaintiff to finish the job of sawing at Hart's creek, and ordering the work to stop and the mill to be closed, and refusing and failing to allow plaintiff to resume that work and complete the job of sawing, and in neglecting, failing, and refusing to look after and take care of said engine, sawmill, machinery, and fixtures as he agreed to do, and permitting the same to be used and the belting and other parts of the machinery and fixtures to be carried away, stolen, and destroyed, and in refusing to account to plaintiff and pay for the lumber sawed for him by the plaintiff, and in neglecting, refusing, and failing to carry out his contract and furnish plaintiff means to keep up his work, and thereby forcing plaintiff to suffer his valuable machinery to be taken from him and sold, and in depriving plaintiff of the labor and profits he was justly entitled to possess and enjoy by sawing the timber left unsawed at Hart's creek when defendant ordered the work stopped, but wholly neglected so to do. And by reason of all this bad care, negligence, and default of said defendant in complying with his contract and obligations to plaintiff, as hereinbefore set forth, although often re-

quested so to do, said plaintiff has been greatly wronged, and caused to pay out money, and suffer great injury, loss, and damage to the said plaintiff three thousand dollars. And therefore he sues. John W. Arbuckle, P. Q."

From an inspection of this declaration it is impossible to say whether the draftsman thereof intended it to be a declaration for trespass on the case or trespass on the case in assumpsit. In form it is a commingling of the two actions, while the substance thereof and the account filed therewith are proper only in an action of assumpsit. The difference between the two actions is that case is for damages occasioned by wrongful action or negligence, while assumpsit is damages for failure to perform, or breaches of promises, express or implied by law. In the latter the promise is the gist of the action, and where there is no promise alleged on the part of the defendant the declaration is fatally defective, for it presents no averment on which the defendant can take issue by the plea of nonassumpsit. 2 Tuck. Com. 143; Wolf v. Spence, 39 W. Va. 491, 494, 20 S. E. 610; 4 Minor's Institutes, pt. 1, p. 577; 2 Chit. Pl. 279; 1 Rob. Forms, 527; Sexton v. Holmes, 3 Munf. 566; Winston's Ex'rs v. Francisco, 2 Wash. 189; Hogg's Pleading and Forms, p. 72, § 84. It would have been a very easy matter for the plaintiff to have made this declaration good in assumpsit by having added after the matter of inducement and consideration "that by reason whereof the defendant became indebted to and liable to the plaintiff in the sum of \$—, and, being so indebted, he, in consideration thereof, undertook and faithfully promised to pay the same to the plaintiff on request, yet the defendant, though often requested, hath not paid the same, but refuses, to the damage of the plaintiff \$—, and therefore he sues," or words to the same effect averring a promise on the part of the defendant. It does not make any difference whether the defendant ever made any such promise, nor is it necessary to prove it. All that is necessary to prove is a liability under the allegations of the declaration, and the law implies the promise if it is properly alleged. Nor is such promise rendered unnecessary by section 29, c. 125, Code 1899, for such section was not intended to do away with the common-law forms of pleading, or destroy the essential characteristics of the different kinds of actions, as these are highly necessary to promote the ends of justice. The declaration being bad because of the want of the necessary allegation of promise on the part of the defendant, the demurrer thereto should have been sustained, and plaintiff should have been required to amend his declaration so that a proper issue thereon could have been joined. There is no misjoinder of action, for the plaintiff has the right to recover in an action of assumpsit for the various matters averred in the declaration when

he properly amends the same to conform to an action of trespass on the case in assumpsit or on promises. This seems a technical matter on which to reverse the case, but, according to long established principles of law calculated to promote justice and a fair trial between litigants, and precedent firmly established, the court cannot do otherwise.

The judgment is reversed, the verdict of the jury set aside, and the case is remanded to the circuit court, with leave to the plaintiff to amend his declaration.

(35 W. Va. 185)

HANNA v. CHARLESTON NAT. BANK et al.

(Supreme Court of Appeals of West Virginia. March 1, 1904.)

APPEAL—PARTY IN INTEREST—FRAUDULENT CONVEYANCE—FUTURE SUPPORT.

1. A surety in an execution levied on the property of the principal debtor has such interest in the controversy over the ownership of such property, to which he is a party, as to entitle him to appeal from a judgment discharging such property from the lien of such execution.

2. Among others, a deed from a father to a daughter, conveying her his property, contains the following stipulations: "The further consideration of this deed is that the party of the second part, shall not dispose of said property during the lifetime of the party of the first part without the written consent of the party of the first part and that the party of the second part will furnish to the party of the first part a comfortable and proper support and maintenance during his natural life." Such stipulation renders such deed, in law, *prima facie* a nullity and void as to existing creditors, and it cannot be sustained unless it is shown that the grantor retained a sufficient amount of property to satisfy his debts.

(Syllabus by the Court.)

Error to Circuit Court, Kanawha County; J. H. Couch, Special Judge.

Action by Kate P. Hanna against the Charleston National Bank and others. Judgment for plaintiff, and Peter Silman brings error. Reversed.

A. M. Prichard, for plaintiff in error. A. B. Littlepage and Flournoy, Price & Smith, for defendant in error.

DENT, J. Peter Silman complains of a judgment of the circuit court of Kanawha county rendered in certain proceedings to try the right to certain personal property, wherein Kate P. Hanna was plaintiff, and the Charleston National Bank, plaintiff in error, Peter Silman, and George Pfeiffer were defendants. The property in controversy was levied on as the property of George Pfeiffer by virtue of an execution for the sum of \$165.07, with interest and costs, in favor of the Charleston National Bank, against George Pfeiffer, as principal, and Peter Silman, as surety. By verdict of a jury, under the instructions of the court, the property was

¶ 1. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. §§ 206, 208.

found to be the property of the claimant, and judgment was rendered accordingly. Peter Silman obtained this writ of error. The defendant in error, Mrs. Hanna, claims that he has no such interest in the subject-matter in controversy as entitles him to maintain this writ. He is surety for the judgment, and entitled to have it made out of the property of his principal for his relief. If the property levied on was the property of his principal, he was virtually interested in preventing its release, and in having it applied in satisfaction of the execution. By section 138, c. 50, Code 1899, it is provided that "when a joint judgment is rendered against a principal debtor and his surety, if such suretyship appears to the satisfaction of the justice by any evidence at the trial or paper filed in the cause, or by admission of the parties, he shall note the fact on his docket, and in such case a memorandum thereof shall be endorsed on the execution, and the personal property of the principal debtor subject to execution, within the jurisdiction of the officer, shall be first sold, unless the surety direct otherwise." This section confers on the surety the right to have his principal's property subjected to the payment of the judgment for his benefit. This right always existed in equity under certain limitations, and by this statute it is made a matter of law. Or the surety had the right to pay the judgment, and he was then substituted to all the rights and remedies of the judgment creditor. Now, under the statute, before payment of the judgment he has the legal right to have the principal's property subjected to the payment of the execution. This invests him with an appealable interest in this case, for he has the right to have the property levied on, if the property of the principal, applied for his benefit. The surety's right, then, to maintain this writ, depends entirely on the merits of the controversy, and this is as to whether the property claimed by the defendant in error was leviable on as the property of George Pfeiffer, the principal debtor. If so, the surety has the right to have it held and applied for his relief. The record shows affirmatively and clearly that if the property released from the levy was subject thereto, as the property of the principal debtor, the surety was aggrieved by the release thereof; and such grievance does not depend on the contingency that there may probably be other property of the debtor subject to such levy, or that the creditor might otherwise be able to make its money out of the principal debtor. Such contingencies are too remote to destroy the surety's grievance occasioned by the release of the debtor's property actually in the custody of the law for the satisfaction of the debt. A bird in hand, under such circumstances, is worth a whole flock in the dense forest of uncertain probabilities.

The first question on the merits which presents itself is whether, for any reason, the conveyance under which the defendant in er-

ror claims the property in controversy is void as to the plaintiff's debt. If so, the motion of the defendant, Peter Silman, united in by the Charleston National Bank, to set aside the verdict "and grant them a new trial on the ground that the same was contrary to the law and the evidence," should have been sustained, and the circuit court erred in not doing so. The conveyance is as follows:

"This deed, made this 29th day of March, 1900, between George Pfeiffer, of the county of Kanawha, West Virginia, of the first part, and Mrs. Mary Catherine Hanna, daughter of the said George Pfeiffer, of the same county and state of the second party:

"Witnesseth: That the said party of the first part, for and in consideration that the party of the first part is indebted to the party of the second part in a large sum of money for services rendered him as his housekeeper during a period of several years, and for other services, and for other valuable considerations hereinafter mentioned, and that this conveyance shall operate as a release of all liability now existing on the part of the party of the first part to the party of the second part.

"Doth grant unto the party of the second part all the following real estate owned by the party of the first part situate in the said county of Kanawha and below the city of Charleston, to wit: First. About 23 acres of land on Kanawha River bottom and between the Popp lands and the Wm. Pfeiffer 23 acres recently sold to John S. Payne. Second. About 50 acres of land conveyed to said George Pfeiffer by Henry G. Tucker and wife. Third. A certain lot known as lot No. 91, block 22, West Charleston. Fourth. 100 acres of land known as the Stanley tract, and lying back of what is known as the Military Grant; all of which foregoing tracts of land are the same which are described in a certain deed of trust executed by said George Pfeiffer to George S. Couch, Trustee, to secure certain indebtedness due to one Aaron Baer, which said deed of trust is recorded in Kanawha County Court Clerk's Office in Trust Deed Book No. 20, page 442, to which reference may be had for a fuller description of the property above mentioned. Fifth. About 150 acres of land lying north of the county road, and being the land upon which the said George Pfeiffer now resides, the same being made up of two tracts, to wit: one of about 142 acres conveyed to said George Pfeiffer by Henry G. Tucker and wife, by deed dated October 10th, 1859, and recorded in said clerk's office in Book W, at page 140, and about 8 acres described in a deed from Matilda Stanley and others to said George Pfeiffer, and recorded in deed book No. 32, page 627, to which two said deeds reference may be had for a fuller description of the said 150 acres. Sixth. Also the following personal property now on the lands of the party of the first party, to wit, two horses, one grain

drill, two mowers, one self-binder, one spring wagon, one farm wagon, two buggies, and all farm implements of the party of the first part. The further consideration of this deed is, that the party of the second part shall not dispose of said property during the lifetime of the party of the first part without the written consent of the party of the first part, and that the party of the second part will furnish to the party of the first part a comfortable and proper support and maintenance during his natural life, and it is further understood and agreed that this deed is subject to a certain deed of trust this day executed by the party of the first part in favor of F. A. Sattes.

"And the said party of the first part doth hereby covenant with the party of the second part, that he will warrant generally the property hereby conveyed:

"Witness the following signature and seal.

"George Pfeiffer. [Seal.]"

The following provision, to wit, "The further consideration of this deed is, that the party of the second part shall not dispose of said property during the lifetime of the party of the first part without the written consent of the party of the first part, and that the party of the second part will furnish to the party of the first part a comfortable and proper support and maintenance during his natural life," makes this deed void, as a matter of law, as to existing creditors, it matters not how pure may have been the intentions and motives of the parties thereto, unless it be shown that the grantor retained a sufficient amount of property to pay all of his existing debts; and this can best be established by showing that all such debts have been satisfied. In 14 Am. & En. En. Law (2d Ed.) 246, it is stated that "a conveyance of property by an insolvent or embarrassed debtor, upon consideration of his future support by the grantee, is fraudulent and void as against existing creditors." This text is supported by a numerous array of authorities, from Alabama to Vermont, without dissent. Davidson v. Burke, 143 Ill. 139, 32 N. E. 514, 36 Am. St. Rep. 367. In note on page 375, 36 Am. St. Rep., it is said: "An agreement for future support, while it is a valuable consideration, is not sufficient to sustain a conveyance, when to do so will operate to the prejudice of the grantor's existing creditors. Harting v. Jockers, 136 Ill. 627 [27 N. E. 188, 29 Am. St. Rep. 341]; Sidsensparker v. Sidsensparker, 52 Me. 481 [83 Am. Dec. 527]." In the case of Smith v. Smith, 11 N. H. 459, it is said that the grantee who accepts a deed on consideration, in whole or part, for future support, should see that all existing debts of the grantor are satisfied. If the property, however, is conveyed for full and adequate consideration, a cotemporaneous agreement for future support of the grantor, which forms no part of the consideration, will not render the conveyance void. 14 Am. & En. En. Law (2d Ed.) 246. In the present

case, on the face of the deed itself, the future support is made a part of the consideration thereof, and it is rendered thereby *prima facie* void, as a matter of law. This can only be overcome by the grantee showing that the grantor reserved a sufficient amount of property to pay all his existing debts, the best evidence of which, as heretofore said, is that all existing debts have been satisfied. The void character of the deed cannot be cured by showing that the grantee had afterwards assumed and paid debts to the full value of the property conveyed. Welcome v. Batchelder, 23 Me. 85. In the case of Sidsensparker v. Sidsensparker, 52 Me. 481, 83 Am. Dec. 532, it is said: "The gist of the objection to the validity of the conveyance in this respect consists not in the amount to be paid in future support, but in the fact that the promise of such support formed part of the consideration, as an inducement to the sale. In such case the grantor essays to put his property beyond the reach of his creditors, and receives therefor an inadequate present consideration with which to satisfy their claims. When this fact is established, whatever be the amount so secured from attachment, instead of entering upon the task of determining what part of the consideration was paid in money or other property, and what part was agreed to be paid in future support of the grantor, and of holding the grantee responsible to the grantor's creditors for the latter sum, the law treats the conveyance as a nullity, as between the grantee and the grantor's creditors, and holds the property liable for their claims. Such an arrangement between grantor and grantee is a continuing fraud, and has been held void not only as against precedent, but as against subsequent creditors. Clark v. French, 23 Me. 221, 39 Am. Dec. 618; Smith v. Smith, 11 N. H. 400; Jackson v. Brush, 20 Johns. 5." While there may be some doubt as to whether such a deed, under our recording acts, would be invalid as to subsequent creditors who deal with full knowledge thereof, it is unquestionably void as to existing creditors, as a matter of law, without regard to the intent of the parties. The effect of it is to hinder, delay, and defraud creditors, and this renders it void. No debtor, as against existing creditors, can secure to himself the benefit of his property, either in whole or part, by conveying it to some one else. This being a question of actual fraud in law, section 2, c. 74, Code 1899, is not involved, as it applies only to unlawful preferences. Nor does the bona fides of Mrs. Hanna's conduct or claim affect the matter. She having accepted a deed which the law presumes void on its face as to existing creditors, she can only preserve it from their demands by paying them, or showing that her father retained sufficient property to satisfy them. This renders it unnecessary to consider the instructions either of the plaintiff or the defendant. As the deed is, in law, *prima facie* fraudulent,

lent, neither the good nor bad intent of Mrs. Hanna in accepting the same, nor the bona fides of her debt, nor the question of unlawful preference, can change the legal status thereof. She must show that her father retained sufficient property to pay the debt involved, or she must pay it, or allow the property levied on to be sold for its satisfaction.

The judgment of the circuit court is reversed, the verdict of the jury set aside, a new trial is awarded the defendants, and the case remanded.

(55 W. Va. 181)

RYLAND & RANKIN v. CHESAPEAKE & O. RY. CO.

(Supreme Court of Appeals of West Virginia.
March 1, 1904.)

CARRIERS—SHIPMENT OF GOODS—REFUSAL TO ACCEPT—CONVERSION BY CARRIER.

1. R. & R. shipped by the Chesapeake & Ohio Railway Company a box of goods on the 14th day of September, 1900, from White Sulphur, W. Va., to Newark, N. J. On the 28th of November, 1900, the carrier tendered the box to La Pierre Company, the consignee, who refused to accept the same. R. & R. brought their action of assumpsit for the value of the goods, alleging their loss. The plaintiffs proved the tender of the goods to the consignee, and consignee's refusal to accept them. *Held*, plaintiffs could not recover the value of the goods in said action, not having first made a demand on the carrier therefor.

2. Delay on the part of a carrier does not constitute a conversion of the goods, no matter how long continued, so as to make him liable for their value; and, so long as the goods remain in specie, the plaintiff can recover from the carrier only the damages which he has sustained by the delay.

3. The owner cannot charge the carrier with a conversion, or the value of the goods, for a delay, however long, if they are safely kept, unless they have been demanded of the carrier, and their delivery refused.

(Syllabus by the Court.)

Error from Circuit Court, Greenbrier County; J. M. McWhorter, Judge.

Action by Ryland & Rankin against the Chesapeake & Ohio Railway Company. Judgment for plaintiffs. Defendant brings error. Reversed.

Simms & Enslow, for plaintiff in error.
Gilmer & Gilmer and H. L. Van Sickler, for defendants in error.

McWHORTER, J. Ryland & Rankin filed their declaration in the clerk's office of the circuit court of Greenbrier county against the Chesapeake & Ohio Railway Company, averring that on the 14th day of September, 1900, plaintiffs shipped from White Sulphur Springs, in said county, by the defendant railway company, to the city of Newark, N. J., a box containing certain goods in the declaration described, of the aggregate value of \$418.21, and that said defendant on the said day undertook and faithfully promised to take care of the said goods and chattels, and safely and securely carry and convey the same on and by the railroad cars of said

defendant from the said White Sulphur Springs to the said city of Newark, N. J., and there safely and securely deliver the same for the said plaintiffs; that, although the said defendant had received the said goods and chattels for the said purpose, yet, not regarding its duty as such carrier, nor its promise and undertaking, it had not taken care of the goods and chattels, and safely and securely conveyed them and delivered them at the said city of Newark, N. J., but had so carelessly and negligently behaved and conducted itself with respect to the said goods and chattels that, by and through the mere carelessness, negligence, and improper conduct of the defendant and its servants, said goods and chattels, being of the said value, afterwards, on the said day and year, became and were wholly lost to the said plaintiffs. The declaration contains three counts, all substantially the same; each count closing with the allegation that the goods were wholly lost to the plaintiffs. The defendant entered its general plea. A jury was impaneled, and the case tried, and a verdict rendered in favor of the plaintiffs for \$418.21. The defendant filed its bill of exceptions, certifying all the evidence taken in the case, and showing that the defendant had moved to set aside the verdict and grant it a new trial because the verdict was contrary to law, and because of improper instructions given the jury, which motion the court overruled, and refused to set aside the verdict, and entered judgment thereon.

It appears from the evidence introduced by the plaintiffs that the box containing the goods which were shipped was tendered by the defendant on the 28th of November, 1900, to La Pierre Manufacturing Company at its place of business in the city of Newark, N. J., who refused to receive it; La Pierre Manufacturing Company being the consignee named on the box, and to whom the evidence shows the box was shipped, although the declaration fails to disclose the name of the consignee of the goods. The declaration is a declaration for the loss of the goods, and yet the evidence shows that the goods were not lost; hence they must be yet in the custody and care of the defendant. Instructions Nos. 1, 2, 4, 5, 6, and 7 given for plaintiffs, as well as instruction No. 1 offered by defendant and refused, are all based upon the theory of the declaration, that the box was lost, and there is no evidence in the case upon which to base any such instructions; and therefore plaintiffs' instructions were improperly given, and defendant's instruction No. 1, of the same character, was properly refused. The only instruction offered which was proper to be given was defendant's instruction No. 2, which was refused by the court, and is as follows: "The court instructs the jury that if they find from the evidence that the defendant or any one else offered to deliver to the consignees, La Pierre Manufacturing Company, at their place of busi-

ness in Newark, New Jersey, the box shipped by Ryland & Rankin on September 14, 1900, from White Sulphur, and the said manufacturing company refused to receive the same, then you should find for the defendant." This instruction was in line with the evidence given in the case. The goods were never demanded of the defendant by the consignors, and the consignee had refused to receive the box when tendered to it. On the 30th of November, 1900, Ryland & Rankin wrote to R. H. Boatright, agent of the defendant, referring to the fact that they had on the 22d of October advised the defendant that La Pierre Manufacturing Company had not received the goods, and that, unless they were delivered to them on or before the 1st of November, the goods would not be accepted, and stating that they had that morning received advice from the La Pierre Manufacturing Company that defendant had endeavored to deliver to them a package on the 28th, which they presumed was the package containing the goods shipped on the 14th of September, and that they had refused to receive the same, and they thought the La Pierre Manufacturing Company was right in so doing, and closed by saying, "You will confer a favor on us by having this matter adjusted immediately and send us check to cover the amount of invoice." They did not demand the goods, but demanded of the defendant that it pay the invoice price of the goods; treating it as a conversion of the goods, which they could not do until after making a demand, and a failure or refusal on the part of the defendant to deliver the goods. Section 775, *Hutchinson on Carriers*, pp. 927, 928, says: "Delay on the part of the carrier does not constitute a conversion of the goods, no matter how long continued, so as to make him liable for their value; and, so long as the goods remain in specie, however much they may be depreciated in value, the consignee or owner must receive them when tendered, and can recover from the carrier only the damages which he has sustained by the delay. Nor will a voluntary acceptance of the goods, when there has been inexcusable delay on the part of the carrier in their delivery, preclude the owner from a recovery of whatever damages he may have sustained thereby." And authorities there cited. And the same writer, in treating of the duties of common carriers in section 328, says, in part: "But as to this implied contract or duty, his responsibility is only that of an ordinary bailee for hire; and, if he fail in the performance of it, he becomes liable for only such damages as the bailor may have suffered by his negligence. Although he may have delayed the carriage for an unreasonable length of time, the bailor is still bound to receive the goods, when tendered where the delivery is required to be made, and cannot refuse them, and hold the carrier liable for their value. And though the carrier may delay ever so long, the owner cannot charge

him with a conversion, or for value of the goods, if they are safely kept, unless they have been demanded of the carrier, and their delivery refused. But if by the unreasonable delay they have deteriorated, or their market value has fallen, or they arrived too late for the market, he may hold him liable for the damages. And in an action to recover such damages, he may recover for any reasonable expense to which he has been put by the delay."

The evidence wholly fails to support the allegations of the declaration, and, the court having erred in giving the instructions named for plaintiffs, and refused the second instruction for defendant, hereinbefore set forth, the judgment must be reversed, the verdict of the jury set aside, and the cause remanded, and the plaintiffs granted leave, if they so desire, to amend their declaration, or take such other proceedings as they may be advised it is proper to do.

(55 W. Va. 173)

COCHRAN v. COCHRAN.

(Supreme Court of Appeals of West Virginia.
March 1, 1904.)

CO-TENANCY—ADVERSE POSSESSION.

1. When one tenant in common occupies the common property, openly, notoriously, and exclusively, as the sole owner, keeping up the improvements, paying the taxes thereon, and receiving to himself the rents and profits, and exercising over the property such acts of ownership as evidence an intention to ignore the rights of his co-tenants, such acts amount to a disseisin, and his possession will be regarded as adverse to his co-tenants from the time they are shown to have knowledge of such acts and claims.

(Syllabus by the Court.)

Appeal from Circuit Court, Pocahontas County; J. M. McWhorter, Judge.

Bill by D. J. Cochran against George B. Cochran and others. Decree for plaintiff, and defendant George B. Cochran appeals. Reversed in part.

Gilmer & Gilmer, for appellant. McNeill & McNeill, for appellee.

McWHORTER, J. D. J. Cochran filed his bill in the circuit court of Pocahontas county against Michael Cochran, Miles Cochran, Nancy Cochran, Samuel Cochran, and George B. Cochran, praying for the partition of two tracts of land, containing, respectively, 215 acres and 72 acres, in said county; the 215 acres having descended from his father, Jesse Cochran, and the 72 acres from Jane Cochran, his mother. George B. Cochran filed his answer and cross-bill, admitting that the plaintiff was entitled to a partition among himself and the other heirs of the 215 acres, but claiming the 72 acres as his own, alleging that it belonged to his mother, Jane Cochran; that his father had died in 1865; that

¶ 1. See *Tenancy in Common*, vol. 45, Cent. Dig. § 46, 49, 50.

respondent had from that time until his mother's death, in 1882, taken care of and supported her, and that she had promised to give to him, and in fact had given to him, the 72 acres of land, and placed him in actual possession thereof, and that he had continued in possession of said 72 acres of land from that time until the present; that he had tilled the same, maintaining the fences, exercised sole and exclusive possession and control thereof, had paid all taxes thereon, and, as much as 18 years prior to the making of his answer, notified the plaintiff in this cause, and all the other heirs at law of Jane Cochran, that respondent claimed all of said 72 acres, and that he did not recognize any other right thereto; that no one of the children of Jane Cochran, other than respondent, ever had any part of said 72 acres in possession; and denied that plaintiff was entitled to any part, share, or interest therein, but denied that the 72 acres was capable of being partitioned, and that the plaintiff had any right to have the same partitioned or sold; that plaintiff lived close to respondent, and well knew he had never allowed any rights on said 72 acres, and that respondent had expressly claimed all of the same, and had never allowed any one else to have any control or possession of it; that the county road separated the 72 acres from the part owned by Jesse Cochran; that respondent had paid all taxes on his father's interest in 430 acres of land, which was the 215-acre tract, for over 30 years, and that neither the plaintiff, nor any one of the defendants, other than respondent, had ever paid any taxes on said land, and he had saved the land from forfeiture; and prayed that all he had so paid be repaid to him, and that his title to the 72 acres be quieted; that this answer be treated as a cross-bill, and that process issue against plaintiff and the other defendants in said suit; and that he recover his costs; and for general relief. The plaintiff and defendants who were made parties defendant to the cross-bill were summoned, but none of them filed answers to said answer and cross-bill. Depositions were taken and filed in the cause, and the cause came on to be heard on the 11th day of April, 1902. While no answers were filed to the cross-bill, it is stated in the decree that D. J. Cochran and Samuel Cochran contested the claim set up by G. B. Cochran. "Upon consideration of the pleadings, depositions, and exhibits, and the court being of the opinion that the defendant George B. Cochran is not entitled to the 72-acre tract, as claimed by his answer, in the nature of a cross-bill, filed in this cause, but that his possession of the same inures to the benefit of the coparceners," the court proceeded to appoint commissioners to go upon the said two tracts of 215 acres and 72 acres, and partition the same amongst the parties entitled thereto according to their respective interests, from

which decree the said defendant George B. Cochran appealed.

But one question arises for consideration in this cause. The appellant, George B. Cochran, by his answer and cross-bill, shows that he had sole, actual, exclusive, and adverse possession of the 72 acres of land from the time of the death of his mother, in 1882, and that 18 years before the institution of this suit he had notified the plaintiff and all the other heirs at law of his mother of his exclusive claim to the land, and the fact that he did not recognize any rights in any of the said heirs in said land. It is shown that the plaintiff lived on land adjoining the 72 acres, and that he helped said George B. Cochran to maintain a line fence between the land of plaintiff and this 72 acres. The answer and cross-bill of defendant was taken for confessed as to the plaintiff and all the other heirs, defendants thereto. In *Newell on Ejectment*, § 72, p. 763, it is said: "The possession of one co-tenant is the possession of all the rest. * * * But when one tenant in common occupies the common property openly, notoriously, and exclusively as the sole owner, improving it and receiving to himself the rents and profits, or exercising over the property such acts of ownership as evidence an intention to ignore the rights of his co-tenants, such acts will amount to a disseisin, and his possession will be regarded as adverse to his co-tenants from the time they are shown to have knowledge of such acts and claims." And authorities there cited. See, also, *Buswell on Limitations & Adverse Possession*, § 298, to the same effect; *Cooley v. Porter*, 22 W. Va. 120. And in *Justice v. Lawson*, 46 W. Va. 163, 33 S. E. 102 (Syl., points 3, 4), it is held: "(3) One tenant in common may oust his co-tenant, and hold in severalty, but a silent possession, unaccompanied with any action amounting to an ouster, or giving notice to the co-tenant that his possession is adverse, cannot be construed into an adverse possession. (4) It is the intention of the tenant or parcener in possession to hold the common property in severalty and exclusively as his own, with notice or knowledge to his co-tenants of such intention, that constitutes the disseisin."

Defendant George B. Cochran, after notifying plaintiff and all the other heirs of his claim to said 72 acres, claiming it under his mother, the owner, who placed him in possession of it, continued in open, notorious, adverse, and exclusive possession, if not with the consent, with the acquiescence, of all the other heirs, undisturbed in such possession, for a period of 18 years before the institution of this suit; and this, under the authorities cited, entitles the said George B. Cochran to have title to the said 72 acres of land, and the court erred in directing its partition among the heirs at law of the said Jane Cochran.

The decree of the circuit court, only to that

extent, is reversed, and the cause remanded, with directions to require the heirs at law of the said Jane Cochran to convey the said 72 acres to said George B. Cochran, and to appoint a commissioner to convey the same for them in default of their doing so, and for such further proceedings in said cause as may be proper to be had therein.

(55 W. Va. 199)

TILLIS v. TILLIS.

(Supreme Court of Appeals of West Virginia.
March 1, 1904.)

DIVORCE—DESERTION—EVIDENCE—ADMISSIONS.

1. It requires willful desertion to warrant a divorce from the bond of matrimony. Willful desertion is a breach of matrimonial duty, and is composed, first, of a breaking off of matrimonial cohabitation; and, second, an intent in the mind to desert. Both must combine to make the desertion complete. Noncohabitation alone is not desertion.

2. To authorize a divorce for willful desertion, the plaintiff bears the burden of proof, and the evidence of such desertion must be full and clear.

3. Whether admissions are competent evidence on which to ground a divorce or not, they are competent evidence to defeat a divorce.

(Syllabus by the Court.)

Appeal from Circuit Court, Mason County;
F. A. Guthrie, Judge.

Bill by Smith Tillis against Mary A. D. Tillis. Decree for plaintiff, and defendant appeals. Reversed.

W. A. Parsons, Hogg & Kerwood, and W. M. Duffy, for appellant. J. E. Neller, for appellee.

BRANNON, J. This is an appeal from a decree from the circuit court of Mason county granting an absolute divorce to Smith Tillis from his wife, Mary A. D. Tillis, upon a bill filed by him charging her with abandonment, from which decree she has appealed.

It is at once enough to reverse the decree to say that the evidence fails to show a material element; that is, willful abandonment. It is of the very core of such a case to show, not merely that the wife went away from home, as that is only one element or circumstance of the case; but it must be shown that she ceased cohabitation with willful design and intent to desert her husband. Both facts must be shown. Willful desertion cannot be inferred from the fact that the parties do not live together. Mere cessation of cohabitation is not enough. *Burk v. Burk*, 21 W. Va. 445. The words of the Code of 1899, c. 64, § 5, giving this cause of divorce, gives it "where either party willfully abandons or deserts the other for three years." This shows there must be intent to finally desert. I may fairly say that the plaintiff's case rests only on his own evidence, and that is too short. He says that they lived together in Mason county, but had not lived together for four years,

and, being asked why, he answered, "Because I considered it an utter impossibility, on account of the disposition and temper of the woman, to live together agreeably." The question was then propounded, "Do I understand by your answer that she has abandoned and deserted you?" He answered, "Yes, sir. She left Mason county in November, 1898, and moved her goods and chattels to Jackson county." Now, this shows rather, from his own lips, that he abandoned her than that she abandoned him. At any rate, it utterly fails to show willful, intentional abandonment, giving it the most favorable construction for the plaintiff. His evidence shows merely his assertion that his wife had abandoned him, his mere opinion of the character of her actions, without facts and circumstances to explain why she went to Jackson county, or give cast to her act in so doing. Why she left he does not say, nor for what cause. Perhaps his wrong caused her to leave. He ought to show that she did wrong in leaving, and make her act unjustifiable, and vindicate himself from blame. His failure as a witness to do so is significant. There is absolutely no evidence given by the plaintiff to show willful design to desert. His case signally fails to show this cardinal element. It does show that she left home, and moved to Jackson county, and there resided. It does show a cessation of matrimonial cohabitation; but willful abandonment is not shown, and that is the very cause on which alone the statute grants the divorce. The law and moral and religious sentiment of the country do not favor divorce, and, as Judge Johnson said in *Burk v. Burk*, "The bonds of matrimony should never be dissolved, unless for the most cogent legal reasons made clearly to appear." Full proof is required. 2 Bishop on Marriage, Divorce and Separation, § 762. Turning to the evidence of the defendant, she swears that when she was sick, and was merely able to sit up when helped to a chair, her husband told her that he was going to Sayre's after his son, to get him back in school, leaving her with not over a gallon of flour and not over two gallons of meal, and some eight or ten bushels of corn in the ear, and without a bit of lamp oil for light, and when she could not wait on herself. He said he was coming back as soon as he could get back, but she says he never returned again, and refused to live with or support her. He admits that he then lived with his son-in-law. She says that there was never any trouble between them. She swears that in about three weeks after he left her she went to him at Bud Conley's, and cried and begged him to come back and live with her, and told him that, if she had said or done anything wrong, she begged him to forgive her, and come back; and that he told her she had never said or done anything that was hard. He said that "he had left, and that was all there was of it; that he left just because he left." She says he refused all

support to her. This is the woman's version under oath, and, if it comes from an interested party, I respond that her version is entitled to as much credit as is his, and the burden is on him to prove his case. And it is here very important to say that he never went upon the stand to deny her statement. A son of hers by a former marriage was present at this interview, and swears that she asked him if she or her children had said anything causing him to leave, and he said "No"; and she asked him why he left, and he said just because he wanted to leave. The son swears that he asked Tillis to come back, and that he declared that he never intended to do so, and that he told the son to take his mother away. The son swears that his mother was clinging to her husband, and that her husband shoved her away, got on his horse, and ran his horse nearly to the top of the hill, the woman following him part of the way, and fell in the road under her excitement, and that Mrs. Conley helped to take her home. H. E. Greer swears that he met Tillis in the road shortly after Tillis left his wife, and he told Tillis that he had heard that Tillis had left his wife, and said to him that he thought he had done wrong, and had better go back, and that he had left the woman in bad shape and circumstances, and Tillis said that he had left with the intention of not going back, and would not go back. Mrs. Reesa Greer, a school teacher, swears that Mrs. Tillis sent for her, and requested her to write a letter to her husband, requesting him to come back home; and she wrote the letter. Another witness swears that Tillis stated to him that he had no grounds on which to bring a suit for divorce, and requested the witness to go to see his wife, and get her to apply for a divorce, and said that he (Tillis) would bear her expenses and pay all the cost, and that he would make a statement before the court that he would not live with or support her, and that that would get a divorce. Tillis came back on the witness stand to meet this evidence of Nicholas King. At first he denied King's evidence, but on cross-examination, while denying such conversation at the two points named by King, he admitted an important fact in these words: "I did tell Nicholas King that if she would go ahead and apply for a divorce that I would pay the expenses, but I didn't tell him I knew I had no grounds." Thus it is clearly proven that Tillis wanted a divorce, and clearly proven that he abandoned his wife. The evidence clearly shows that he abandoned his wife. Admissions from his own lips clearly prove it. Whatever construction may be properly put on the language in section 8, c. 64, of the Code of 1899, that "the cause shall be heard independently of the admissions of either party in the pleading or otherwise"; whatever we may think of the correctness of the case of *Bailey v. Bailey*, 21 Grat. 43, holding that said statute does not render admissions, except by collusion, incompetent evidence on

which to obtain a divorce—we cannot question their admissibility as evidence to defeat a divorce. "In a suit for divorce the admissions of the plaintiff are competent evidence to support the averments of the answer." *Cralle v. Cralle*, 79 Va. 182. It is plain that we must reverse the decree and dismiss the bill.

(55 W. Va. 202)

PAYNE et al. v. STAUNTON, County Clerk.
(Supreme Court of Appeals of West Virginia.
March 1, 1904.)

ELECTIONS—POLLBOOKS—INSPECTION—REFUSAL—MANDAMUS—WHO MAY BRING.

1. Pollbooks of a special election, under a special act of the Legislature, deposited in the office of the clerk of a county court, are public papers or documents under sections 3 and 3 of chapter 117, Code 1899, and the clerk is under duty to allow inspection of them, under proper circumstances, to a person interested in them, though such special act be unconstitutional.

2. Several persons who make common application to a clerk of a county court for inspection of public records, and are refused it, if entitled to such inspection, may unite in mandamus to compel such inspection.

3. A clerk of a county court has such interest as entitles him to refuse an inspection of records in his office, when such inspection is not called for by law.

4. Ministerial officer. Can he refuse to perform an act required by an unconstitutional statute, before it has been judicially declared invalid?

5. A pecuniary interest in an individual in the act sought to be compelled by mandamus must exist to maintain it.

6. One or more individuals may maintain mandamus to compel the doing of an act in which the public at large, including them, have a common interest.

7. Inspection of records and papers in a county clerk's office is not a right vested in every person or under all circumstances. The person asking it must have an interest in the record or paper of which inspection is sought, and the inspection must be for a legitimate purpose.

8. Mandamus will not lie to compel inspection of records by a private individual for the sole purpose of learning evidence for the institution of criminal prosecution.

McWhorter, P. J., and Dent, J., dissenting.
(Syllabus by the Court.)

Error to Circuit Court, Kanawha County;
F. A. Guthrie, Judge.

Action by J. M. Payne and others against E. W. Staunton, county clerk. Judgment for defendant. Plaintiffs bring error. Affirmed.

Linn, Byrne & Cato, P. G. Walker, and A. Burlew, for plaintiffs in error. Mollohan, McClintic & Mathews, for defendant in error.

BRANNON, J. The Legislature of 1903 passed chapter 59 (Acts 1903, p. 170), "to authorize the county court of Kanawha county to fund the indebtedness of said county by issuing its bonds, and to authorize

a special election for that purpose." Under that act an election was held upon the question whether bonds should be issued, and the returns of the election were made and canvassed and the result ascertained, and the pollbooks and ballots were returned to the office of the clerk of the county court. J. M. Payne and others applied to E. W. Staunton, clerk of the county court, to be allowed to inspect the pollbooks of said election for all the precincts of the county, but he refused to do so. Then they demanded that said clerk make them certified copies of certain ones of said pollbooks, offering to pay for them, but said clerk refused to make such copies. Then said Payne and others applied to the circuit court of the county by petition for a mandamus to compel the clerk to allow them to inspect said pollbooks and to make such copies as they should require. An alternative mandamus was awarded, and upon its return Staunton demurred to it, and moved to quash the alternative mandamus, and the court gave judgment sustaining the demurrer to the petition and quashing the alternative mandamus, and from this judgment the plaintiffs sued out a writ of error.

One defense made by Staunton is that the pollbooks are not records or papers contemplated and provided for in section 5, c. 117, Code 1899, providing that "the records and papers of every court shall be open to the inspection of any person, and the clerk shall, when required, furnish copies thereof." The reason given for such denial of the public character of these pollbooks is that the act of the Legislature under which the election was held violates article 6, § 39, of the Constitution, prohibiting special or local legislation in certain cases. Staunton claims that these pollbooks are not more than waste paper in his office, and that no duty rests upon him to allow inspection or make copies of them, because of the unconstitutionality of the act. We will not pass upon the validity of the act, because we do not find it imperative upon us to do so. In deference to the Legislature, it is everywhere held by the courts that courts will not pass upon this question, unless a decision upon that very point is necessary to the determination of the case. *Edgell v. Conaway*, 24 W. Va. 747. Even if we say that the act is open to such objections, still we hold that these pollbooks are public papers on file in a public office, subject to inspection for the purpose of this case; they are such *pro hac vice*. It is of primary import that public records and papers shall be of ready access to the public, and we must be reluctant to declare that a custodian of them can restrict this right incorporated in the cited provision of the Code. We must be slow to announce that a clerk, whose duties as to their inspection and making copies of them are purely ministerial, not discretionary, can assume the dangerous power to hold an act of the Legislature invalid, and for that reason deny to citizens

the right to inspect papers deposited in his office and custody only for preservation and public inspection and use, because merely they originated under such a statute. We do not say that any and every paper happening to be in the clerk's office is official, or that any but legally public ones give the right to inspection; but that is not the case in this instance. These election papers have higher character. The election was held, the returns made, the result canvassed and declared, and the pollbooks put in the keeping of the clerk in the public office under color of law; they were actually in the office. Section 3, c. 117, Code 1899, says: "All papers returned to, or filed in the clerk's office shall be preserved therein until legally delivered out." This only requires that they be "returned to or filed in" the office. It does not draw the refined distinction that those filed under valid law are to be preserved, while those filed under an act turning out to be unconstitutional, though filed under color of law, are simply refuse or waste in the office. Could they be thrown in the street, or altered or burnt, by the clerk with impunity? If citizens favorable to or against the bonds, believing a recount would sustain or defeat the proposition, should ask inspection prior to demand of recount, could they not lawfully do so?

A question of great practical importance comes up in this case. Can a clerk asked to do a ministerial act refuse on the ground that the statute under which he is asked to do that act is unconstitutional? Can he say that the Legislature has violated the Constitution before the statute has been judicially declared void? *Merrill on Mandamus*, § 65, says: "But the courts will not consider the constitutionality of a law in a mandamus proceeding at the instance of a ministerial officer. If he should be allowed to question the law of the land, the operations of the government would be thwarted, and great confusion would result. If the law is void, the parties can appeal to the courts for further protection. A mandamus will not be issued to compel the granting of a license under a law for a reason which, if valid, shows the law itself to be unconstitutional." Not much consistency or clear guidance is there in that section. *Merrill* cites *Smyth v. Titcomb*, 31 Me. 272, holding that a ministerial officer, collecting and disbursing revenue, has no right to withhold performance of ministerial acts, prescribed by law, merely because, possibly, the law may be unconstitutional. He cites *People v. Salomon*, 54 Ill. 39. In it an assessor refused to assess certain taxes on the ground that the law was invalid. The law was held valid, but the court broadly states the law to be that a ministerial officer cannot be allowed to decide upon the validity. "It is the duty of a ministerial officer to obey an act of the Legislature directing his action, not to question or decide upon its validity," the court said. The

fully considered case of *State ex rel. v. Auditor*, 47 La. Ann. 1679, 18 South. 746, holds, even against the State Auditor and Treasurer refusing to pay money under a statute allowing it, that "executive officers of the state government have no authority to decline performance of purely ministerial duties imposed upon them by a law, on the ground that it contravenes the Constitution. Laws are presumed to be and must be treated and acted upon by subordinate executive officers as constitutional and legal until their unconstitutionality has been judicially established." For the double purpose of showing that these pollbooks are, for the matter involved, public papers properly in the office, and also the holding that a ministerial officer cannot refuse to file them because, in his opinion, the act under which an election is held is unconstitutional, I refer to *Franklin Co. v. State*, 20 Am. & Eng. Corp. cases, 60; *Id.*, 24 Fla. 55, 3 South. 471, 12 Am. St. Rep. 183. The syllabus says: "A statute which requires inspectors to canvass votes of an election and make return to the county commissioners imposes upon such commissioners the duty of receiving and keeping the returns in their official custody as records. Neither the constitutionality of such statute nor the legality of the election held thereunder can be considered by the commissioners officially, nor can the same be raised by them as ground for not performing such duty in a mandamus brought to compel its performance." In *State v. Commissioners*, 18 Neb. 506, 28 N. W. 315, a mandamus issued to compel commissioners to call an election, the court refusing to pass on the validity of the act, saying that the presumption is in favor of the validity of a statute, and that it is the duty of all ministerial officers to obey it until it is declared invalid. There the court by mandamus compelled an act going straight to the enforcement of the statute. The presumption that a statute is valid always operates. Just how far is not clear. Some courts say that it operates until it is judicially declared to be void. The expression in point 2 in *State v. Buchanan*, 24 W. Va. 362, has this import. It is a very grave assumption of power for an officer exercising ministerial functions to say that the highest, the sole, lawmaking power has violated the Constitution, and he will therefore disobey its will. Great confusion and disorder might ensue from the exercise of such power. It should rarely be exercised, very prudently, only in plainest cases. I do not think that mandamus will go to compel an officer to do an act going directly to execute an invalid statute. I do not see that a court will take affirmative action to support it. But this is not a mandamus to enforce the statute. It is not to compel officers to hold, return, declare the result of an election, or issue bonds, under the statute. The demand upon the clerk did not call for an act on his part to enforce the statute in question. It was made

under the Code section, given above, allowing inspection and copies, and the contested statute does not enter into the matter, except from the fact that the documents were created under it. And the pollbooks did not go to the enforcement of that statute, as they were to be used only as evidence to punish frauds in elections. So the court was not asked to enforce the statute condemned as invalid. In support of the position that mandamus will not be awarded to compel the direct enforcement of a statute against the Constitution, it may be useful to give some cases. A mandamus was sought to compel a town clerk to assess a tax; but the court holding that the statute commanding it was unconstitutional, it was refused. *State v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622. A statute required supervisors to divide counties into districts. Mandamus refused to compel them. *Van Horn v. State*, 46 Neb. 62, 64 N. W. 365. Mandamus refused to compel canvassing board to count ballots as directed by the statute. *Maynard v. Board*, 84 Mich. 228, 47 N. W. 756, 11 L. R. A. 332. Mandamus refused to compel controller to draw warrant to pay a demand allowed by a statute. *Patty v. Colgan*, 97 Cal. 251, 31 Pac. 1133, 18 L. R. A. 744. Mandamus refused to pay bond. *Brandenstein v. Hoke*, 101 Cal. 131, 35 Pac. 562. Mandamus refused to compel payment of judge's salary. *McDermont v. Dinnie*, 6 N. D. 278, 69 N. W. 294. So to compel issue of town bonds to build a railroad. *People v. Bachellor*, 53 N. Y. 128, 13 Am. Rep. 480. These are the cases where mandamus would operate directly to execute the unconstitutional law. For this reason I do not doubt the text of 19 Am. & Eng. Ency. L. (2d Ed.) 1090, that "it is the prevailing rule that ministerial officers charged by a certain act with a duty may urge the unconstitutionality of the act as a defense to mandamus to compel them to perform the duty." An officer surely can refuse to do an act not imposed upon him as a duty by law. "An unconstitutional act is not a law; it confers no right; it imposes no duty; it affords no protection; it creates no office; it is, in legal contemplation, as operative as though it had never been passed." *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178. Though in 1813, in *Custis v. Lane*, 3 Munf. 579, the eminent Judge Roane said that it was a grave question whether action would lie against an officer acting in obedience to a legislative act found to be in conflict with the Constitution, it is at this day fully settled that such an act is no law, and affords no protection to a ministerial officer for an act doing harm to another. *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178; *Mechem on Pub. Offices*, § 662; *Fisher v. McGirr*, 61 Am. Dec. 381; 23 Am. & Eng. Ency. L. (2d Ed.) 369. "When an act is adjudged to be unconstitutional, it is as if it never had been. Rights cannot be built up under it; contracts which

depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it; and no one can be punished for having refused obedience to it before the decision was made." Cooley, Con. Lim. (7th Ed.) 259. It would seem to be logical and just that an officer has a right to refuse to act under a void statute on the principle of self-preservation. But in so doing he acts at his peril; for, if he is mistaken, he is liable for nonfeasance of duty. "If it is unconstitutional, no one is obliged to obey. If constitutional, it binds every one to obedience. Disobedience on such ground is always at the peril of the party disobeying, whether a private individual or a public officer." *Clark v. Miller*, 54 N. Y. 528. As he cannot be compelled to act, cannot be sued or punished for not acting, it follows that he may refuse to do an act under a void statute. The case of *State v. Butler* (Mo. Sup.) 77 S. W. 560, is a well-considered, elaborate case based on this principle. An indictment was found against a person for attempt to bribe an officer to vote in a certain way in discharging a duty under a city ordinance, and the Supreme Court of Missouri held the ordinance void, and that it imposed no legal duty, and therefore there could be no bribery to do the act. Under this doctrine I would hold that if the duty asked of Staunton went to execute the act, and if the act were void, he could not be compelled to perform it.

It is contended by Staunton that the plaintiffs cannot join in a mandamus; that each individual has a separate right, not joint; and cites 13 Ency. Pl. & Prac. 645, reading: "Those who have a common and joint interest" may join in mandamus, and should join. Without strain, it may be said that all citizens have a common interest in seeing that records in a clerk's office are preserved, and that proper inspection be granted, as it is that the county be supplied with a courthouse. Is this not a matter of common public right, and may not citizens unite to vindicate it? But these plaintiffs united in a demand for inspection; the demand was joint; the refusal to all in common; the wrong done, one single wrong to all alike.

The plaintiffs say that Staunton could not refuse them inspection because he has no such pecuniary interest as will enable him to raise the question of the constitutionality of the act of the Legislature, and this upon the legal principle that courts do not hear "an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it." Cooley Con. Lim. 232; *Lampsasac v. Bell*, 180 U. S. 276, 21 Sup. Ct. 368, 45 L. Ed. 527; 6 Am. & Eng. Ency. L. 1080. The plaintiff say that all Staunton had to do was to keep the records, and allow inspection, and make copies for pay. So Judge Johnson remarked of the assessor in *State v. Buchanan*, 24 W. Va. 375. But it does not

strike me that an officer, as regards his individual interest, is not compelled to spend time and labor to do a thing which the law does not impose upon him as a duty. He has an actual, we may say valuable or pecuniary, interest in resisting. But then many cases, several cited above, allow an officer called on to exercise his office to resist mandamus by pleading the Constitution against the statute. He is actually interested in the matter.

We now encounter a question raised by Staunton's demurrer to the petition and motion to quash the mandamus nisi, which question is, whether the plaintiffs present to the court such interest in the documents and purpose in their inspection as entitles them to inspection and mandamus to secure it. "The remedy by mandamus is restricted to cases where the relator is deprived of some pecuniary right." "A mere abstract right, unattended by any substantial benefit to the relator, will not be enforced by mandamus." 19 Am. & Eng. Ency. L. (2d Ed.) 884, 758. "To maintain his mandamus in such a case [private right] the relator must show some personal or special interest in the matter." *Merrill on Mandamus*, § 228. As to the private individual right of the plaintiffs: The election was over. They do not say that its result was unsatisfactory, or that it had been falsely declared, or that they sought by recount or contest to change it, or that they had been denied their votes, or that the election had already prejudiced them, or that they were harmed. They do not point out how they as individuals had any pecuniary interest, or sought by the document to vindicate such interest. They do not say that they had suffered or would suffer a penny's loss because of the election, or that they had been, or would be, detrimented thereby. Therefore, as individuals, they show no actual interest or loss or damaged right to be vindicated by the inspection or writ. They say they are citizens, voters, and taxpayers of the county; but it is not seen that that fact gives them any individual right over persons, not such, asking inspection of records. Could they sustain an action against Staunton for damages? They could not.

Can the plaintiffs sustain their case upon the theory that they represent and seek to vindicate the public right? They do not sue for themselves and others, but only as themselves—citizens, taxpayers, and voters. Where a clear public right, common to the community at large, is wronged and calls for vindication, some cases hold that it must be done by the public officer; others, that citizens may do so. 13 Ency. Pl. & Prac. 630. *Merrill on Mandamus*, § 230, says: "The great weight of American authority is to the effect that, where relief is sought in a public matter or a matter of public right, the people at large are the real party, and any citizen is entitled to a writ of mandamus to enforce the performance of a public duty." This is likely the true rule, as otherwise often the

public interest would deeply suffer. On this theory this court has entertained mandamus to compel building of a bridge, a courthouse, and to declare the result of an election upon change of county seat. *Doolittle v. County Court*, 28 W. Va. 158; *Brown v. Randolph County*, 45 W. Va. 727, 32 S. E. 165; *State v. County Court*, 47 W. Va. 672, 35 S. E. 959; *Morgan v. Wetzel County*, 53 W. Va. —, 44 S. E. 182. Though not cases of mandamus, as showing that citizens have such interest as enables them to prosecute proper proceedings in public matters, I refer to *Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640; *Hamilton v. County Court*, 38 W. Va. 71, 18 S. E. 8, and citations; *Welch v. County Court*, 29 W. Va. 63, 1 S. E. 837; *Davis v. Brown*, 46 W. Va. 716, 34 S. E. 839.

Conceding the right of citizens, taxpayers, and voters to judicial process to defend or promote the public weal or interest, still what is the public interest in this case that is to be defended, promoted, established? The election over; no recount asked; no objection made to its result; no future public interest to be advanced by interference with it. The petition says the proposition to issue bonds was defeated, and it is not proposed to contest that result. That is ended. The petition proposes to do nothing whatever to affect that election or any right dependent upon or arising from it. That petition sets forth only one purpose in view. It says that in certain precincts frauds and irregularities were committed by the officers of the election, in conducting it and declaring its result; that persons were recorded as voting who did not vote; and that the officers "stuffed" and "padded" the ballot boxes, as would be shown by the pollbooks; and that inspection and copies of them were sought in order to know whether such officers had honestly and lawfully performed their duties, and for the purpose of instituting criminal prosecutions against them if the disclosure of the facts should warrant it. It would be a fishing writ. Will mandamus go for this purpose? I repeat the rule that mandamus is restricted "to cases where the relator is deprived of some pecuniary right." Where is the pecuniary interest in the plaintiffs or the public? "Mandamus is applied to the protection of civil rights." *Merrill on Mandamus*, § 61. No criminal warrant is asked. In *People v. Masonic Benev. Ass'n*, 98 Ill. 635, a mandamus was asked to compel officers of a Masonic society to declare the adoption of an amendment to the constitution of the body. The case holds: "Pecuniary interest must be involved. Mandamus will not be awarded to a party until he shows that he has a clear legal right, which is denied, and that the denial of the right affects his pecuniary interest. It will not be granted to settle a mere fancy question." In *State v. St. Louis Paint Co.*, 21 Mo. App. 526, it is held that every application for this writ must state two essential requisites: First, the legal

duty imposed upon the defendant to do the thing asked; second, a pecuniary interest not to be compensated in damages. "The individuals must have this interest, or the public must have a substantial, actual right in having the act done. What interest had the public in the inspection, or in having copies? I have seen no case holding that mandamus will issue merely and only to glean evidence for criminal prosecution. Equity will not entertain a bill of discovery to do so.

It becomes pertinent in this connection to see how far the right to inspect records goes. It is virtually claimed by the plaintiffs to be unlimited. True, the words of our statute are broad in saying that records shall be open to the inspection of "any persons," and so *State v. Long*, 37 W. Va. 266, 16 S. E. 578, says, using the words of the statute. As Clark had a plain right of inspection for business, it was not necessary to go far in interpretation of the law. Does the statute mean that inspection is for every one for pastime, whim, fancy? Is the right of inspection to be granted under all circumstances? An Alabama statute said: "The records of the judge of probate's office must be free for examination of all persons." It was held that the right was "limited to any person having an interest," and that it did not confer the right on those engaged in negotiating loans on mortgage to make abstracts to all land in the county for future business use. *Randolph v. State* (Ala.) 2 South. 714, 60 Am. Rep. 761. Two former cases there cited held that examination was "not the unqualified right of every citizen, * * * and the individual who claims access to the records * * * can properly be required to show that he has an interest in the documents, and that the inspection is for a legitimate purpose. The qualification of the rule is that no person can demand the right save those who have an interest in the record." The right to make abstracts or copies for speculative purposes in compiling abstracts was denied in *Weber v. Worth*, 43 Mich. 534, 38 Am. Rep. 213. The right is not given "to all indiscriminately, who may, for curiosity or otherwise, desire the same, but is limited to those who have some interest therein." In *Cormack v. Wolcott*, 37 Kan. 391, 15 Pac. 245, the statute read: "All books required to be in their offices shall be open for the examination of any person." The court said that the common law gave inspection to only those having interest in the land or subject of the record. 24 Am. & Eng. Ency. L. (2d Ed.) 182. The court said the inspection must be under the eye of the clerk, and under reasonable rules made by him. "The right claimed by the plaintiff for himself and every other person to inspect the records at will, and make copies, must of equal necessity be governed. If the right exists, it exists for all." The court said that under an unlimited right the office might be clogged, the use of the books engrossed for simply

private ends, and they diverted from the public use designed. Right to make general abstracts of title for business was denied. The Colorado statute said the books "shall be open for the examinations for all persons." The court refused mandamus to allow abstract makers to abstract the entire land titles of the county for sale. "It matters not that relators require no aid from him; for he is charged with the safe-keeping and preservation of the records, and is responsible for their truthfulness and freedom from mutilation. A single stroke of the pen, the erasure or addition of a single word, may change the character of a consequence, or destroy the most valuable property right. The clerk is unfaithful to his trust if he allow one of the record books to remain for an instant in the hand of a stranger out of his sight." Even where a statute gave a stockholder of a corporation right to examine its records, in mandamus it was required to plead and prove some property right involved, that some controversy existed, or that some specific and valuable interest was in question, to settle which an inspection of the documents was necessary. *Ellsworth v. Dorwart* (Iowa) 63 N. W. 588, 58 Am. St. Rep. 427. "Any person who has an existing interest in information to be obtained from public records in any county office has a right to make an examination to the extent of his interest," under an act saying that records "shall be open for the examination for any person." *Boylan v. Warren* (Kan.) 18 Pac. 174, 7 Am. St. Rep. 551. See 60 Am. Rep. 764, full note; 24 Am. & Eng. Ency. L. (2d Ed.) 183. Under the law, common and statute, I think we may say that when it comes to the test, under strict law, when mandamus is asked to compel inspection, the plaintiff must have some legal right to have inspection for legitimate use. Mechen on Public Officers so regards the authorities. In section 687 we read: "It is the duty of the clerk to permit persons having a present or prospective interest in the particular public records in his office to inspect and copy the same at reasonable times and under reasonable regulations. The performance of this duty may be enforced by mandamus." The case of *Barber v. West Jersey*, 53 N. J. Eq. 158, 32 Atl. 222, holds that "every person has right of access to the public records of the county clerk's office, without payment of fees, to examine any title in which he is interested, subject to reasonable rules and regulations." It held that an abstracting company had right of inspection to examine title to a "particular piece of property, but not to occupy the office to make a general abstract."

I think that the plaintiffs as citizens and taxpayers had right to inspection, it not appearing but that they desired a recount to change the result. I think people have right to inspect public papers, unless it appears that their object is an improper one, for whim or scandal, as the publication of inde-

cent evidence in a divorce suit, tending to degrade the parties and injure public morals or any other improper or useless purpose. But when it does so appear, then there is no right of inspection. How far a clerk may inquire into the purpose we need not say. I have said so much on this point because *State v. Long*, 37 W. Va. 266, 16 S. E. 578, is relied upon as giving unlimited right of inspection, and because that case does not enter far into the subject, and I have thought the decisions here given may be of public use. What interest have the plaintiffs on which to predicate the demand? What object which the public interest law can realize to subserve? "The judicial records of the state should always be accessible to the people for all proper purposes, under reasonable restrictions as to the time and mode of examining the same; but no one has a right to examine or obtain copies from mere curiosity, or for the purpose of creating public scandal." In *re Caswell* (R. I.) 29 Atl. 259, 27 L. R. A. 82, 49 Am. St. Rep. 814. I am not for a moment to be taken to intimate the slightest impeachment of the honest public motive of the worthy men who seek this mandamus. I do not doubt their motive, but I am stating legal principles as I see them. And it is a fixed rule that if there be other remedy to accomplish the end sought, mandamus does not lie. The only end stated is to gather evidence for criminal prosecution. The grand jury is the medium of that end. It can send for persons and papers, and bring offenders to justice. Citizens cannot meddle in prosecutions save in the appointed modes, by becoming prosecutors or informants before grand juries, or by recourse to criminal process. We do not think they can use mandamus for such purpose.

Judgment affirmed.

DENT, J. (dissenting). This is an application of citizens, taxpayers, and voters of Kanawha county, who have been excluded from the right of inspecting the pollbooks of an election lately held therein, and refused copies thereof by the clerk of the county court, for a mandamus against such clerk to compel him to permit such inspection and make such copies.

The majority of the court, in determining the interests and rights of the applicants and the duties of the respondent, to some extent have chosen to follow the ancient English common-law rule, emanating from a throne to its subjects, instead of the modern American republican-democratic doctrine, applicable to a government "of the people, by the people, and for the people." 24 Am. & Eng. Enc. Law (2d Ed.) 184, 183, note 5; *State v. Long*, 37 W. Va. 266, 16 S. E. 578; *State v. King*, 154 Ind. 621, 57 N. E. 535. By the former imperialistic rule, the keeper of the rolls or records was a deputy of the King, from whom all power was derived, and in allegiance to whom all rights were held, who

was only permitted to allow such royal subjects to inspect the records who might have or show a special pecuniary interest therein, all others being excluded therefrom, except where public interests were involved; while the modern, popular doctrine is that the clerk, the custodian of the records, is the servant of the people, chosen by them as their trustee to have charge of such records in their behalf, and to hold them open for their inspection at reasonable times, under reasonable regulations, without let, interference, or hindrance on the part of such clerk, or inquiry as to the purpose or object of such inspection. Every citizen, taxpayer, and voter has the presumptive right of such inspection as adhering to his sovereignty, which the clerk cannot deny him unless he can show that the object of the inspection is for illegitimate, improper, or scandalous purposes. This is especially true in the strongest sense as to pollbooks or other election records, in which all the people have a common interest, as a repository of the sovereign exercise of their right to select their servants and determine the extent of their powers, including taxation for public purposes. 24 Am. & Eng. Enc. Law (2d Ed.) 170. The most open publicity is required by the public good as to such records, to prevent crime, detect crime, and punish crime against the purity of the ballot box, the sovereignty of the people, and the rights of citizenship. Every qualified voter has a two-fold interest therein: First, an interest in common with the people for the preservation of the purity of the ballot box, the object of which is the continuity of the government and the preservation and perpetuation of its benefits; second, a personal interest in the right to vote, to have such vote recorded and counted, and to preserve it from being vitiated or destroyed by fraud. As incident thereto, he has the right to inspect the pollbooks to see that his vote has been recorded, and that it has not been invalidated by the insertion of fictitious names as a cover for fictitious ballots. It is a more heinous wrong to deprive a voter of his vote by fraud than it is by force. In the latter case he can have a speedy remedy by mandamus under the election law, or by an action for damages by suit (10 Am. & Eng. Enc. Law [2d Ed.] 678); while in the former case, he is remediless unless he is accorded the right of inspecting the pollbooks, and then he may be able to detect the fraud by which he has been cheated. For this reason, although he has no pecuniary interest involved, yet because the right to vote is so important to himself and the public, as indirectly affecting his pecuniary interest, that he not only should be accorded the right of inspection, but also the right to have copies of the pollbooks, and to have the privilege of enforcing such rights by mandamus. 13 En. Plead. & Pract. 632; Clay v. Ballard, 87 Va. 787, 13 S. E. 262; Wise v. Bigger, Clerk, etc., 79 Va.

269. Section 22, c. 147, Code 1899, provides that: "If a clerk of a court or other public officer, fraudulently make a false entry, or erase, alter, secrete or destroy any record in his keeping and belonging to his office, he shall be confined in jail not more than one year and fined not exceeding one thousand dollars." The concealment from public inspection, while not technically so, comes very near being an offense under this section, and should be made so by law. The word "secrete," used here, is undoubtedly broad enough to cover the willful concealment of public records from persons having the right to inspect the same, although it would not cover the overt act of refusal where the clerk is acting from pure motives for justifiable ends. The sixth clause of section 74, c. 3, Code 1899, provides that if any person "erase, deface, or change in any manner, any election record or any ballot, poll book, tally sheet or certificate of election, deposited with either of the clerks of the county or circuit courts, or conspire with another to do any of said acts, or induce or attempt to induce, any other person to do any of said acts, whether or not said acts or any of them, be committed or attempted to be committed, shall be deemed guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than two nor more than five years." A comparison of these two sections shows how much more important and necessary to the public weal the Legislature regarded the records of an election, than it did the ordinary records kept in the clerk's office. In one case the offense is a misdemeanor, with forfeiture of office; the other is a felony, carrying with it not only the forfeiture of office, but the forfeiture of citizenship. The Legislature, in making this great difference between these two classes of records, undoubtedly acted in obedience to the will of the people. As the records are more sacred, so should the right of inspection by the people and the voters be held the more sacred. Under section 68, c. 3, Code 1899, the clerk of the county court is made the custodian of the pollbooks. They thereby become public records, subject to the same right of inspection to those interested as other public records in his office. The clerk himself thereby became a part of the election machinery of the state, subject to the same penalties and the same remedies as all other election officers. Section 89, c. 3, Code 1899, provides that "any officer or person upon whom any duty is devolved by this chapter, may be compelled to perform the same by writ of mandamus." By this chapter the duty devolved upon the clerk to preserve the pollbooks for the benefit of the public, which necessarily includes the right of inspection. They are still election records, in which the public interest continues unabated and undiminished, although in the hands of the clerk, and are subject to pro-

tection and inspection under the penalties and remedies of the election law. By this same section it is provided that this court may compel any officer mentioned therein to do and perform legally any duty required of him by mandamus.

So it seems to be perfectly clear that the applicants, without regard to any direct, pecuniary interest, had the right to enforce the publicity of the pollbooks, both in the interest of themselves as voters, and in common with the public generally. It seems to be conceded in the opinion of the majority that the right of inspection exists and that mandamus lies, but, as the applicants have stated the purpose for which they want inspection, and that is to ascertain whether the pollbooks have been feloniously tampered with and the names of fictitious voters placed thereon, that the mandamus should be refused because such writ cannot be used in ascertaining evidence to aid in criminal prosecutions. No authority is cited for such proposition, but it is alleged in support thereof that a bill of discovery will not lie to compel a defendant to incriminate or subject himself to criminal prosecution. There is no analogy between the two proceedings. 6 En. Plead. & Pract. 742. Section 5, art. 3, of the Constitution, provides that no person shall in any criminal case be compelled to be a witness against himself. There is no provision in the Constitution or in the law, statutory or common, that provides that a public officer may refuse the inspection of public records because he or some one else may be thereby subjected to prosecution or malfeasance in office or for the felonious defacement of public records. Nor is there any law that permits the clerk to secrete or conceal public records from public inspection because such inspection may lead to the prosecution of some person or officer for a public crime. Such laws would be contrary to public policy, injurious to public morals, and subversive of the public weal. The very object of publicity is to prevent the perpetration of crime and the making of criminals. Mandamus lies in support of criminal prosecutions. 13 En. Plead. & Pract. 593. A bill in equity never does. Not only has the clerk no legal right to shield crime from the gaze of the public, but, if the public records in his control show the commission of felonies, it is his duty to aid and assist in bringing the perpetrators to the bar of justice. This is a duty he owes to the public by reason of his agency and trusteeship in its service. If guilty himself, he is not bound to disclose it, but such guilt gives him no legal excuse to deny access to the public records. If a clerk deface, or knows that the record of a deed to property owned by another has been mutilated and defaced, he cannot deny to the person injured the right to inspect such record, and then resist a mandamus because the party injured says he wants to inspect the record for the purpose of instituting crim-

inal proceedings to punish the guilty party. Nor can he interpose such objection to a mandamus for inspection of the election records; and the courts, instead of entertaining such objection, should not deny any legal remedy to citizens and voters who are honestly endeavoring to preserve the integrity of the election laws, because, forsooth, it may eventuate in a criminal prosecution; nor does an appeal to a grand jury afford a remedy, for the reason that they have no definite information on which to act. The information applicants want, and are bound to have, before they can call on the grand jury for investigation in their behalf, and which they are justly entitled to have, is withheld from them by the illegal and arbitrary action of the clerk. Such pretenses as these, which stand in the way of the zealous voter endeavoring to enforce the election law in the interest of pure elections, for his own and the public good, will hardly meet with the moral approval of the public conscience, or excite a responsive thrill in the great, honest, trustful heart of the people, full of truth and justice, and always made glad with pride inexpressible by the immovable integrity and unsullied uprightness of their chosen servants. Nor can it be believed that Mr. Staunton, who has so long been before the public and enjoyed the esteem of his fellow citizens, will derive any satisfaction from pleas of this character interposed for his protection from a mandamus far less harmful in its nature. He has certainly not been guilty of any crime himself that he is endeavoring to conceal from the people, nor does he want to place himself in the position of preventing investigation into crimes committed by others. I cannot help but think that the denial of the applicants' rights, and his defense, in this case, is wholly actuated by misconception of his legal duties, and probably wounded pride. Public office is a public trust, to be exercised wholly in the public interest. The officer who forgets this, and is controlled in the discharge of his public duties by base and partisan ends, in disregard of patriotic love for the whole people, though he may temporarily triumph and reach success in all his undertakings, will live to realize the sober truth that "corruption wins not more than honesty," and to feel the full force of those most remorseful words of tongue or pen, uttered by the great, fallen politician, Cardinal Wolsey: "Oh, Cromwell, Cromwell, had I but served my God with half the zeal I served my King, He would not in mine age, have left me naked to mine enemies!" All that the applicants should be required to show is that they are citizens, taxpayers, and voters, and as such have an interest in the records of an election in which they participated, and have demanded and been refused the right to inspect the pollbooks of such election deposited with the clerk; and on such showing a mandamus should issue as a matter of

course, unless the clerk shows that the purposes for which such inspection is desired are unlawful, scandalous, or for some other reason improper. Neither the inspection of such pollbooks for publication, nor for the institution of a civil suit, or prosecution for crime, is an unlawful, improper, or scandalous purpose, for they are all in the interest of and promote the public good.

The sentiment held and being fostered by politicians, through a corruptible vote, that crime against the election laws is no crime, should be firmly met and vigorously repelled before it becomes a floodtide, destructive of popular government. Courts of justice, at least, should give no countenance to such a false and dangerous sentiment. Sound public policy, in the interest of public morals, for the promotion of the public good and the vindication of the sovereign rights of the people, enjoyed in common by citizens, taxpayers, and voters, demands the reversal of the judgment and the award of a mandamus. Hence my dissent.

MCWHORTER, P. J., concurs in this opinion.

(55 W. Va. 167)

CLAYTOR v. PIERSON et al.

(Supreme Court of Appeals of West Virginia.
March 1, 1904.)

GIFT CAUSA MORTIS—EVIDENCE.

1. W. D. C., being ill, and in the expectation of death, gave and delivered to J. E. C., his brother, a paper in the words and figures following, to wit: "Sewell, W. Va., Aug. 26th, 1899. \$1100.00. Eleven hundred dollars. Received of William Claytor for safe keeping. L. C. Claytor;" William Claytor mentioned in the receipt being said W. D. C. At the time of the gift and delivery of the receipt the donor said to donee that he had a present for him (donee); that donor took the receipt from his trunk, and said to donee, "Here, I will give you this; here is a note I have for \$1,100. I will make you a present of this; take it, and keep it, and go and draw the money on it;" that donor further told donee not to let anybody else have it—his (donor's) wife, or anybody else; that he did not want his wife to have it; that he was going to the hospital, and the way the disease worked on him he didn't think that he would get well; and further said, "I will give it [the receipt] to you before I go, so you will be sure to have it;" that donor was then the owner of said money, which was at the time in the care and keeping of L. C. C.; that donor was on that day taken to the hospital, where he died one month thereafter, as a result of his said illness; that two days before his death, at the hospital, donor asked another brother, did Ed (meaning donee) have the note (meaning the receipt) which he gave him, and, being told that Ed had the receipt, donor then said to tell him (Ed) to be sure and keep it, to go and get the money on it; that donee kept possession of said receipt continuously until after the death of donor; and that donor died without making any change in relation to the gift, and leaving donee surviving him. *Held*, that the acts and declarations of the donor constitute a valid gift of said money causa mortis.

(Syllabus by the Court.)

Error to Circuit Court, Fayette County; J. M. McWhorter, Judge.

Action by J. E. Claytor against E. G. Pierson and others. Judgment for defendants, and plaintiff brings error. Reversed.

C. W. Osenton and W. L. Ashby, for plaintiff in error. Dillon & Nuckalls, for defendants in error.

MILLER, J. J. E. Claytor appeals from a decree of the circuit court of Fayette county entered on the 6th day of March, 1902, in a chancery cause wherein he was plaintiff, and E. G. Pierson, in his own right, and as administrator of W. D. Claytor, deceased, and L. C. Claytor, were defendants.

The bill alleges that on the 26th day of August, 1899, W. D. Claytor, who was sometimes called William Claytor, deposited and left \$1,100 belonging to him with defendant L. C. Claytor for safe-keeping; that L. C. Claytor thereafter executed and delivered to W. O. Claytor a receipt therefor, in the words and figures following, to wit: "Sewell, W. Va., Aug. 26th, 1899. \$1100.00. Eleven hundred dollars. Received of William Claytor for safe keeping. L. C. Claytor." That on the — day of —, 1900, said W. D. Claytor was taken suddenly and violently ill, and continued to grow worse until the 19th day of November, 1900, when he died; and that during his said last sickness, and in expectation of death, he gave and delivered to the plaintiff said sum of \$1,100 then deposited for safe-keeping with said L. C. Claytor as aforesaid, and then and there gave and delivered to the plaintiff said receipt for said money. That on the 22d day of November, 1900, the defendant E. G. Pierson, without authority of law therefor, caused himself to be appointed administrator of the estate of said W. D. Claytor, and qualified as such; that on the — day of —, 1900, said E. G. Pierson asked plaintiff to allow him to inspect said receipt for said \$1,100, which plaintiff did; and that thereupon said Pierson, in violation of plaintiff's rights, kept said receipt and refused to return it to plaintiff, and that plaintiff was informed that Pierson had collected from L. C. Claytor \$800 on said receipt. Plaintiff then prays that L. C. Claytor be required to answer and disclose what disposition, if any, he has made of said \$1,100; that said Pierson be also required to answer and discover what disposition, if any, he has made of said receipt; that said \$1,100 be decreed to plaintiff; and for general relief.

Defendant Pierson answered the bill, and avers in his answer that, at the instance of Annie Claytor, widow of W. D. Claytor, he was appointed administrator of said decedent; that, as such administrator, he took into his possession the said receipt for said \$1,100, with the other personal property of the estate of the decedent; and that he found said receipt in the possession of said J. E.

Claytor, who turned it over to respondent without objection. Respondent denies the gift of said receipt, and of the money therein mentioned by said W. D. Claytor to plaintiff as alleged in the bill, but admits that he had collected \$865 from said L. O. Claytor upon said receipt, which receipt he files with his answer.

Eliminating the incompetent testimony in the cause, we think the legal evidence therein clearly and conclusively establishes the following facts: That the plaintiff and W. D. Claytor, the decedent, were brothers; that on the 26th day of August, 1899, said W. D. Claytor delivered to his cousin, L. C. Claytor, said \$1,100 for safe-keeping, and took from him the receipt set out in the bill, which was then signed by said L. O. Claytor and delivered to W. D. Claytor; that in the latter part of October, 1900, W. D. Claytor became ill; that on the 19th day of that month he was removed from his home to the hospital at Paint Creek, in said county, where he died on the 19th day of November, 1900, not having recovered from his illness above mentioned. On the morning of the 19th day of October, 1900, while being prepared for his removal from his home to the hospital, he was, with the assistance of his two brothers, and at his request, taken to his trunk in his house, from which he took the said receipt, and gave and delivered it to his brother, the plaintiff. The evidence touching this transaction, as given by Richard Claytor, is substantially as follows: "He told Ed [meaning the plaintiff, J. E. Claytor] that he had a present for him; and Ed told him all right, and asked him what it was; and he would not say, but got up, and witness and John Claytor assisted him to his trunk." After stating about the finding of the receipt in the trunk by said W. D. Claytor, witness states that W. D. Claytor further said: "Here, I will give you this; here is a note I have for \$1,100; I will make you a present of this;" and Ed told him, "All right." Witness also says that, after the receipt was handed to J. E. Claytor, he (J. E. Claytor) handed it to witness, who read it to plaintiff, and then plaintiff put it into his pocket. Witness states that W. D. Claytor also said to plaintiff "to take it [the receipt] and keep it, and go and draw the money on it; that it was his [plaintiff's]; he made him a present of it; and Ed told him, 'All right.' He [decedent] told him [plaintiff] not to let anybody else have it—his wife or anybody else. * * * He further told him [plaintiff], 'Don't let my wife get hold of it, because she hasn't treated me right; I don't want her to have it.' He said he was going to the hospital, and the way the disease worked on him he didn't think that he would get well; and, 'I will give it [the receipt] to you before I go so you will be sure to have it.'" This same witness says that W. D. Claytor died on Monday; that he was down to see him at the hospital

on the preceding Saturday; that "he [W. D. Claytor] asked me, that Saturday I was there, did Ed have the note which he gave him? and I told him 'Yes'; and he told me to tell him [Ed] to be sure and keep it, and 'don't let Annie or anybody else have it'; to go and get the money on it; and I told him, 'All right.'" The witness says that, at that time, decedent told him that he was not getting any better; and "I asked him if he thought he would get well; and he said, 'No'; and he said that the Lord had forgiven him of his sins; and he didn't think he would be here but a little while; and to tell Ed [the plaintiff] to keep what he gave him." John Claytor, another brother of deceased, testifies that he was present at the time the receipt was given by W. D. Claytor to J. E. Claytor. He corroborates Richard Claytor about the receipt being taken out of the trunk and given to the plaintiff by decedent, who at the time said to plaintiff: "Here it is; you can have this. * * * This is yours; you can get the money on it any time you want it." It is also shown by the evidence that the receipt was seen in the possession of plaintiff about two weeks before the death of the donor; that plaintiff then claimed it as his own; and that it remained in his possession up to the time when it was procured from him by Pierson. The evidence further shows that Annie, the wife of decedent, was a woman of questionable character, and was convicted upon an indictment on the charge of causing the death of her husband, W. D. Claytor, by poison, but that on a second trial she was acquitted of the charge.

The court, at the final hearing of the cause, dismissed the plaintiff's bill at his cost, and of this action the appellant complains, and says that the decree of dismissal was and is erroneous.

The principal question presented for our determination is whether or not the evidence clearly and conclusively establishes all the essential attributes or constituent elements of a donatio mortis causa as defined by the law and established by the course of adjudication. In *Dickeschied v. Bank*, 28 W. Va. 340, this court defined and established the essential elements of a valid gift causa mortis, and held that the donor should make the gift in contemplation of death, either in his last illness or while he is in other imminent peril; that his death should result from such illness or peril; that the donor must part with all dominion over the subject of the gift, so that no further act by him or the personal representative will be necessary to vest the title perfectly in the donee, in order that it may belong to him presently, as his own property, in case the owner should die of his present illness, or from the impending peril, without making any change in relation to the gift, and leaving the donee surviving him. Blackstone says that a donatio mortis causa takes place "when a person in his last sickness, ap-

prehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods * * * to keep in case of his decease." In *Dickeschied v. Bank*, supra, it is also held "that delivery at the time of making the gift is essential to a perfect gift causa mortis. It is not the possession of the donee, but the delivery to him by the donor, that is material; and that where a party claims title to personal property as a gift, either inter vivos or causa mortis, the burden of proof, in whatever form the issue may be presented, rests upon him to establish the validity of the gift, of which the delivery of possession is the strongest and most material. * * * The mere possession of the chattel, unaccompanied by proof of its delivery by the donor to the donee, is insufficient to establish a gift either inter vivos or causa mortis, for every person claiming title by gift necessarily admits that up to the time when the gift was alleged to have been made the chattel was the property of the donor. And as the law does not presume that the owner has voluntarily parted with his property without any valuable consideration, the gift itself, and the delivery thereof, must be proved by the party claiming under it. * * * The donor must not only give, but he must deliver; and that delivery must be actual, when the subject of the gift is capable of an actual delivery of the thing itself; or it must be the delivery of the means of getting the possession and enjoyment of the thing; and this delivery must be at the time of the gift." 14 Am. & Eng. Enc. Law, 1029, says: "It is well settled that choses in action may be the subject of valid gifts. Thus, gifts of promissory notes, bonds, mortgages, savings banks books, certificates of deposit, etc., have been upheld." The words "goods and chattels," in section 1 of chapter 71 of our Code of 1899, include money and every other kind of personal property which may be the subject of a gift inter vivos or causa mortis. *Dickeschied v. Bank*, 28 W. Va. 368; 14 Am. & Eng. Enc. Law, 1028.

No absolute rule can be laid down as to what will constitute a sufficient delivery to support a gift in all cases, for in each case the character of the requisite to sustain the transaction as a gift will depend very largely upon the nature of the subject-matter of the gift and the situation and circumstances of the parties. Am. & Eng. Enc. Law, supra, 1019. It is well established that where the chose in action is a bill, promissory note, or other written instrument payable to order, no indorsement of the instrument is necessary. 14 Am. & Eng. Enc. Law, 1023, and cases cited. Counsel for appellee cites 3 Minor, 91. The entire text, of which a part is given in the brief, is as follows: "The delivery under the statute, as well as at common law, must be, as in every other case, according to the nature of the thing—always being an actual delivery, so far as the subject is capable of it, and not momentary nor colorable, but

bona fide, remaining for a time with the donee or his assigns. If the thing be not capable of actual delivery in the literal sense, there must be some act equivalent to it. The donor must part, not only with the possession, but with the dominion, of the property. If the thing given be a chose in action, or an interest in a chattel by way of remainder, the law requires an assignment, or some equivalent instrument in writing, and the transfer must be actually executed. His intention to execute it not being perfected it does not amount to a gift." *Mayo's Ex'r v. Carrington's Ex'r*, 19 Grat. 74, cited by Mr. Minor, holds, "as the result of all the authorities, that a voluntary gift valid in law or equity, may be made of any property, real or personal, legal or equitable, in possession, reversion, or remainder, vested or contingent, and including choses in action, unless they be of such a nature as that an assignment of them would be a violation of the law against maintenance and champerty; that such a gift, to be valid, must be complete, and not executory; that what is necessary to the completion of the gift depends on the nature of the subject and the circumstances of the case; and that it is always sufficient, though not always necessary, to the completion of a gift, at least between the parties, that the donor do everything in his power, or which the nature of the case will admit of, to make it complete."

The above seems to be a correct statement of the legal principle involved here. If any other requirement as to delivery be essential in cases where the owner does not have, and cannot at the time have, actual possession of the specific thing which is the subject-matter of the gift, or in instances where the donor is physically or otherwise incapable of making an actual transfer or delivery, there no valid gift could be made by him.

In the case of *Elam v. Keen*, 4 Leigh, 333, 26 Am. Dec. 322, the owner of a bond which was in suit, and for which the owner held an attorney's receipt, told the plaintiff that he might have the bond, and delivered him the attorney's receipt for it, instead of delivering the bond itself, which was then filed in the suit in court; no consideration was given by the plaintiff for the bond. Held, this was a valid gift of the bond to the plaintiff, and he is entitled to recover the money collected upon it. *Brooke, J.*, in his opinion, says: "The gift in the case before us was proved to have been made by Mrs. Keen to the appellee, and the attorney's receipt for the bond, the subject of the gift then in suit, was delivered to the donee. This was as effectual as the delivery of the bond itself. The attorney was bound to respect his receipt; he could not have refused to pay the money collected on the bond, or to deliver the bond itself, if demanded, to the donee."

In the case of *Ward v. Turner* [2 Ves. Sr.

431, 442], the doctrine is very fully explained by Lord Hardwicke. That was the case of a donation *causa mortis* of receipts for South Sea stock, which was held invalid. His first objection was that there was but one witness, whereas the civil law, from which the doctrine was taken, required five; but this he did not rely on. In conclusion, he said that the gift there was merely legatory, and amounted to a nuncupative will, and contrary to the statute of frauds. He seems to admit the authority of *Jones v. Selby* [Finch, Prec. in Ch. 300], where a tally for £500 was given by the delivery of the key of a trunk in which it was found, though he intimates that Lord Cowper went in that case on the ground of a satisfaction or ademption. This doctrine was examined by this court in *Ewing v. Ewing* [2 Leigh, 337], where it is said that "there is no distinction between gifts *causa mortis* and gifts *inter vivos* [like that now before us], except that in the former case the gift does not take effect until the death of the donor, in the latter it takes effect immediately." Carr, J., says: "The bond itself could not be delivered; it was in court, in the custody of the law. The receipt was its representative. We must presume it described the bond accurately, and stated that it was received to be put in suit; and that, when collected, the attorney would account for it. As in the case of the key, the delivery of this receipt 'was the true and effectual way of obtaining the use of the subject.' Speaking from my own experience, I should say an attorney requires no better order for the payment of money he has collected on a bond than the receipt he has given for the bond; when he takes this in, with a receipt upon it for the money, he feels himself safe. I think, therefore, the circuit court did not err in refusing to give the instruction to the jury asked by the appellant."

In *Thomas' Adm'r v. Lewis*, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848, cited by appellee, it is, among other things, held that: "A valid gift *causa mortis*, including the valuables in the depository, is effected where a man, sick in bed, on the day of his death sends for securities and the keys to the depository containing other securities all belonging to him, and with the remark, 'I am a sick man, and don't know what may happen to me,' picks up the securities and hands them to the donee, saying, 'I give you these,' and taking the keys describes in a general way the contents of the depository, and, handing the keys to the donee, says, 'These keys I now give you' are where the valuable papers are; 'whatever you find you can have—it is yours,' and then directs the donee to place the securities and keys in her trunk and lock it, which the donee does." But it is also held therein that delivery of possession of a savings bank pass-book in consummation of a gift *causa mortis* is not sufficient to transfer the bank deposit.

We are unable to determine upon what fact or legal principle involved in that case the decision as to the passbook is based. Many cases hold the contrary. Page v. Lewis, 18 L. R. A. 171, note; 14 Am. & Eng. Enc. Law, 1029, and cases there cited.

In *Elam v. Keen*, 4 Leigh, 335, 26 Am. Dec. 822, Carr, J., said: "There are many things of which actual manual tradition cannot be made, either from their nature or their situation at the time. It is not the intention of the law to take from the owner the power of giving these; it merely requires that he shall do what, under the circumstances, will in reason be considered equivalent to an actual delivery."

In *Stephenson's Adm'r v. King*, 81 Ky. 425, 50 Am. Rep. 173, it is held that the delivery by the decedent of the key of her desk, and the actual delivery to her mother of the letter of King, containing a full description of the notes and bonds held by him as agent of the decedent, is a sufficient delivery to make the gift *causa mortis* complete, and that the arbitrary rule, requiring an assignment and delivery of the identical thing in order to make such a gift valid, has been abandoned.

The facts in the case show all the elements of a valid gift *causa mortis*. The gift was made by the donor in the peril and contemplation of death; it was of personal property, such as, under the law, may be the subject of a gift *causa mortis*; possession of the receipt by the donee was taken at the time of the gift; and the donor died of his then illness in a month thereafter, without making any change in relation to the gift. It was accepted by the donee at the time it was made, and it became absolute at the donor's death. Donor did not want his wife to have his money for the reason stated by him, and, doubtless, for the other reasons disclosed by the record. He did want his brother, J. E. Claytor, to have it, because, as he said, "he always thought more of him than the rest." Therefore, applying the law to the facts, we hold that the plaintiff was and is entitled to the money specified in said receipt, at and from the time of W. D. Claytor's death.

The evidence proves that, about two weeks before the death of W. D. Claytor, the plaintiff showed said receipt to defendant L. C. Claytor; that after Pierson obtained possession of the receipt, and before L. C. Claytor paid him any money thereon, the plaintiff told said L. C. Claytor not to pay the money therein mentioned to Pierson; that L. C. Claytor afterwards, on the 3d day of December, 1900, paid \$865 of the money mentioned in the receipt to Pierson; that on the 4th day of December, 1900, Pierson gave his check on the Fayetteville National Bank, for \$600, payable to Annie Claytor, and signed it by the name and designation of "E. G. Pierson, Administrator," which check was indorsed by her, and delivered to C. W. Dil-

lon, who, in turn, indorsed the same, deposited it in the bank, and received credit for it on the same day. There is some conflict in the evidence as to whether or not Pierson was notified by the plaintiff not to pay out the money before the said check was delivered to Annie Claytor, but it does sufficiently appear that he had knowledge of the claim of plaintiff to the money before and at the time he collected it from L. C. Claytor.

The plaintiff was entitled to collect the money from defendant L. C. Claytor immediately upon the death of W. D. Claytor. L. C. Claytor, having notice of the claim of plaintiff to the money, did not relieve himself of liability to the plaintiff by his said payment to Pierson; and Pierson, also having notice of plaintiff's claim, paid the \$600 to Annie Claytor at his own risk, and subject to plaintiff's right thereto. Therefore defendant L. C. Claytor is liable to plaintiff for the whole sum of \$1,100, and Pierson is likewise liable for said sum of \$865, with interest thereon from the time he received the same; but, as between said defendants, Pierson is primarily liable for said last-mentioned sum. Upon the evidence, the circuit court should have made and entered its decree in the cause, requiring Pierson and L. C. Claytor to pay the plaintiff said \$865, with interest thereon from the 3d day of December, 1900, and further requiring said L. C. Claytor to pay to the plaintiff \$225, with interest thereon from the 19th day of November, 1900, being the balance of said \$1,100.

For the reasons stated, the decree of the circuit court must be reversed and held for naught, and a decree entered by this court as above indicated.

(68 S. C. 140)

STATE v. ELMORE

(Supreme Court of South Carolina. March 4, 1904.)

PAROL EVIDENCE—LANDLORD'S LIENS—ASSIGNMENT—CONSTITUTIONAL LAW.

1. After an account has been offered in evidence as between defendant and J. Bros., parol evidence is inadmissible to show that the items sold were in fact sold by J.

2. Code of Laws 1902, § 3057, relating to landlord's liens for rents and advances, is constitutional.

3. Code of Laws 1902, § 3057, gives a lien to landlords for advances made during the year. *Held* that, where a landlord assigns his rent to some other person, such assignment does not make such assignee a landlord, so as to entitle him to a lien.

Appeal from General Sessions Circuit Court of Spartanburg County; Buchanan, Judge.

Alfred Elmore was convicted of violation of the act relating to landlords and tenants, where rent is secured by levy on crops, and appeals. Reversed.

The contract on which the indictment was based is as follows:

"State of South Carolina, County of Spartanburg. This indenture, made this 7th day of October, A. D. 1901, between L. L. McLemore and Alfred Elmore, witnesseth that Alfred Elmore is to labor on the land of L. L. McLemore for the year 1902, and to cultivate all of the land on the John Johnson plantation, from the new fence to the line, except three acres on the northwest of plantation above the road. Said land situate in said county and state, and bounded by lands of L. P. Walker, Jos. Walker, and others, and John N. Cudd, containing about ninety acres. And it is distinctly agreed that the entire crop belongs to L. L. McLemore, that they are to have possession and control of the same, and that for the labor to be done by Alfred Elmore he is to pay said Alfred Elmore all the crops grown on said plantation, after paying themselves, from said laborer's aforesaid wages, all advancements made or debts due to the said L. L. McLemore, and four bales of the first lint cotton, weighing five hundred pounds each, and the seed out of the same; and the said Alfred Elmore further agrees that he will take good care of the premises, will keep all persons from trespassing thereon, and the houses occupied by him in good repair; and said Alfred Elmore agrees to keep all ditches, terraces, branches, or creeks, surrounded by or bordering on land worked by him, open and in good, clean condition, and that no animal shall be pastured on said land, except at such times as L. L. McLemore, except four head of cattle and two mules, shall give written consent thereto. Only timber is to be used for firewood, except by express permission of L. L. McLemore. If the crop is not cultivated and gathered promptly, L. L. McLemore can hire help to cultivate and gather the same at the expense of Alfred Elmore. L. L. McLemore is to be at no other expense, except expressly stipulated herein; and the said Alfred Elmore is to have charge of the shop and tools that are on said place, to use as he sees fit, and all plows and tools on said place. The covenants herein shall be binding on the heirs, executors, or administrators of the parties herein. Witness the hands and seals of the parties aforesaid the day and year above written.

his

"Alfred X Elmore. [L. S.]

mark.

"In presence of C. P. Sims.

his

"L. L. X McLemore. [L. S.]

mark.

"For value received I hereby assign the within contract to J. F. Johnson.

"L. L. McLemore.

"Witness: P. S. Corn, H. V. Johnson."

Ralph K. Carson and John S. Reynolds, for appellant. T. S. Sease, Sol., for the State.

§ 2. See Landlord and Tenant, vol. 22, Cent. Dig. § 987.

POPE, J. The defendant was tried before the court of general sessions for Spartanburg county, in this state. The jury found him guilty, and he was duly sentenced. Thereafter he appealed from such judgment.

The following statement embodies the pertinent facts underlying the contention:

On the 7th day of October, 1901, the defendant leased from one L. L. McLemore 80 acres of land, in the county of Spartanburg, in this state, for the year 1902, as farming lands. The agreement was under seal and signed by both parties. The rent was fixed at four bales of cotton, each bale weighing 500 pounds, and the seed from said 2,000 pounds of cotton, with a lien upon the entire crop to secure payment of rent and any advances made by said landlord. After said lease had been made, the landlord, L. L. McLemore, assigned said contract to one J. F. Johnson. On the 27th March, 1902, the said defendant, wishing guano and some supplies, executed a note and mortgage of one horse and top buggy to the firm of Johnson Bros., as merchants, of which firm J. F. Johnson was one of the partners, for the sum of \$110. The defendant's account with said firm was allowed to reach the sum of \$175.15. On August 2, 1902, this account was transferred on the books of Johnson Bros. to J. F. Johnson. Some time in the month of October, 1902, the defendant paid to J. F. Johnson the entire rent. During the same month, October of 1902, the defendant paid off his note and mortgage to the firm of Johnson Bros., and received from said firm said note and mortgage fully satisfied by said firm of Johnson Bros. But there remained unpaid the sum of \$85.15, which the defendant promised to pay as soon as he picked out the balance of his cotton crop. Three days after such promise, J. F. Johnson went upon the leased premises, and found that the defendant had removed all of his cotton from said premises. The defendant was indicted for a violation of section 3057, relating to landlords and tenants, whereby rent is secured by a lien on all crops grown upon the rented lands and supplies furnished by landlord to tenant. While his trial was in progress, and after it had been proved by the books themselves, of the firm of Johnson Bros., that the defendant's account for supplies and guano had been entered as with Johnson Bros., as well as the note and mortgage, the prosecution sought to establish, by asking one of the state's witnesses, if the firm did not look to J. F. Johnson as the person really liable to them for payment of such advances. The defendant objected to such testimony, on the ground that it was at variance with the rule of law declaring that parol testimony which tended to vary a written contract was not admissible. The judge allowed the testimony to be given. This is one of the grounds of appeal.

When the testimony offered by the state was announced as closed, the defendant ask-

ed the circuit judge to instruct the jury to acquit the defendant: (1) Because there was a failure of proof to establish a lien in favor of the landlord, or that the defendant was indebted to him for the supplies. (2) Because contracts for advancements must be in writing. (3) Because section 3057 of Code of Laws of this state, giving a landlord a lien for supplies advanced, whether the contract for advancements be in writing or verbal, was unconstitutional, in that it violated section 5, art. 1, of the Constitution of South Carolina. The circuit judge refused the motion. This is a ground of appeal.

No testimony was offered by the defendant. The court then charged the jury, and to certain parts of this charge the defendant has accepted. The defendant was found guilty by the jury. A motion was made for a new trial, which was refused. It should have been stated, just before the last sentence, that at the close of the judge's charge the defendant requested the court to charge the jury "that if Alfred Elmore believed that he was purchasing goods from Johnson Bros., that he was dealing with Johnson Bros., then it cannot be taken in the matter of J. F. Johnson without the knowledge or consent of Alfred Elmore; that is, if he understood that he was trading with Johnson Bros., then they could not transfer that debt to J. F. Johnson." This the court declined to charge in these words: "The view I take of it is, it is immaterial as to who he got the goods from, just so they were coming from the man that furnished him; that is sufficient. It is enough for him that he received the goods."

The defendant has preferred in his appeal several grounds of exception to the judgment against him as follows: "(1) In overruling the defendant's objection to the solicitor's question, 'Mr. Johnson, who furnished Alfred Elmore goods this year?' upon the ground that he was attempting to contradict a written contract by parol evidence. (2) In ruling and holding that a landlord had a lien under the statute for supplies advanced to his tenant without a written contract. (3) In holding that section 3057, Code of Laws, was not in violation of section 5, art. 1, of the Constitution of South Carolina. (4) In refusing to instruct the jury to acquit the defendant, upon the ground that there was no proof of lien upon his crop, or of any contract, written or verbal, for the advancement of supplies by the landlord, J. F. Johnson, to the defendant. (5) In refusing to charge the jury that, if Alfred Elmore believed that he was purchasing the goods from Johnson Bros., he could not be made the debtor of J. F. Johnson without the knowledge or consent of Elmore; that, if he understood that he was trading with Johnson Bros., then they could not transfer the account to J. F. Johnson, so as to make Alfred Elmore indebted to him for supplies furnished. (6) In refusing to instruct the jury that, in order

for the landlord to have a lien for supplies furnished, they must have been furnished by him to the defendant under an agreement to that effect, and instructing the jury 'that it was immaterial as to who he got the goods from, just so they were coming through the man that furnished him; that is sufficient. It is enough for him that he received the goods.' (7) In charging, 'It makes no difference how many hands the goods come through, if the person alleged to be the owner of the crop did advance the goods alleged to have been advanced here. It makes no difference whether the guano was bought from partnership or not. If he got the advance, it makes no difference who sold him the goods, if it was done by agreement of Mr. Johnson.'"

Let us see what virtue there is in these exceptions.

1. The real object of the appellant in this exception was to establish the proposition of law that it was not proper to allow J. F. Johnson, through his own testimony or that of any other witness, to state that the contracts of the defendant with Johnson Bros. were really the contracts of the defendant with J. F. Johnson. The appellant was correct. The testimony is inadmissible.

2. The misfortune of the appellant, so far as the second exception is concerned, was that he agreed in writing to give a lien to his landlord, L. L. McLemore, for any supplies he furnished him. We are not sure but that if this landlord, L. L. McLemore, had made any advances to the defendant as his tenant, said landlord could have recovered for the same under the machinery of the law. In other words, we think this language of section 3057 of Code of Laws of this state applies: " * * * And subject to the laws hereinafter provided for and enforceable in the same, the landlord shall have a lien on all the crops raised by a tenant for all advances made by the landlord to such tenant during the year."

3. We do not see why section 3057 of the Code of Laws in this state is not constitutional. It deals with all landlords as a class. See *Porter v. Railway*, 63 S. C. 169, 41 S. E. 106, 9 Am. St. Rep. 670; *Simmons v. Telegraph Co.*, 63 S. C. 425, 41 S. E. 521, 57 L. R. A. 607.

4. It seems to us that this exception is fatal to the judgment against the defendant. Section 3057 of the Code of Laws of this state is direct and specific in its reference to landlords. It provides a lien in favor of landlords. It is true, it is the power of a landlord as such to assign his rent to some other person; but that does not make such assignee of a landlord a landlord. A man, to be a landlord, must sustain some relation to the land. He must be owner, or quasi owner. The said J. F. Johnson was neither owner nor quasi owner of this land leased to the defendant. All he could do under his assignment was to collect the rent, and

probably any advances L. L. McLemore had made the defendant before he assigned the lease to J. F. Johnson. Anderson's Dictionary of Law, at page 597: "A landlord is described as one who owns lands or tenements which he has rented to another or others." By *Rapalje & Lawrence's Law Dictionary*, "landlord" is defined: "He of whom lands or tenements are holden, who has a right to distrain for rent in arrears." Co. Litt. 57. We have just remarked that all the right of Johnson, the assignee, as against the defendant, was to collect the rent, to wit, four bales of cotton and the seed from said four bales, except the covenants as to the use of the lands. This the defendant has paid. The covenants in the lease were that Alfred Elmore bound himself therefor, so far as "the heirs, executors, or administrators" of McLemore were concerned. We hold, however, that as to the rent due the assignment was good. It follows, as no lien was given by Alfred Elmore to J. F. Johnson to secure the \$65.15 still due on the account of Johnson Bros., the prosecution failed, because J. F. Johnson, as assignee of Johnson Bros., had no lien subsisting on the crops of Alfred Elmore to secure said advances.

5, 6, and 7. These exceptions become immaterial after our holding that J. F. Johnson had no enforceable lien on the crops of Alfred Elmore during the year 1902.

It is the judgment of this court that the judgment of the circuit court be reversed.

JONES, J. I concur in the result. I do not think the first exception should be sustained, as I cannot see how the testimony admitted tended to contradict any written instrument. But I concur in reversing the judgment upon the ground that there was no proof that defendant had disposed of any crop upon which there was any existing lien.

WOODS, J. I concur in the result. The written contract, which will be printed in the report of the case, did not create the relation of landlord and tenant. *McCutchen v. Crenshaw*, 40 S. C. 511, 19 S. E. 140. McLemore, therefore, had no satisfactory lien to assign, and the defendant could not be convicted of disposing of crops under a lien which did not exist. I think the fourth, fifth, sixth, and seventh exceptions should be sustained, on this ground, as well as on the reasoning of the CHIEF JUSTICE.

(68 S. C. 133)

STATE v. THOMPSON.

(Supreme Court of South Carolina. March 1, 1904.)

CRIMINAL LAW—TRIAL—RECEPTION OF EVIDENCE—HOMICIDE—SELF-DEFENSE.

1. It is not error to admit, on a trial in a criminal case, evidence in reply which should have been offered in chief, but which was ruled out because the witness was thought to be in-

competent, which ruling was afterwards found to be incorrect.

2. To make out a case of self-defense, the evidence should satisfy the jury that accused actually believed that he was in immediate danger of losing his life or sustaining serious bodily harm, so that it was necessary to take the life of his assailant, and the circumstances must have been such as would, in the opinion of the jury, justify such a belief in the mind of a person possessed of ordinary firmness and reason.

Appeal from General Sessions Circuit Court of Greenville County; Aldrich, Judge.

Isadore Thompson was convicted of murder, and appeals. Affirmed.

The charge as to self-defense is as follows: "Self-defense is the next grade I will call your attention to. Self-defense is based upon—predicated and built upon—the theory of necessity. It is allowed to a man, when it is necessary for him to strike to save his life, or to protect his person from serious bodily harm. When does the right to self-defense come to a man? He has to show you, in the first instance, that it was when he was at the time without legal fault in bringing about the difficulty. If he brought it about, and is in legal fault in causing trouble, he cannot plead self-defense, because the foundation of self-defense is based upon the rock of necessity. Self-defense comes to a man when he is attacked, assaulted, and some effort is being made which endangers his life, or suffering serious bodily harm. It does not come to a man before he is attacked or assaulted, nor it does not remain with him after the danger is over. It comes to him when he is assaulted, and goes when danger is over. It comes to him when he is assaulted, and he honestly believes, in order to save his life from danger, or his person from serious bodily harm, that he must meet the attack with force to save his life. That is the first degree. And the second degree is this: If you, gentlemen of the jury, believe a man of ordinary courage and firmness would have formed the conclusion in this case, as the testimony shows that the defendant acted—if so, he has made out his plea of self-defense. You catch the idea. Self-defense comes to a man when he is attacked, and he honestly believes that it is necessary for him to resort to force in order to save his life, or his person from serious bodily harm, and he does it; that is self-defense. The law adopts some rule to go by, and that is the rule the law adopts to go by—the ordinary man. And you, gentlemen, are intelligent men, and it is for you to say whether or not an ordinary man would have been excusable or justifiable in acting as the testimony shows that the defendant acted? That is a question of fact for you. Self-defense rests upon the rock of necessity. If a man is assaulted, and he believes that his person is in jeopardy, and he, by some safe and easy manner, can avoid taking the life of his as-

sailant, then the law says that he must adopt that safe and easy manner; but the law is that he is not bound to retreat, or seek to avoid difficulty, if by so doing he would increase his danger, because, if he is acting in self-defense, he can do anything and everything necessary to save his life. Now, gentlemen, when the defendant sets up the plea of self-defense, he takes upon himself the burden of proof, not as the state is required to do to prove its case of guilt of the defendant beyond a reasonable doubt, but by the preponderance of the testimony—the greater weight of the testimony. That is sufficient, and he is entitled to any reasonable doubt growing out of the testimony in the whole case."

Blythe & Blythe and Jas. I. Earle, for appellant. Asst. Atty. Gen. Townsend, for the State.

POPE, C. J. The appellant was convicted of the murder, with a recommendation to mercy, of one Arch Sullivan, at the July term, 1903, of the court of general sessions for Greenville county, and thereafter duly sentenced to an imprisonment for life in the state penitentiary. The testimony tended to show that the deceased, upon a promise of marriage, had accomplished the ruin of defendant's daughter. During the progress of the trial, and while the state was offering testimony in chief, the state offered one G. F. Spann as a witness. The defendant objected to this witness on the ground that he was incompetent as a witness, having been convicted of the crime of burglary. The circuit court sustained the objection. After the defense had completed its testimony, the state again offered this witness, on the ground that it was a mistake of fact that said G. F. Spann had been convicted of burglary. The circuit judge reversed his ruling denying the right of the prosecution to use this witness. The defense objected to this testimony, not because the witness G. F. Spann had been convicted of burglary, but upon the ground that it was too late to hear the testimony, as the defense could not procure testimony in reply. The court had ruled that the defense should have the right to fully reply to this witness. The court, as before stated, ruled the testimony competent in chief, even if the defense had closed its testimony. He then testified. The defense alleges that this was error, and made this the first ground of appeal.

After the judge's charge upon murder, manslaughter, and self-defense, the defense requested him to charge as follows: "Even if the jury believe, from the evidence, that the defendant did have ill will or malice toward the deceased before and at the time of the killing, yet if they further believe that the defendant killed the deceased, not because of the malice, but to save himself from death, or great bodily harm, he could still

¶ 2 See Homicide, vol. 26, Cent. Dig. §§ 160, 161.

avail himself of his plea of self-defense, in spite of such malice, and if, therefore, the jury believe, from the evidence, that he has established such plea by the preponderance of the evidence, then the verdict should be 'not guilty.' The circuit judge refused to charge such request, and said: "I think I have charged fully on that question." This is made the second ground of appeal.

We will now pass upon these two grounds of appeal in their order.

1. It is clear to our minds that the circuit judge made no error as here presented. Suppose the circuit judge had erred in refusing to allow one of defendant's witnesses to be examined after the state had fully gone into its evidence in reply to the defense, and then for the first time the court became conscious of his error; ought he not to have allowed defendant's witnesses to be examined? Clearly so. Courts are organized to dispense justice, and, when such courts find that they have made mistakes in refusing to admit competent testimony, they should at once admit such testimony. There are numerous decisions in our state sustaining such conclusions. The case of *State v. Jagers*, 58 S. C., at page 46, 36 S. E. 436, does not contravene this rule; for in the case just cited the late Chief Justice McIver said in that case, when one Wilson had been allowed to testify after the close of the testimony for the defense: "It does not appear in this case as prepared for argument here, or from the supplement found in the argument of the solicitor, that the defendant had offered any testimony to which the testimony of the witness Wilson could in any sense be regarded as a reply. Nor does it appear at any part of the record before us that the testimony of Wilson tended to contradict anything testified to by the defendant. * * * This testimony, while no doubt competent, if it had been offered by the state when developing its testimony in chief, when the defendant would have had an opportunity to contradict or explain it, was clearly incompetent in reply; for it was not in reply to any testimony adduced by the defendant." In the case at bar, the state, or prosecution, had in its testimony in chief offered testimony to show threats by the defendant against the life of the deceased, and the defense had replied to this testimony. This exception is overruled.

2. In reference to the second exception, it may be well to reproduce from the case of *State v. McGreer*, 18 S. C. 466, what this court says in regard to the plea of self-defense: "To make out a case of self-defense, two things are necessary: (1) The evidence should satisfy the jury that the accused actually believed that he was in such immediate danger of losing his life, or sustaining serious bodily harm, that it was necessary, for his own protection, to take the life of his assailant. (2) That the circumstances in which the accused was placed were such as would, in the opinion of the jury, justify such

a belief in the mind of a person possessed of ordinary firmness and reason. It is not a question which depends solely upon the belief which the accused may have entertained; but the question is, what was his belief, and, under all the circumstances as they existed at the time the violence was inflicted, the jury think he ought to have formed such belief." Now, this doctrine has been declared to be the law in this state repeatedly since it was announced. The charge of the circuit judge was in conformity with this ruling. The Reporter will set out that part of the charge of the circuit judge as found on pages 15 and 16, at folios 58, 59, 60, 61, and 62 of the "case" for appeal. An inspection of so much of the charge of the circuit judge as referred to self-defense will be found to contain sound law. Sometimes it is hazardous to charge requests to charge in the exact language embodied in such requests. We do not think the circuit judge erred in refusing this request.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(68 S. C. 110)

RUSHTON v. WOODHAM et al.

(Supreme Court of South Carolina. Feb. 26, 1904.)

DISTRICT COURTS—JURISDICTION—NEWLY ORGANIZED COUNTY—USURY—JUDICIAL SALES.

1. 23 St. at Large, p. 1199, § 11, creating Lee county, provides that records belonging to any suits or indictments pending in those portions of other counties forming the county of Lee shall be transferred to the county of Lee within 10 days after demand therefor by the clerk of the court of Lee county. Held that, until the officers of Lee county are qualified and demand the records, the courts of the old counties out of whose territory Lee county was formed have jurisdiction of causes relating to lands in the new county, and retain jurisdiction in a case which was argued and in which an opinion was announced three days before the officers of Lee county qualified, though the decree was filed six days afterwards.

2. The words "full jurisdiction and power," as used in 23 St. at Large, p. 1199, § 14, providing that courts and officers of old counties out of which Lee county was organized should have such jurisdiction and power within the limits of Lee county taken from their respective counties until officers shall have been elected and qualified in Lee county, means jurisdiction over real and personal property in the territory.

3. Where a creditor collects an excess of interest by mistake, it will not support a plea of usury.

4. Where an order of sale in a portion of a county taken to create a new county was properly made in the old county, and before sale was made the officers of the new county qualify, it was proper to order sale made in the new county.

Appeal from Common Pleas Circuit Court of Darlington County; Klugh, Judge.

Action by J. E. Rushton against J. M. Woodham and others. Decree for plaintiff, and defendants appeal. Modified.

Spears & Dennis, for appellants. Geo. W. Brown, for respondent.

WOODS, J. This action for the foreclosure of a mortgage of real estate was commenced July 30, 1900. The only defense set up in the answer was usury. An order was made September 28, 1901, referring the cause to T. H. Spain, Esq., master, to take testimony and report his conclusions of law and fact. The master made his report November 15, 1902, finding that there was no usury, and recommending judgment in the full amount claimed by the plaintiff. This report came up for consideration on defendants' exceptions, December 6, 1902, in the court of common pleas for Darlington county, and the counsel for the defendants then objected to the jurisdiction of the court on the ground that after the commencement of the action the new county of Lee had been created, which embraced within its limits the mortgaged premises, and that its county officers had qualified and been commissioned. The circuit judge overruled the plea to the jurisdiction, heard arguments on the exceptions, and on the same day announced that he would confirm the master's report, instructing plaintiff's attorney to prepare the decree. The decree was not filed until December 15, 1902.

The defendant again raises the question of jurisdiction in this court. It is here admitted, however, that while the act creating Lee county was passed on February 25, 1902, and the county officers elected at the general election held in November, 1902, the officers did not qualify and receive their commissions until December 9, 1902, three days after this cause had been heard in the court of common pleas for Darlington county. This fact we think decisive of the question of jurisdiction. The eleventh section of the act creating Lee county provides: "Sec. 11. All suits pending in the counties of Kershaw, Darlington and Sumter in which the defendants reside in the portion of said counties now established as the county of Lee, and all indictments now pending in the aforesaid counties in which the offenses were committed in the portion of said counties now established as Lee county, shall be transferred to the calendars of the courts of the county of Lee; and all records, commissions, and other papers belonging to any of said suits or indictments, together with all the legal incidents thereto appertaining, shall be transferred to the county of Lee within ten days after notice and demand therefor by the clerk of the court for Lee county upon the clerks of the courts for Kershaw, Darlington and Sumter counties, respectively." 23 St. at Large, p. 1199. It being manifest that no transfer of records and causes from the old counties could be made until there was an officer who could receive public records and take charge of and docket causes for the court in which they were to be tried, and that no public business could be conducted without public officers, the General

Assembly in the fourteenth section of the act provided that the courts and officers of the old counties should have "full jurisdiction and power in and over the people of the territory within the limits of Lee county taken from their respective counties until the officers shall have been appointed or elected, as provided by law and qualified in and for the county of Lee, as provided for in this act."

The defendant, however, insists that "jurisdiction and power in and over the people of the territory within the limits of Lee county" confers jurisdiction only over the person of any one residing in Lee county, and not over the land situated therein. Nothing but the plainest and most emphatic enactment would justify a court in imputing to the General Assembly an intention to leave any portion of the state without public officers or courts for the protection and enforcement of property rights. The term "people" is here used in a comprehensive sense, clearly intended to embrace the inhabitants of the territory with respect to their personal and property rights and liabilities, and also all personal and property rights and liabilities over which the courts of the several old counties would have had jurisdiction, and concerning which the officers of the several old counties would have had power to act before the county of Lee was created. It is therefore obvious that the court of common pleas for Darlington county had jurisdiction of the cause on December 6, 1902, when it was heard. The delay of the court until December 15, 1902, in filing the decree, the officers of Lee county having qualified in the meantime on December 9, 1902, does not affect its validity, because the decree will be referred to the date of the hearing, and regarded as filed on that day. *Keep v. Leckie*, 8 Rich. Law, 164; *Aultman v. Utsey*, 35 S. C. 596, 14 S. E. 351; *Calhoun v. Ry. Co.*, 42 S. C. 132, 20 S. E. 30; *State v. Fullmore*, 47 S. C. 34, 24 S. E. 1026; *Mitchell v. Overman*, 103 U. S. 62, 26 L. Ed. 369.

All the remaining exceptions assign error to the circuit judge in not sustaining the plea of usury. Usury, being an affirmative defense, must be established by the preponderance of the evidence. The defendant here specifically alleges that the contract expressed in the bond and mortgage was for interest at the rate of 8 per cent., yet the real contract was for 10 per cent., and that this rate of interest was exacted by the plaintiff from the date of the mortgage until December 28, 1899. The defendant and others of his family testify in support of this allegation, and the plaintiff flatly denies the charge. A number of receipts were given for payments, and corresponding entries, were made on the bond, but none of them indicate that more than 8 per cent. was exacted. It is true the defendant made pay-

(68 S. C. 123)

ments which would amount to about 10 per cent., but the plaintiff denies that they were received other than as general credits applicable to the interest at 8 per cent. until extinguished, and then to the principal, and charges that payments of such amounts were made by defendant with the purpose to give color to the plea of usury which he was preparing to set up. The master and the circuit judge concur in the finding that the plaintiff never contracted for a greater rate of interest than the rate stated in the bond, and did not at any time collect a greater rate. So far from the preponderance of the evidence being against this finding, we think it is well supported. According to the defendant's own computation, from January 1, 1897, the date of the bond, to December 1, 1898, when no difference had arisen between the parties, the payments exceeded the legal rate of interest by only \$18.73. The plaintiff's explanation of this excess, that the payments were made in small amounts, some of them when he did not have the bond and without any accurate calculation of the interest due—accuracy not being regarded essential, as it was understood the principal should be gradually reduced—seems quite reasonable. On the other hand, if the payments had been exacted and made on the basis of 10 per cent. interest, the excess of the payments over 8 per cent. would have aggregated over \$100, instead of \$18.73. The explanation of the defendant that it was due to the kindness of the plaintiff that he was let off from paying the full 10 per cent. for this period on account of the hard times is not only at variance with his answer, but is not convincing in view of the fact that at the trial the plaintiff was represented on behalf of the defendant as quite an exacting creditor. It need hardly be said that the collection of an excess of interest on account of a mistake in the computation or other error in fact against the intention of the party will not support the charge of usury. 3 Parsons on Contracts, 123. As to the later payments made when serious differences had arisen between the parties as to the cutting of timber on the mortgaged premises, it seems not at all probable the plaintiff would have risked the heavy penalty of usurious interest when dealing at arm's length with his debtor, and for this reason, if no other, his statement that the payments were received on the principal as well as interest, and not for usurious interest, is more reasonable. The exceptions are therefore overruled.

As the cause is still pending, it should be transferred to the court of common pleas for the county of Lee, and application made to that court for an order directing the sale of the land to be made at Bishopville by the proper officers of Lee county, instead of by the master for Darlington county.

With this modification, the judgment of this court is that the judgment of the circuit court be affirmed.

46 S.E.—60

LEVIN v. LEVIN.

(Supreme Court of South Carolina. Feb. 29, 1904.)

ACTION FOR ALIMONY—WHEN MAINTAINABLE—CRUELTY—CONDONATION.

1. Alimony should be allowed on desertion of the wife by the husband without just cause, or where he inflicts upon his wife, or threatens her with, personal injury, or he indulges in such practices as outrage all the sentiments characteristic of the sex.

2. Evidence in action for alimony reviewed, and held that the husband's cruelty justified his wife in separating from him.

3. Cruelties of the husband which have been forgiven may be considered when others have followed until the wrong becomes unbearable.

4. Where the complete alienation between husband and wife has come almost entirely from the gross misconduct of the husband, he will not be exempted from the support of his penniless wife and dependent children.

Appeal from Common Pleas Circuit Court of Charleston County; Purdy, Judge.

Action by Dora Levin against Hyman Levin. Judgment for defendant. Plaintiff appeals. Reversed.

Bryan & Bryan, for appellant. Mordecai & Gadsden, for respondent.

WOODS, J. Hyman Levin and Dora Friedman were married on October 15, 1899. After a short bridal trip, they lived together at the home of the wife's father in New York until November 1, 1899. Levin then returned to his home in Charleston. Mrs. Levin did not accompany him, but continued to live with her father, and has continuously refused to go to her husband's home and assume the position of a wife. She commenced this action for alimony on October 26, 1901, alleging, under a number of specifications, cruel and inhuman treatment, sufficient, as she insists, to justify her in refusing to cohabit with her husband and in demanding separate support. The defendant denies the charges, and undertakes to lay the blame of separation entirely on his wife and her parents. The cause was referred to G. H. Sasa, Esq., master, and his report finding against the plaintiff has been reviewed and confirmed by the circuit judge.

The findings of fact in the report and the decree are of great value, not only on account of the sources from which they come, but because of the earnest consideration manifestly given to the cause. A careful study of the evidence leads to the conviction that these findings as to the essential issues are, in the main, correct. The chief question for discussion is as to the correctness of the legal conclusions drawn by the master and the circuit judge from the facts.

The grounds upon which alimony should be allowed are thus stated in *Wise v. Wise*, 60 S. C. 447, 38 S. E. 802, after a review of the

¶ 1. See *Husband and Wife*, vol. 25, Cent. Dig. §§ 1063, 1064.

decisions in this state: "(1) Desertion of the wife by the husband, without just cause. * * * (2) Where the husband inflicts upon his wife, or threatens her with, bodily injury, amounting to the *sævitia* of the civil law, which is defined 'to be personal violence actually inflicted or menaced, and affecting life or health.' (3) Where the husband practices such obscene and revolting indecencies in the family circle, and so outrages all the sentiments of delicacy and refinement characteristic of the sex that a modest and pure-minded woman would find these grievances more dreadful and intolerable than the most cruel inflictions upon her person." It should not be supposed that a separate support must be denied to the wife under the second proposition, because the personal violence on account of which it is claimed does not actually imperil her life or health. It is sufficient if it tends to do so. Great and continued physical indignities—such, for example, as chastisement or imprisonment—might possibly not endanger life or health, but certainly a wife is not called upon to endure them. It should also be said in this connection that the time has passed when assent can be given to the statement made in *Hair v. Hair*, 10 Rich. Eq. 173: "No words of reproach and insult amount to legal cruelty; no affront and indignity, no torture of the feelings and sensibilities, however severe and grievous to be borne, unaccompanied by bodily injury or a well-grounded apprehension of such, will authorize the wife to leave the bed and board of her husband, and to claim thereupon from this court a decree for alimony." At the same time we fully accept the language used in *Evans v. Evans*, 1 Hagg. Rep. 39, quoted with approval in *Rhame v. Rhame*, 1 McCord, Eq. 206, 16 Am. Dec. 597: "What merely wounds the mental feelings is, in few cases, to be admitted, where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion (if they do not threaten bodily harm), do not amount to legal cruelty." One of these few cases arises when a husband habitually uses to his wife abusive language, which she cannot endure without a complete surrender of self-respect, or strikes at the vital point of female character by making and maintaining the charge of unchastity. The husband's right of dominion and the wife's duty to live with him and obey him cease to exist when the husband ceases to support them by at least decent respect and consideration. The general view of the law above stated will, no doubt, receive ready assent; but the delicacy of the subject makes the application of principles to the facts of each case the real judicial task.

While each case that has arisen in this state differs widely as to its facts from every other, a review of the cases leads to the conclusion that the decision of this case should depend

upon the following questions: (1) Has the defendant inflicted on the plaintiff such physical violence or personal indignity as would make her residence with him as a wife intolerable? (2) Has the wife deserted her husband, or so contributed to the alienation that the law will deny her separate support? (3) Has the wife so condoned the alleged wrongs that her claim must fail? (4) Does the defendant's invitation to the plaintiff to come to his home as his wife discharge him of any liability he may have incurred for her separate support? It may be well to remark before beginning the discussion of these questions, that we attach slight importance, except as a mere sidelight, to the fact that the acquaintance of these parties was brought about by Levin and the parents of Mrs. Levin through the intervention of a matchmaker, and the marriage itself based more on convenience than sentiment. The court in a case of this kind has little to do with the finer sentiments and emotions of conjugal life, and must concern itself with the right of the wife to be protected from cruelty and indecency.

A number of charges are made against Levin. The first accusation—that he was very drunk on his wedding night—is clearly proved, and it cannot be doubted that this misconduct brought to his bride great mortification and disgust. Some excuse is to be allowed in the fact that he had been fasting for a day under the Jewish law, and did not take proper account of the effect of wine on an empty stomach. If the occasion had been an ordinary one, the drunkenness would, no doubt, be excused by all the charitable as accidental; but it is not easy to see how the instinct of ordinary self-respect could have been so off guard on his wedding night. This offense, however, was forgiven, and no doubt its effect on the wife's feelings would have been obliterated if the impression of lack of sensibility had not been deepened by subsequent misconduct. Levin's explanation of registering with his wife at the St. Dennis Hotel under an assumed name is sufficient to make the impropriety of little consequence in this inquiry.

Mrs. Levin testifies that on the bridal trip to Baltimore the defendant forced sexual intercourse against her will, called her "flirt and loafer," telling her "to go to the devil" or "to go to hell," in anger struck her in the face, and nearly pushed her down the stairs. Whether all these cruelties were perpetrated, it is impossible to say with certainty, for they rest in assertion by the wife, and are met by denial of the husband. It cannot be doubted, however, that there were serious disagreements on this unhappy journey arising from the husband's grossness of conduct and jealous disposition. After this they returned to the home of Mrs. Levin's parents, and lived together as husband and wife for a week or more. For some reason, during this period, Mrs. Friedman became

solicitous about her daughter's physical condition, and had an examination by a physician, from which she received the impression that Mrs. Levin was pregnant. Levin insisted that he had not known his wife sexually, and we cannot doubt that, in her father's house, he strongly intimated, if he did not directly charge, that, if his wife was pregnant, she had been unchaste. While there is much conflict, we think the testimony sustains the master and circuit judge in finding that Levin, before leaving New York, insisted on sexual intercourse at a time when his wife's physical condition made his doing so indecent. It appears that this became so repulsive to her that she left his room, and sought refuge with her mother. The details of the testimony on this point are too revolting to be recited. It is sufficient to say that plaintiff's physical condition was such that it would be difficult to imagine anything more disgusting and distressing to a decent woman than the defendant's conduct in this respect towards her. When the defendant left New York, his wife was painfully, if not seriously, ill, and in great distress. He testifies that he believed she was shamming; and there is no doubt that her statement is true that he actually charged her with pretending to be sick, without having, so far as we can discern, the slightest ground for the imputation. In addition to all this, Levin, on his departure, failed to leave his wife any money, or to make provision of any kind for her maintenance and comfort.

It may be that any one of the wrongs done by Levin, standing alone, might be regarded as only "a sally of passion," or a somewhat abnormal development of human weakness, to which in some degree many men may be subject, and which ought to be borne by a wife as incident to an unfortunate alliance. But, considering all the outrages together, perpetrated as they were when his wife was a young bride, having a right to expect, even from a husband of the commoner sort, at least respectful consideration, we cannot resist the conclusion that they amount to intolerable cruelty, justifying her separation from him. We think the evidence sustains the opinion that the plaintiff's refusal to accompany her husband to Charleston was due to her sickness, and also to her aversion to him arising from ill treatment.

The real defense up to this point, linked to a total denial of all improper conduct, except drunkenness, on the part of the defendant, is the allegation that all the matrimonial differences arose from the officious intermeddling of Mrs. Friedman, the plaintiff's mother. While the failure of the plaintiff to have her father and mother testify has not impressed us favorably, we have sought in vain for facts adequate to support this defense. Mrs. Friedman was satisfied with the alliance, and in defendant's behalf had induced her daughter to be recon-

ciled to him after his drunkenness. This kindly attitude, even if her temper was not of the best, is entirely inconsistent with Levin's statement that, upon his return from the bridal tour, without any provocation, Mrs. Friedman became prejudiced against him, and determined to separate her daughter from him. Nor does the evidence bear out the allegation, pressed with so much vigor in argument, that plaintiff's parents were determined all along that their daughter should not live in Charleston, being willing to separate her from her husband to prevent her doing so, and that this is the secret of the separation; for after the marriage Mrs. Levin's personal apparel and all the wedding presents were packed by Levin, and shipped to Charleston, with the apparent acquiescence of the entire family. This theory requires for its support much stronger evidence than is offered here. It is against nature that parents should be anxious to separate a daughter from her husband, and thus wreck her life, in order to keep her at home.

We next inquire, has the wife deserted her husband, or so contributed to the alienation that the law will deny her a separate support? Having already held that she committed no breach of duty in separating herself from her husband, it follows that she did not in any legal sense desert him.

One phase of Mrs. Levin's conduct, which has given rise to the greatest perplexity in the effort to reach a just conclusion, is the accusation made by her that her husband had imparted to her a repulsive disease. She does not allege this as one of her grounds of action, but it is considered here for the reason that, if she falsely and recklessly made such a charge, in connection with her refusal to live with her husband, she would be entitled to no relief. The charge she made was on the trial completely disproved by the best evidence on the subject that could then be offered. We hold that Levin did not have such a disease, and therefore could not impart it. Nevertheless, it cannot be said that Mrs. Levin is subject to great censure for entertaining the opinion she expressed. The attending physician discussed her symptoms with her or her mother, and while he did tell them that he could only be sure of the cause which produced them by the use of the microscope, yet it is manifest from his testimony that he regarded these unusual symptoms as probably indicating venereal disease; and this view was no doubt expressed at that time as strongly as it was in his testimony. Mrs. Levin cannot be acquitted of a lack of care in not doing what she could to relieve her husband of this dreadful imputation by procuring a microscopic examination, as suggested by the physician; but it must be remembered that Levin knew of his wife's condition, and her belief as to the cause, before he left New York, and yet he left with this shocking charge hanging

over him without even seeing the physician who had made the examination, and from whom, as we must suppose, the impression came. It is said in *Hair v. Hair*, supra, that: "The conduct of the wife must be blameless. If she elopes, or commits adultery, or violates or omits to discharge any of the important hymeneal obligations which she has assumed upon herself, the husband may abandon her without providing for her support." It is not meant by this that a wife must be perfect—her conduct absolutely free from fault—in all distressing circumstances. It does not mean that when her husband has brought upon her great wrongs sufficient to sustain her appeal to the courts, she must be entirely free from imputing to him other wrongs of which he is not guilty. We do not think, when all the circumstances are considered, such blame attaches to the plaintiff as should defeat her action.

We next inquire, is the defendant protected from his wife's claim by condonation of his offenses? It is quite clear that a decree for alimony cannot be based upon wrongs which have been condoned, all misconduct having ceased after such condonation. But to hold that cruelties of a husband which have been forgiven are not to be considered when others have followed until the wrong becomes unbearable would not be to give encouragement and support to a wife's patient endurance, but to mock at it. In such case, as is said in *Threewits v. Threewits*, 4 De S. 574, the wife has a right to judge of the future by the past; and the court will connect the whole of the husband's conduct, in order to form a correct judgment. The case of *Wise v. Wise*, supra, is not in conflict with this view, because the conditions under which the condonation was there held a bar are essentially different from those existing here.

The last inquiry is, does the defendant's invitation to the plaintiff to come to his home as his wife discharge him from any liability he may have incurred for her separate support? At the outset of the discussion of this question it is proper to remark that ordinarily evidence as to negotiations for settlement should be excluded, but in this case these negotiations were brought into the issue by the answer, and we do not perceive how testimony concerning them could have been rejected by the master, or could now be excluded from consideration at the defendant's instance. When the past misconduct of a husband has justified his wife in leaving him, it is too obvious for argument that a mere invitation to her to return to him does not impose upon the wife any obligation to comply with her husband's wish at the risk of receiving like treatment. Under the decisions of this state and elsewhere, his invita-

tion must be accompanied by such expressions of sorrow as would lead a court to hold that the wife had reasonable ground to expect ordinary respect and consideration in future. Levin's position from first to last, except as to the drunkenness, has been one of absolute self-justification and denial of wrong, laying all the misconduct at the door of the wife and her parents. But, aside from this, and attributing to the defendant an honest conviction that he did nothing, while his wife was cohabiting with him, that was not strictly within his marital rights, her refusal to return was justified by his charge of unchastity. That he made the accusation before parting with his wife cannot be doubted. He himself testifies that his suspicions were removed on the birth of the child. Yet after this, when professing to wish his wife to come to him, assuring her by letter that he did not blame her, but her mother, for any wrong done to him, he says no word of retraction or regret. He sends Mr. Banov to influence his wife to come to him, who returns with a written retraction for his signature, which she asks at his hands, but the paper is not signed. Levin's attorney, Mr. Mordecai, says he told Mr. Bryan, attorney for Mrs. Levin, before this suit was brought, that she would come out of court "with her character as a wife ruined." Whatever meaning Mr. Mordecai may have intended to convey by this language, in view of the serious charge of unchastity before made, and apparently adhered to, it must have meant to her a threat to establish this charge. An invitation extended under such circumstances as these we cannot hold a wife bound to accept.

We conclude that Levin's acts of cruelty justified his wife in separating from him; that, while her behavior has not been faultless, her fault had such excuse as to make it insufficient to deprive her of support for herself and her child; that her claim is not barred by condonation; and that she had sufficient reason to decline her husband's invitation to go to his home as his wife.

The consideration of the mass of nauseous testimony will not leave in an impartial mind any hope of reconciliation of these parties. This complete alienation has come almost entirely from the gross misconduct of the defendant, and we cannot exempt him from the support of his penniless wife and dependent infant.

The judgment of this court is that the judgment of the circuit court be reversed, and that the cause be remanded to that court for the purpose of ascertaining and adjudging a proper allowance for the expenses of this suit and reasonable alimony for the plaintiff, having in view all the circumstances of the husband and wife.

(134 N. C. 683)

STATE v. DUNN.

(Supreme Court of North Carolina. March 16, 1904.)

ASSOCIATIONS — NATURE — RELIGIOUS AND BENEVOLENT SOCIETIES—TREASURER—FUNDS — FAILURE TO ACCOUNT — STATUTES — CONSTRUCTION.

1. Code, § 1017, provides that if any treasurer or other financial officer of any benevolent, religious institution, society, or congregation shall lend any of its moneys without its consent, he shall be guilty of a misdemeanor. *Held*, that the words "benevolent" and "religious" qualified the words "society or congregation," as well as the word "institution," so that societies or congregations which were neither benevolent nor religious were not within the section.

2. An association formed to extend aid to sick members, and to defray burial expenses of their dead, from funds accumulated from initiation fees and monthly dues, is not a benevolent or religious society within Code, § 1017, relating to misdemeanors of treasurers of such societies.

3. Where the treasurer of an association rendered a statement in writing of his receipts and payments as treasurer, including a list of items of debits and credits, with their respective dates, etc., which was acceptable to the association's officers, he thereby complied with Code, § 1017, requiring a treasurer of a benevolent or religious institution to "account" for moneys belonging to the association, though he failed to pay over the balance in his hands on demand.

Appeal from Superior Court, Lenoir County; Geo. H. Brown, Judge.

C. F. Dunn was convicted of unlawfully failing to account for money belonging to an alleged benevolent religious association, and he appeals. Reversed.

N. J. Rouse, Loftin & Varser, and W. D. Pollock, for appellant. Land & Cowper, with the Attorney General, for the State.

WALKER, J. The defendant was indicted under section 1017 of the Code, in one count for unlawfully lending, and in the other for unlawfully failing to account for money belonging to the Love & Union Society, an unincorporated body or association of individuals. The members paid an initiation fee and monthly dues, and in this way the necessary funds were raised for the uses of the society, which was formed "for extending aid to sick members and their families and to defray the expenses of burying their dead." The defendant was a member of the society, and was elected treasurer. In his official capacity he received the funds of the society, and, when demand was made by the proper authority upon him to account and pay over the money to his successor, he refused to pay the money, though he presented a statement of the amount in his hands; and this appears to have been correct, and to have been satisfactory to the trustees. We deem it necessary to consider only one or two of the questions involved in the case, in order to dispose of this appeal.

The defendant's counsel requested the court to charge the jury that the Love & Union

Society is not such a benevolent institution or organization as is described in section 1017 of the Code, and that they should therefore acquit the defendant. The court refused to give this instruction, but charged the jury that, if they believed the testimony beyond a reasonable doubt, it is established that the Love & Union Society is a society or congregation, within the meaning of that section of the Code; that the words "benevolent" and "religious" are adjectives qualifying the word "institution," but not the words "society or congregation." The court further charged that, if the jury believed the testimony beyond a reasonable doubt, the defendant, as treasurer of the society, had failed to account for and pay over the said money to the proper officers, and therefore that he was guilty under the second count. The defendant excepted to the refusal to give the instruction, and also to the charge. The jury convicted the defendant, and from the judgment upon the verdict he appealed.

In this construction of the statute we cannot concur. The society was organized for the mutual benefit and advantage of its members, and was not "benevolent," within the ordinary meaning and acceptation of that word. Webster defines "benevolent" to mean "having a disposition to do good; possessing or manifesting love to mankind, and a desire to promote their prosperity and happiness; disposed to give to good objects; kind; charitable." Substantially the same definition is given in the other standard dictionaries. Black, in his Law Dictionary, defines "benevolence" as the doing a kind or helpful action towards another, under no obligation except an ethical one. He says it will include all gifts prompted by good will or kind feeling towards the recipient, whether an object of charity or not. A benevolent society, of course, is one organized for benevolent purposes. He defines a benefit society as one which receives periodical payments from its members, and holds them as a fund to be loaned or given to those of the members needing pecuniary relief. "The essential difference between a benevolent association and a beneficial society, in the strict use of those terms, is that the former has for its object the conferring of benefits without requiring an equivalent from the one benefited, and in that sense it may be a charity." 3 Am. & Eng. Enc. (2d Ed.) p. 1043. In the case of *State ex rel. Attorney General v. Critchett*, 37 Minn. 13, 32 N. W. 787, an association was organized as a "benevolent" one, under a special statute, for the purpose of endowing the wife of each member, on his marriage, with a sum equal to as many dollars as there were members. The court, in passing upon the validity of its incorporation, said, "It is clear from the plan of the association that it was not intended to bestow any benefit or help, without what was thought to be an equivalent;" and the court therefore held that it could not be a "benevolent society," within

the ordinary or legal meaning of those words. And so, in another case, in which the association was in all essential respects like the one described in this case, the same court said that "the undertaking is not in any sense benevolent, but is for a quid pro quo. It is paid for. It is no more a benevolent society than any mutual insurance company or other mutual company, or any partnership of which one member undertakes to do something for the pecuniary advantage of another member, in consideration of the undertaking of the latter to do a like thing for him." *Foster v. Moulton*, 35 Minn. 458, 29 N. W. 155; *Beam, Benev. Soc.* § 44. The law upon the subject is clearly stated in *Gorman v. Russell*, 14 Cal. 581. In that case it appeared that certain persons of a particular avocation associated and agreed that each should contribute a certain fixed sum to the common treasury, which sum, consisting of initiation fees and dues, was to be applied, in certain events, as in sickness, etc., to the relief of the necessities or wants of the individual members, or of their families. The court held that it was not a benevolent society, or a charity, any more than an assurance or benefit society is a charity, and that it was simply a fair and reciprocal contract among the members to pay certain amounts, under certain contingencies, to each other, out of a common fund. It is perfectly clear in our case that the members of the society united for the purpose of mutual benefit and advantage, and not merely from motives of charity, or with the desire or the design merely of doing good to others, which would seem to be the very essence of benevolence. The object of their organization was a most commendable one, but, though it was laudable in its purpose, it was not for that reason benevolent. The statute (Code, § 1017), being a penal one, must be construed strictly. We are of the opinion, therefore, that the court erred in refusing to give the instruction prayed for by the defendant, and in the instruction given to the jury, to the effect that the Love & Union Society was a benevolent society, within the meaning of section 1017 of the Code.

We think there was also error in the instruction that the adjectives "benevolent" and "religious" do not qualify the words "society or congregation." The general arrangement of the section and of those particular words with respect to each other, and the punctuation, clearly indicate that the purpose was to protect only benevolent or religious institutions and benevolent or religious societies or congregations, and it was not intended that the section should apply to any society, regardless of its being either of a benevolent or religious character. We observe that the word "congregation" is used in the indictment in describing the society. The evidence does not disclose why this word was so used. It may be that it is a religious society or congregation, in fact, though the

proof does not show it to be such. If it is, then, of course, the case would come within the provisions of that section of the Code; but it may be necessary in that event to send another bill, so that the allegations can be made to correspond with the facts as they will be shown at the next trial.

If the defendant is not indictable under section 1017, it may be that he is amenable to the law under section 1014. We do not think that the words "fail to account," as used in section 1017, refer to any failure to pay upon demand what is in the hands of the fiduciary, but only require that he shall render an account or statement of the funds, and, too, an itemized account, if required, in order that it may be known what disposition he has made of the funds intrusted to him. An account is defined to be "a statement in writing of debts and credits, or of receipts and payments; a list of items of debts and credits, with their respective dates." *Black's Dictionary*, p. 17. In our statutes the word is used in this sense, and when not only an account, but payment or settlement, is intended, additional words are used to express that idea. Code, §§ 1016, 1017, 1018, 724, 764, 1399 to 1402, 1837, 1865, 1868. In this case the defendant seems to have rendered what was accepted by the prosecutors as a satisfactory account, but the court charged that, if he failed to pay on demand, he had not complied with the requirement of the law. We do not think this is so. A failure to pay or settle on demand would be an unlawful conversion, and, if done with a dishonest, corrupt, or fraudulent intent, would be embezzlement, which particular offense is indictable and punishable under section 1014. It is for this reason that we have suggested that the defendant may be indictable under the latter section. If so, there must be a separate bill, as counts under each of the sections 1014 and 1017 cannot be united in the same bill. *State v. Watts*, 82 N. C. 656. The fact that the defendant is a member of the society may seem to present an obstacle in the way of his successful prosecution under section 1014, but it seems to be settled by the authorities that where a member of an unincorporated society receives money of the society, not in his capacity merely as a member, but in trust or as a fiduciary, he will be criminally liable for any embezzlement of the money so held by him. Having acquired it by virtue of the confidence reposed in him, any fraudulent conversion of it is indictable, although, as a member of the society, he may be one of the joint owners of the money, and his conversion of it therefore would not, at common law, have been criminal. *McLain*, *Crim. Law*, § 631; *Reg. v. Woolley*, 4 Cox, C. L. C. 251, 255; *Reg. v. Turberville*, *Id.* 18; *Rex v. Hall*, 2 Eng. Cr. Cases (1 Moody) 474; *Reg. v. Proud*, L. & C. Cr. Cases 97; *Reg. v. Murphy*, 4 Cox, Cr. L. Cases, 101. In *Reg. v. Woolley*, 4 Cox, C. L. C. 251, the defend-

ant was indicted for embezzling funds, the property of E. M. B. and others, his partners (members of Friendly Society), and pleaded that he could not be convicted, because he was a member of the society. The court said: "Even assuming that the prisoner, being himself one of the members, was included in the words 'others,' that point was taken in a case before Mr. Justice Erie at the last Monmouth assizes [Reg. v. Turberville, supra], and that learned judge ruled that he should consider the prisoner included or excluded in the word 'others' as the justice of the case might require." The same principle is laid down in *Laycock v. State*, 136 Ind. 217, 38 N. E. 187, in which the court says: "The fund in question was set apart and devoted to charitable and benevolent purposes. The appellant was made the trusted agent of the association, charged with the duty of preserving its funds for the use of the needy and distressed brothers of the order; and an answer by him to a charge of fraudulent conversion that he had an equal interest with the others therein, and no one had a right to complain because there was no principal entitled to its recovery, does not find support under existing statutes. This money having been dedicated to the wants of the sick and helpless, the trustee had no right to profane or violate a sacred trust in the manner charged, and for such he is answerable. The act of embezzlement may be perpetrated as well against the property of an association as of a corporation." We see, therefore, that the technical rule of the common law that in general a party having a right of property in goods, and also a right to the possession, cannot be guilty of larceny, and consequently that tenants in common, joint tenants, and partners cannot be guilty of stealing their own property (*Roscoe, Cr. Ev. p. 626*), seems not to apply to a case of embezzlement by one who has received the property in trust and confidence to apply it to certain specific uses. We merely call attention to this principle for the purpose of showing the difference between section 1014 and section 1017 of the Code; the latter referring only to the unlawful lending of money, or failing to "account" for the same, when received in trust for a benevolent or religious institution, society, or congregation, and the former to the fraudulent conversion of the same (evidenced by the failure to pay over on demand) when received in trust for any corporation, person—or persons, by Code, § 3765 (1)—or copartnership.

Whether the prosecution can be successfully maintained under the present indictment, and whether it is advisable to send a bill under section 1014, are matters which we leave entirely to the consideration of the learned and able solicitor who prosecutes in behalf of the state in the district from which the case has come to this court. We only decide now that there was error in the rulings

of the court, as above indicated, and, because of them, there must be another trial. New trial.

(134 N. C. 428)

ISLER v. BROCK et al.

(Supreme Court of North Carolina. March 22, 1904.)

TESTAMENTARY TRUST — ADMINISTRATION — SUBSTITUTION OF TRUSTEES—FINALITY OF DECREE—ACCOUNTING—INTEREST ON TRUST FUND.

1. A testamentary trustee was to receive the rents, profits, and interest thereof, and to pay such part thereof to testator's son and his children as the trustee might think proper during the son's life, and after his death to hold the same for the use of such children as the son might have, etc. In an action by the cestuis que trust, a third party was substituted as trustee, the decree vesting in him the title to the property in as full a manner as the same was vested in his predecessor by the will, and he was thereby directed and empowered to lend the money which should come into his hands, and to pay the interest, with the rents, to the testator's son during his life. Held, that this gave him no right to encroach on the principal fund.

2. The judgment was final, and did not keep the action open for further ex parte orders as to the administration of the trust, made without notice to the cestuis que trust.

3. A trustee who was required by the terms of a testamentary trust, and the decree by which he was appointed in place of the original trustee, to pay the trust money and property to remaindermen on the death of the life tenant, was properly required to pay interest from the latter's death on whatever sums he had in his hands, it not appearing that he was unable to lend the money at interest, or that he kept it separate or apart from his own funds.

Appeal from Superior Court, Wayne County; Peebles, Judge.

Action by S. W. Isler against O. Brock and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Battle & Mordecai, for appellant. Stevens, Beasley & Weeks, for appellees.

MONTGOMERY, J. This action was brought by the plaintiff for an account and settlement between himself as trustee and the defendants, cestuis que trust, for a division of the personal property and proceeds of sale of real property belonging to the cestuis que trust, and for a sale of certain land also belonging to them. At September term, 1895, of Wayne superior court, in a regularly constituted action, wherein Everett Joyner, Jr., and the defendants in this action were plaintiffs, and A. U. Kornegay, executor of W. F. Kornegay, and others, were defendants, the plaintiff was substituted as trustee in place of James F. Kornegay, the latter having been appointed trustee under the will of Everett Joyner, deceased. Under that decree, the plaintiff received from James F. Kornegay, former trustee, the sum of \$3,960. At November term, 1901, of said court, it appeared in the present action that a long and complicated account would have

to be taken, and it was by consent of the parties ordered that F. R. Cooper be appointed referee to find the facts and make his conclusions of law under the Code, and the plaintiff was directed to proceed with the sale of the land described in the complaint. The referee heard the matters in dispute, and made a report of his findings of fact and conclusions of law to the September term, 1903, of the superior court. Exceptions were filed by both parties to the report of the referee. A judgment was rendered at September term, 1903, from which the plaintiff appealed.

The principal contention on the part of the plaintiff is that he should have been allowed certain credits, which were admittedly encroachments on the trust fund, on the grounds, first, that the terms of the decree of the court under which he was made trustee gave him the right to encroach upon the principal fund, and, second, because he was empowered specially by the superior court of Wayne county at various terms to expend part of the principal fund. In the third item of the will of Everett Joyner, the testator said: "I give, devise and bequeath all the balance of my estate, real, personal, mixed, or in action, to my friend James F. Kornegay, in trust to receive the rents, profits and interest thereof, and to pay in his discretion such parts thereof to my son Everett and his children, as he may think proper during the life of said Everett, and after the death of said Everett to hold the same for the use of such children as said Everett may have, and to the issue of such as may be dead, such issue to represent the parent and to take such share as the parent would if living." Kornegay, as we have seen, acted for a while as trustee, but afterwards, as we have seen, the plaintiff was substituted in his place as trustee, and, in the decree of the court in which the substitution was made, the nature of the trust under the will of Everett Joyner was set forth. In that judgment the court said: "It is further adjudged that S. W. Isler be and is hereby appointed trustee in place of James F. Kornegay and W. F. Kornegay, under the will of Everett Joyner, Sr., and that the title to said land and money is hereby vested in said S. W. Isler in as full and ample a manner as the same was vested in James F. Kornegay by said will, and he is hereby directed and empowered to lend the money which shall come into his hands upon first mortgage security upon land as he shall have opportunity, and to pay such interest as he may obtain upon the same, together with the rents from said real estate, to the plaintiff, Everett Joyner, Jr., son of said Everett, Sr., during his life, and after the death of the said Everett, Jr., to hold the balance in trust for such child or children as said Everett, Jr., may leave, and to the issue of such as may be dead, such issue to represent the parent, and to take such share as the parent would if living; and said trustee

is authorized to deposit any funds which may come into his hands in the Bank of Wayne of Goldsboro, N. C., while in the judgment of said trustee the said bank is a safe place of deposit, until such time as he shall be able to lend the same upon satisfactory mortgage security as herein directed, or until the court shall appoint some other trustee." Counsel of the plaintiff contend that no notice to the defendants was necessary, for the reason that the judgment of September term, 1895, was of such a nature as to keep the action open for further orders in reference to the administration of the trust. That is a mistaken view of the character of the judgment.

It will be seen from the plain language of the judgment of September term, 1895, that the plaintiff as trustee could only disburse to the cestui que trust the interest arising from a loan of the money on hand and the rents and profits of the real estate. It is true that orders were made in the superior court of Wayne county, at several terms thereof, either authorizing the expenditure by the plaintiff of such amounts as were encroachments upon the principal fund, or approving such expenditures after they had been made. Those orders, however, were made on the ex parte application of the plaintiff, and without notice to the defendants. It was not interlocutory, but final. In the judgment in the present action the plaintiff was held liable for the principal fund which he received, to wit, \$3,900, and from that amount he was allowed to deduct 5 per cent. commissions for his services. Upon the balance, to wit, \$3,762, the plaintiff was charged with interest from June 14, 1891, the date of the death of the life tenant, Everett Joyner, Jr., less 5 per cent. commissions on the interest up to the date of the judgment, September term, 1903. Three thousand three hundred dollars was to be credited on the judgment by reason of that amount having been paid into the clerk's office by the plaintiff on September 14, 1903. The judgment further provided that that amount—\$3,800—should bear interest from September 14, 1903.

The plaintiff excepted also to that part of the judgment on the ground that in the decree of September, 1895, in which he was made trustee, he was held liable for only such interest as he might obtain or that might come into his hands. We are not called upon to decide what that language in the decree means. But under the will of Everett Joyner, deceased, and also under the decree of September, 1895, the money and the property in the hands of the trustee were to be paid to those in remainder at the death of the life tenant, and it was certainly proper that in the judgment it should be required that the trustee pay interest on whatever sums he may have in his hands from the time of the death of the life tenant, he not having shown to the referee or to the court

that he was not able to lend the money out at interest, or that he kept it separate and apart from his own funds. The judgment embraced also the amount for which the real estate had been sold by the plaintiff, and the manner of distribution of the money, and also of the proceeds of the sale of the land amongst the defendants, to which there was no exception.

After a careful consideration of the record, we find that there is no error in the judgment, and the same is affirmed.

(134 N. C. 423)

HUMPHREY-GIBSON CO. v. ROBINSON
et al.

(Supreme Court of North Carolina. March 22, 1904.)

REAL ESTATE BROKERS—COMMISSIONS—PERSON BY WHOM PAID—CONCEALMENT OF FACTS FROM PRINCIPAL.

1. The owner of notes employed real estate brokers to negotiate an exchange of them for land. They found a landowner who authorized them to sell his property for \$10,155, the landowner to pay the brokers all their commissions and compensation. The brokers had no authority to close the trade for either party, except upon terms that were agreeable to both, and their agency consisted merely in bringing the parties together to make such trade as was acceptable to each. An agent of the owner of the notes agreed to pay the landowner \$12,300, the notes, with accrued interest, amounting to \$13,440. The brokers were to pay the owner of the notes \$1,140 in cash, and to retain for themselves the difference between \$10,155 and \$12,300. The owner of the notes was not informed of the change in the terms, and did not consent to the new contract. *Held*, that the brokers could not recover commissions from her.

Appeal from Superior Court, Wayne County; Peebles, Judge.

Action by E. A. Humphrey and W. J. Gibson, partners doing business under the firm name of the Humphrey-Gibson Company, against M. E. Robinson and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

This action was brought by the plaintiffs, who are real estate brokers, to recover damages arising out of an alleged breach of contract by the defendants. The complaint is as follows:

"(1) That the plaintiffs, E. A. Humphrey and W. J. Gibson, constitute a partnership as brokers, middlemen, and agents in negotiating trades for the sale, exchange, and purchase of real estate and other properties, and were such partners, and so negotiating, at the times hereafter mentioned.

"(2) That during the early part of 1902 the defendant Mary O. G. Kirby was the holder of six notes of the East Goldsboro Land & Investment Company for \$2,000 each, with accrued interest.

"(3) That during the early part of said year of 1902 the defendant Mary O. G. Kirby asked the plaintiffs if they could not negotiate some trade for her by which she could re-

duce said notes to cash, or invest said notes in real estate that would bring her in a larger income monthly; said notes running 1, 2, 3, 4, 5, and 6 years, and only the interest on each note payable as it fell due.

"(4) That, in compliance with such request, the plaintiffs saw J. F. Southerland, the owner of the real estate hereinafter described, and told him of the desire of the defendant Kirby to invest her notes in real estate, and thereupon said Southerland authorized the plaintiffs to sell to defendant Kirby the following described property [description of land] for the sum of \$10,155 in said notes, including interest, clear of all commissions, attorney's fees, and expenses.

"(5) That, during the negotiation as aforesaid, the defendant Kirby knew that the plaintiffs were representing Southerland in the sale of his said real estate, and Southerland knew that the plaintiffs were representing said defendant in the effort to invest her said notes, and it was understood and agreed with the said defendant that the plaintiffs were to look to Southerland for their commissions and compensation for negotiating said transaction.

"(6) That in said transaction the plaintiffs had no authority to close the trade for either party, except upon terms that were agreeable to said parties, which had to be made known to the parties respectively for their approval, and their agency consisted merely in bringing the parties together, in order that they might consummate such trade as was acceptable to each party respectively.

"(7) That the defendant M. E. Robinson acted as agent of the defendant Kirby in said negotiation, and, as such agent, agreed with the plaintiffs to pay Southerland the sum of \$12,300 for the above-described real estate, which payment was to be made by delivery of said notes to Southerland, with accrued interest, amounting to \$13,440, and the plaintiffs were to pay to the defendant Kirby \$1,140 in cash, all of which notes, with the exception of \$10,155, which was to be paid to Southerland as the purchase price, were to belong to the plaintiffs, as their compensation for negotiating said transaction, in lieu of commissions.

"(8) That, in compliance with said agreement, the plaintiffs had executed by Southerland and wife, and duly proved and acknowledged, with the privy examination of Addie Southerland, wife of J. F. Southerland, properly taken, a good and indefeasible deed in fee simple, with covenants of warranty, to said land, and tendered the same to the defendant, Kirby, and offered to pay the \$1,140 difference in value between the notes and the purchase price of said land to said Kirby, and she, through her agent, Robinson, refused to comply with said contract and deliver said notes and accept said deed and money, and repudiated and refused to carry out said contract, to the plaintiff's damage \$2,045.

"(9) That said Robinson stated to the plain-

tiffs that he would not carry out said contract, and that they might bring a suit, and that he would pay any damage for which defendant Kirby might be held liable for the breach of said contract. Wherefore the plaintiffs demand judgment for \$2,045, and costs," etc.

The defendants in their answer denied the material allegations of the complaint, and specially denied that the contract for the purchase of the land had been made.

After the pleadings were read, it was admitted that neither of the defendants signed any writing touching the purchase of the land mentioned in the pleadings, and, it being further admitted that the plaintiffs did not disclose to either of the defendants that Southerland was getting only \$10,155 for the land, and that the plaintiffs were to get the balance of the purchase money, to wit, \$2,145, the court intimated that it would charge the jury that under such circumstances the plaintiffs could not recover of the defendants. Thereupon the plaintiffs submitted to a nonsuit, and appealed.

I. F. Dortch, W. O. Munroe, and W. O. Dortch, for appellants. F. A. Daniels and F. A. & S. A. Woodard, for appellees.

WALKER, J. (after stating the case). The court below was right in the opinion it expressed that the plaintiffs cannot recover in this action. We know of no legal or equitable principle upon which the plaintiffs can base their right to recover damages of the defendants. It is alleged that the defendant Mrs. Kirby owned certain notes which she wished to invest in real estate, or with which she intended to purchase real estate as an investment, and she asked the plaintiff to negotiate with some one in her behalf so that the notes could be thus invested. The plaintiffs thereupon applied to Southerland for the purchase of the land described in the complaint, and he authorized them to sell the land to Mrs. Kirby for \$10,155 in notes, clear of all commissions, attorney's fees, and expenses. The plaintiffs had no authority to close the trade for either party, except upon terms agreeable to both; their agency consisting merely in bringing the parties together, so that they could consummate such a trade as they might be able to agree upon.

We do not attach any importance to what is alleged in the seventh paragraph of the complaint, as we think Mrs. Kirby was not in any way bound, under the circumstances of the case, by what the defendant Robinson did. Southerland had agreed to sell the land to Mrs. Kirby for \$10,155 clear of commissions and other expenses, and Mrs. Kirby was entitled to have the land at this price. To compel her to comply with the terms of the contract alleged to have been made by the defendant Robinson for her, but without her knowledge and consent, would be virtually to make her pay the plaintiffs' commissions, in violation of the

previous express understanding and agreement. The plaintiffs were representing Mrs. Kirby, even if the defendant Robinson was also acting for her, and they knew that Southerland had agreed to sell at the price of \$10,155 clear of commissions and expenses. If the amount had been increased to \$12,300, in order that the obligation to pay the commissions might fall on Mrs. Kirby, or if any material change had been made in the transaction, she was clearly entitled to a full disclosure of the facts, and the law will not hold her to be bound by a contract or agreement, so vitally affecting her interests, of which she had no notice and to which she did not assent. It was the duty of the plaintiffs, as her agents, to communicate to their principal all the facts known to them and which were material to the transaction, and they will not be permitted to benefit, either directly or indirectly, by any dealing conducted in her name in which this was not done. The principal reposes trust and confidence in the agent, and the latter owes in return the duty to his principal of being faithful in all things, and he must, at all times and in all circumstances, put his principal's advantage above his own. This relation involves the duty of carefully guarding the interests of the principal, and reporting to him all material matters which may come to the agent's knowledge. The principle is of universal application that an agent or trustee, undertaking a special business for another, cannot, on the subject of that trust, act for his benefit to the injury of the principal. *Dodd v. Wakeman*, 26 N. J. Eq. 484. We think it is well settled that a broker cannot recover his commissions, nor damages in the place of them, if he has failed in any respect to make a full disclosure of the material facts to his principal, and certainly not if the latter is prejudiced thereby. *Lamb v. Baxter*, 130 N. C. 67, 40 S. E. 850; *Hafner v. Herron*, 165 Ill. 242, 46 N. E. 211; *Young v. Hughes*, 32 N. J. Eq. 372; *Wadsworth v. Adams*, 138 U. S. 380, 11 Sup. Ct. 303, 34 L. Ed. 984; *Phinney v. Hall*, 101 Mich. 451, 59 N. W. 814; *Halsey v. Monteiro*, 92 Va. 581, 24 S. E. 258; *Jansen v. Williams*, 36 Neb. 869, 55 N. W. 279, 20 L. R. A. 207; *Humphrey v. E. T. Co.*, 107 Mich. 163, 65 N. W. 18. The general principle established by the authorities cited is clearly applicable to our case, and requires us to hold that the plaintiffs are not entitled to recover, for the reason that the defendant Mrs. Kirby was not informed of the change in the terms, nor did she assent, in contemplation of the law or in fact, to the alleged contract. She now declines to accede to the alleged stipulations which the parties made for her without her knowledge, and it is clear, if what was done by them had been communicated to her at the time, she would have rejected the proposed terms of the agreement. The plaintiffs had been authorized by Southerland, the owner of the land, to sell it to Mrs. Kirby at \$10,500 net to him; that is, free of com-

missions and other expenses, as above stated. A new arrangement is attempted to be made by which she is required to pay the commissions—about 20 per cent. of the original purchase price. An agent cannot thus impose an obligation upon his principal in his own favor, unless the principal is first made fully aware of all the facts and circumstances, and, after consideration, assents thereto. When we refer to a change having been made in the contract, or in the terms of the contract, we mean to say that by the enhancement of the price to \$12,300 Mrs. Kirby would virtually be required to pay the commissions, contrary to the spirit, if not the very letter, of the original agreement.

The defendants also contended that, as the contract between Southerland and Mrs. Kirby had not been reduced to writing, the latter could not be held liable to the plaintiffs in damages for refusing to comply with the contract, assuming that one had been made between the parties. This presents a very interesting question, and one, too, not free from difficulty. It is not necessary that we should decide it, as we have already disposed of the appeal upon the other point presented. We will add, though, that it was contemplated by the parties that they should agree upon the terms of their contract before any commissions should be due to the plaintiffs, which it appears that they have not done, and it was not the fault of the defendant Mrs. Kirby that they did not agree. There may have been some misunderstanding between the parties, but even in that case Mrs. Kirby would not be liable to the plaintiffs. The ruling below upon the allegations of the complaint and the admissions was right, and the judgment of nonsuit must stand. No error.

(124 N. C. 410)

LEE et al. v. BAIRD et al.

(Supreme Court of North Carolina. March 22, 1904.)

WILLS—CONSTRUCTION—APPEAL—EVIDENCE—FINDINGS.

1. In a suit to construe a will, objection was made to the testimony contained in a certain deposition as incompetent, but it did not appear that any ruling was made, and in the case on appeal there was a statement that, it having been agreed that the judge should find the facts, he found the facts as stated in the deposition, and adopted it as his finding in so far as the construction of the will was concerned. No issue as to the facts found by the court was made on appeal. *Held*, that it was proper for the court on appeal to consider the evidence contained in the deposition, for the purpose of construing the will.

2. On appeal in a suit for the construction of a will, an objection that the appeal was premature, in that there should have been a reference for an account of advancements before construing the will, was untenable, where no motion for such a reference was made.

3. In a suit for the construction of a will, the refusal to order a reference for an account of advancements before construing the will could be appealed from.

4. Where, in a suit for the construction of a will, the court found certain facts for the purpose of construing the will, and ordered a reference for an account of advancements, the

reference was not bound, in taking the account, to follow the findings of fact.

Application for rehearing. Denied.

For former opinion, see 44 S. E. 605.

CONNOR, J. We have given to the petition to rehear this case a careful consideration. We have not "glanced over," but carefully read, the well-prepared and well-considered briefs of the learned counsel for the petitioners, and the authorities cited. As we stated in our former opinion (44 S. E. 605), the construction of the will presents serious and difficult questions, to which we then gave our best consideration and investigation. To the suggestion that "there is not the least ambiguity upon the face of Mrs. Baird's will, nor any ambiguity arising out of extrinsic facts which call for explanation by parol evidence," it would seem a sufficient answer that counsel of great learning and equal candor have at every stage of this litigation contested every point, and advanced arguments, to sustain their contentions, which were entitled to and which have received most respectful consideration. We are met at the very threshold with the contention that, in disposing of the Forest Hill property the testatrix used the word "children" when she intended to include "grandchildren"; that she not only meant grandchildren, but that she intended by the word "children" to include the children of one daughter and exclude her other grandchildren. It is further contended that when she used the word "heirs" in the fifth item she meant "children."

The learned counsel for the plaintiffs, in their brief upon the first hearing, say: "But we think that this case presents an instance where the court, to reconcile an apparent repugnancy, will give the words 'all my children' a sense beyond their natural import, and, construing items 2, 4, 5, and 7 together, will hold that 'grandchildren' are included." With the greatest possible deference to the learned counsel, we think that it would be difficult to find a will of the same length in which there are more ambiguities and difficulties. Counsel, in vigorous but entirely respectful language, urged that, in examining the parol evidence sent to us to enable us "to place ourselves in the place of the testatrix at the time of making her will," we are "indulging in forbidden fruit." The record shows that, when the deposition of John R. Baird was opened, the plaintiffs filed certain objections thereto, for that the certificate was irregular. The objections were overruled by the clerk, and his ruling upon appeal was affirmed by the judge. It is stated that no objections were made before the commissioner to the competency of the testimony, but the judge at the trial permitted the plaintiffs to file objections, which were objected to by the defendants as not being made in apt time. The record does not show any ruling of his honor upon these objections, but the case on appeal has this statement: "It having been agreed by counsel for the

plaintiffs and defendants that the judge should find the facts, his honor announced that he found the facts as stated in the foregoing deposition of John R. Baird, and adopted it as his findings of fact, in so far as the construction of the will was concerned, and no further." There was no suggestion that we were to disregard the deposition. We considered it for the same purpose and to the same extent as did his honor. It did not occur to us that the estimate of values or other statements were conclusive upon the parties upon taking the account before the referee, but that, for the purpose of construing the will, the facts therein stated were taken as true.

In the appellants' brief on the first hearing we found "a brief statement of the case," in accordance with rule 34 (39 S. E. ix), which was followed by these words: "All the foregoing facts are found by the judge who tried this case in the superior court by consent of all parties, as set out in the record." The plaintiff's brief made no issue with the defendants in regard to the facts, but expressly stated, on the first page, that "the court found the facts to be as stated in the deposition, * * * and adopted it as his findings of fact in so far as the construction of the will was concerned and no further." (Italics in the brief.) The brief states that the plaintiffs objected to the introduction of the deposition. There was no exception to the action of the court in admitting it. The only further reference to the deposition is (page 5): "We think that the evidence offered by the plaintiffs to aid the court in construing the will was incompetent and unnecessary; yet, when duly considered, it confirms the view we have taken." We notice at length these facts because of the language contained in the petition to rehear and the brief filed regarding the action of this court in considering "extrinsic facts." We can decide cases only upon the record sent us, with the aid of briefs and arguments of learned counsel. If it was intended to insist that Mrs. Baird's will was free from difficulty, and that "there was not the slightest ambiguity in the description of those who are to take in item 7 of the will," it was not so suggested in the brief or argument before us upon the first hearing.

After a careful re-examination of the grounds upon which our opinion at the last term was based, we see no reason for changing the conclusion to which we then came. We fully recognize the principle of law, contended for and relied on by the plaintiffs, that where a testator directs his property, whether real or personal, to be equally divided among his heirs, the division must be per capita and not per stirpes, unless there be something in the will showing a contrary intention. For the reasons given in the former opinion, we think there was evidence in the will, as well as the extrinsic facts, of the intention to take the case out of the general

rule, and this upon the principle stated by Lord Langdale, cited in *Bivens v. Phifer*, 47 N. C. 436.

The plaintiffs urge that the appeal was premature. In the light of the record before us in respect to the way by which the case was tried below, we cannot concur with the plaintiffs in this contention. If it was desired to have a reference before the will was construed, it should have been so insisted upon before his honor, and, upon the refusal to order a reference, an exception noted or probably an appeal taken. This appeal being by the defendants, that question is not presented for review, but the plaintiffs could have brought it before this court, by exception and appeal, upon the refusal of his honor to order a reference before construing the will. To prevent possible misconception we desire to say that we concur with the plaintiffs' contention that his honor's findings of fact are to be confined strictly to the construction of the will, and that the referee is in no sense bound thereby in taking the account of the testator's estate as ordered by the judgment below. We do not deem it necessary to repeat the views which we expressed at the last term, or the authorities upon which they were based. That we do not do so should not be construed as a failure on our part to carefully examine and consider the arguments and briefs of the learned counsel for the petitioners.

Let the petition be dismissed.

(124 N. C. 457)

HUGHES et al. v. OLARK et al.

(Supreme Court of North Carolina. March 22, 1904.)

STREET—DEDICATION—REVOCATION—ACCEPTANCE BY TOWN—EFFECT.

1. Where one has a tract of land platted into lots and streets, and sells lots with reference thereto, his dedication of the streets is irrevocable, so that he cannot thereafter convey good title to a part of one of them.

2. Where a tract outside the corporate limits of a town was platted into lots and streets, and lots sold with reference thereto, the acceptance or nonacceptance by the town, on extension of its limits so as to include the tract, of a part of one of the streets, does not affect the title thereto, but only affects the town's liability to keep it in repair.

Appeal from Superior Court, Pitt County; Moore, Judge.

Action by J. E. Hughes and others against W. T. Clark and another. From a judgment dismissing the action as of nonsuit, plaintiffs appeal. Affirmed.

Jarvis & Blow and F. S. Spruill, for appellant. Connor & Connor and Fleming & Moore, for appellees.

MONTGOMERY, J. The purpose of this action is to compel specific performance on the part of the defendant of a contract entered into in February, 1902, for the sale by the plaintiffs and the purchase by the defend-

ant of a parcel or lot of land and its improvements situated in the town of Greenville. In conformity with the written agreement between the parties, the plaintiffs executed in due form a deed to the property, and tendered it to the defendant, who declined to accept it and pay the agreed purchase price on the ground that the plaintiffs had no good and sufficient title to that part of the lot of land described in the deed, upon which was located a leaf tobacco factory and machinery necessary for its operation. The only question in the case, then, is this: Did the plaintiffs have, at the time they tendered the deed to the defendant, a good and sufficient title to that part of the lot on which was situated the factory and machinery and equipment? In 1892 the Greenville Land & Improvement Company, being the owner of a tract of land known as the "Moore Land," lying to the southeast of Greenville, and adjoining the town, had the same laid out by P. Matthews, a surveyor, into building lots and streets; Matthews at the same time furnishing a map on which the streets were designated by names and the lots by numbers. Numerous deeds, in each of which one or more of the lots was embraced, to various purchasers, were executed by the Greenville Land & Improvement Company, its successor, the Greenville Lumber Company, and Lovitt Hines, receiver of the last-named company, and duly registered prior to the sales made by said Hines, receiver, of lots Nos. 21, 34, and 35; and in all those deeds reference was made, as to the description of the property conveyed, to the names of streets and numbers of lots as shown on the map of Matthews. The habendum was in these words: "To have and to hold the above-described parcel or lot of land, together with the rights of ingress and egress on all the streets leading to the same, and all other rights and privileges thereto belonging." The lots Nos. 21 and 35, with several others, were conveyed by Hines, receiver, to L. O. Arthur, and lot No. 34 was conveyed by Hines, receiver, to Strause, who in turn conveyed it to Arthur. In the deed from Hines to Arthur is also conveyed all the right, title, and interest which the Greenville Lumber Company might have in and to any or all of the streets included in the lands or dividing the lots therein conveyed. Arthur and wife, in 1901, conveyed lots Nos. 21, 34, and 35 to the plaintiffs, together with a strip of land 10 feet wide and running along the southern side of the above-mentioned lots, the said 10 feet being at the time a part of Eleventh street on the map of Matthews. The property mentioned and described in the deed which the plaintiffs tendered to the defendant embraced lots 21, 34, and 35, and also the 10-foot strip of Eleventh street, upon a part of which the plaintiffs afterwards built one end of their tobacco factory. Eleventh street, at the time of the Matthews survey, was set apart and staked off with iron stakes, but that part of the street which was

between Clark and Pitt streets, upon which lots 34 and 35 abutted, was not actually put in a condition for general use at the time of the sale of lots 34 and 35, although people could and did pass over the same.

Did Arthur's deed to the plaintiffs have the effect of vesting the title to the 10-foot strip of Eleventh street in the plaintiffs? Or, to state the question in another form, could Hines, the receiver of the Greenville Lumber Company, by his deed to Arthur, enable Arthur or his grantees, the plaintiffs, to obstruct Eleventh street by building on a part of it a tobacco factory, as against purchasers of lots according to the plan of the Matthews survey? The decisions of this court are to the contrary. In *Rives v. Dudley*, 56 N. C. 126, 67 Am. Dec. 231, Judge Pearson, in illustrating the question decided in that case, said for the court: "What is the principle? It is this: If the owner does an act whereby he signifies his intention to appropriate land to the use of the public as a highway or street or square, to be used by the public as a pleasure ground or the like, and individuals, in consequence of this act, purchase property or build houses with reference to its being so used by the public, and become interested to have it so continue, he is precluded from resuming his private rights of property over the land, because it would be fraudulent in him to do so. When individuals have become interested in reference to the use of the land by the public, the dedication takes effect immediately." And again, in *Moose v. Carson*, 104 N. C. 431, 10 S. E. 689, 7 L. R. A. 548, 17 Am. St. Rep. 681, the court declared it to be a well-settled principle that where a corporation or an individual, by laying off streets, has induced third persons to buy lots adjacent to them, the dedication to the public use of the streets was irrevocable, and that even in cases where they have not been formally accepted by the authorities of a town in which they lie. In *Conrad v. Land Co.*, 126 N. C. 776, 36 S. E. 282, the court said: "If the owner of land lays it off into squares, lots, and streets with a view to forming a town or city or as a suburb to a town or city—certainly if he causes the same [the map] to be registered in the county where the land is situate—and sells any part of the lots and squares, and in the deed refers in the description thereof to a plat, such reference will constitute an irrevocable dedication to the public of the streets marked on the plat. *Meier v. Portland*, 16 Or. 500 [19 Pac. 610, 1 L. R. A. 856]. We think the same principle would apply to the piece of land which was marked on a plat as squares, or courts, or parks, and that streets and public grounds designed on said map should forever be opened to the purchaser and the public." It is true that in *Moore v. Carson*, *supra*, the defense of the defendants was that their ancestor had bought lots abutting the particular street in Taylorsville, in Alexander county, and which street the commissioners had

afterwards attempted to sell and convey to the plaintiffs; and in *Conrad v. Land Co.* the action for a perpetual injunction to restrain the defendant from selling for private purposes a part of Grace court was brought by persons who had bought lots abutting Fourth street as it ran alongside the court. Nevertheless, in the last-mentioned case the court held, as we have seen, that all the streets marked on the plat were irrevocably dedicated to the public. And in *Collins v. Land Co.*, 128 N. C. 563, 39 S. E. 21, 83 Am. St. Rep. 720, although the streets which the defendants were obstructing and closing were in a remote and sparsely settled and comparatively less valuable section of the lands which had been laid off into streets and lots, the court held that the scheme of sale as indicated by the map was a unity, and that there was a presumption that all the public ways had added value to all the lots embraced in the scheme. In that case the court, after having referred to the lack of uniformity in the decisions of the courts of the several states upon the matter under consideration—some of them holding that the purchaser had a right of way over all the streets designated on the map, and that each and all of them must be kept open, while in other jurisdictions it was held that a purchaser could only require the public way adjoining the purchaser's lot to the highway in one direction and to the next side street in the other—declared that after a careful consideration it would not alter the decision on that question made in *Conrad v. Land Company*. It will not be superfluous to quote from the last-mentioned case what was said there on this point: "The principle of law involved in this case is, we think, the same as that in *Conrad v. Land Co.*, 128 N. C. 776 [36 S. E. 282]. The inconvenience and loss which may arise here from the enforcement of that principle of law will be greater than in that case, but that argument would not be allowed to influence us in our decision. The courts of the states in which the question before us has been presented and decided are divided. In some jurisdictions it has been held that, where lots have been sold by reference to a plat representing a large tract of land into subdivisions of streets and lots, like the one before us, the purchaser of a lot does not acquire a right of way over every street laid down on the plat. *Pearson v. Allen*, 151 Mass. 79 [23 N. E. 731, 21 Am. St. Rep. 426]. In other courts it is held that a map or plat referred to in a deed becomes a part of the deed as if written therein, and that, therefore, the plan indicated on the plat is to be regarded as a unity, and the purchaser of a lot acquires a right to have all and each of the ways and streets on the plat or map kept open. This view is so well and clearly stated in *Elliot on Roads*, § 120, that we quote it: 'It is not only those who buy land or lots abutting on a street or road laid out on a map or plat that have a right to insist upon the opening of a

street or road, but where streets and roads are marked on a plat, and lots are bought and sold with reference to the general plan or scheme disclosed by the plat or map, they acquire a right to all the public ways designated thereon, and may enforce the dedication. The plan or scheme indicated on the plat or map is regarded as a unity, and it is presumed, as well it may be, that all the public ways add value to all the lots embraced in the general plan or scheme. Certainly, as every one knows, lots with convenient cross-streets are of more value than those without, and it is fair to presume that the original owner would not have donated land to public ways unless it gave value to the lots. So, too, it is just to presume that the purchasers paid the added value, and the donor ought not, therefore, to be permitted to take it from them by revoking a part of his dedications.' The effect of the foregoing decisions therefore is that, where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into subdivisions of streets and lots, such streets become dedicated to the public use, and the purchaser of a lot or lots acquires the right to have all and each of the streets kept open; and it makes no difference whether the streets be in fact opened or accepted by the governing boards of towns or cities if they lie within municipal corporations. There is a dedication, and, if they are not actually opened at the time of the sale, they must be at all times free to be opened as occasion may require. If such streets be obstructed, there is created thereby a public nuisance, and each purchaser can by injunction or other proper proceeding have the nuisance abated, as there is in all such cases an irrebuttable presumption of law that any complaining purchaser of a lot or lots has suffered peculiar loss and injury.

The plaintiffs, however, insist that they acquired a good title to the property through the action of the board of aldermen of the town of Greenville. At the time of the Matthews survey and the sale of the lots by the Greenville Land & Improvement Company and Hines, the receiver of the company, the property was outside the corporate limits of the town; but in 1899 the limits of the town were extended so as to take the entire tract of land, including Eleventh street, within them. On March 14, 1902, the board of aldermen of the town, after declaring in meeting that they had not accepted that part of Eleventh street between Clark and Pitt streets, as it appeared on the map of Matthews, as a street of the town, in consideration of an attempted donation of Arthur to the town of the land on which Eleventh street runs, presumably under his deed from Hines, receiver, and which did not pass the easement, and the further agreement of Arthur to donate the land between Pitt and Greene streets to the town, and to open Eleventh street between those points,

and the proposition of the plaintiffs to open Eleventh street 40 feet wide between Clark and Pitt streets, if the board would agree to accept Eleventh street 40 feet wide in place of 50 feet (Eleventh street being 50 feet wide in fact, and also on the Matthews survey), agreed that the plaintiffs might continue to use and occupy the factory building on that part of Eleventh street lying alongside the southern end of lot 35, and they also relinquished to the plaintiffs and their assigns all right or claim the town might have acquired, if any, to said 10 feet of Eleventh street between Clark and Pitt streets where the factory of the plaintiffs is located. We cannot see how that action of the board of aldermen helped the title of the plaintiffs. There are most respectable authorities which hold that if a city or town accepts, in an amended charter, additional territory previously laid off and platted into streets and lots, the acceptance amounts to an acceptance of such an addition and the streets and alleys therein. If we should adopt that view, it might be in the power of the board of aldermen, under section 3803 of the Code, to narrow the street, but the only effect of that would be to restrict the town's liability to keep in repair the street so narrowed. They would have no right to relinquish or give away the remainder of the former street to a private individual for private purposes. *Pence v. Bryant* (W. Va.) 46 S. E. 275; *Moose v. Carson*, supra. On the other hand, the acceptance of the additional territory under the amended charter did not have the effect in law of an acceptance by the board of aldermen of Eleventh street 50 feet in width, as it appears on the map of Matthews; and if the only acceptance by the town of Eleventh street was that of March, 1902, as being 40 feet in width, leaving 10 feet thereof at the southern side of lots 34 and 35, then the town authorities had nothing to do with the 10 feet of the street which they declined to accept. It remained exactly as it did before—it became a part of the town, dedicated to the public use, though not to be kept in repair by the town, and not to be obstructed because of the reasons already given in this opinion.

We find no error in the judgment of his honor in dismissing the plaintiff's action as of nonsuit, and the judgment is affirmed.

CONNOR, J., having been of counsel, did not sit on the hearing of this case.

(124 N. C. 481)

ATTORNEY GENERAL v. HOLLY SHELTER R. CO.

(Supreme Court of North Carolina. March 22, 1904.)

CORPORATIONS—CHARTERS—FORFEITURE—ENFORCEMENT—ACTION BY ATTORNEY GENERAL—LEAVE TO SUE—CONDITION PRECEDENT.

1. Code, § 603, declares that writs of *scire facias* and *quo warranto* and proceedings in the nature of *quo warranto* are abolished, and

the rights enforceable in these forms may be obtained by civil action. Section 604, as amended by Laws 1889, p. 504, c. 533, authorizes the Attorney General, whenever the Legislature shall so direct, to bring an action against a corporation to annul the act of incorporation or an act renewing its corporate existence or its letters of incorporation on the ground of fraud; and section 605 authorizes the Attorney General, on leave granted by a justice of the Supreme Court, to sue to vacate the charter of a corporation on grounds specified. *Held*, that the Attorney General was prohibited from bringing an action on his own motion for the vacation of a corporation's articles, etc., for fraud.

2. The right to maintain such proceeding was not given by Code, § 2788, in the chapter relating to land, providing that an action may be brought by the Attorney General in the name of the state for the purpose of vacating or annulling letters patent granted by the state where the same has been obtained by fraud.

Appeal from Superior Court, Pender County; Brown, Judge.

Action by the state, on the relation of the Attorney General, against the Holly Shelter Railroad Company. From a judgment in favor of defendant, relator appeals. Affirmed.

Rountree & Carr and John D. Bellamy, for appellant. Iredell Meares and Francis D. Winston, for appellee.

MONTGOMERY, J. This action is prosecuted in the name of the state of North Carolina, on the relation of Robert D. Gilmer, Attorney General, against the defendant, the Holly Shelter Railroad Company, for the purposes of having the charter of the company declared null and void and canceled, and the defendant corporation restrained and prohibited from exercising and attempting to exercise the rights of a railroad company pending the action. A restraining order was granted by Brown, J., with an order that the defendant should thereafter, on a day named, appear before him, and show cause, if any it might have, why the restraining order should not be continued to the final hearing. Afterwards, on December 2, 1903, the matter was heard, and the restraining order dissolved, from which order the plaintiff appealed.

The complaint embraces two causes of action. In the first it was alleged that the charter of the defendant company was organized for the purpose of operating a merely private logging road, and not a railroad for the benefit of the public in carrying passengers and freight, and that the articles of incorporation of the defendant were obtained from the Secretary of State by falsely representing to him that the defendant company was to be organized and chartered for the purpose of constructing and operating a railroad company for public use in the conveyance of freight and passengers. In the second cause of action it was alleged that the defendant was exceeding the authority granted to it in its charter, and was exercising and threatening to exercise franchises

and privileges not conferred upon it by law. The specific charge of exceeding chartered rights was that the defendant had changed one of the termini of its road, and had extended or was extending its roadbed beyond the limit mentioned in the charter. Upon the complaint and answer and the affidavits filed by the plaintiff and the defendant his honor was of the opinion: (1) That the action to set aside the charter of the defendant upon the ground of fraud in obtaining it could not be brought by the Attorney General without the express direction of the General Assembly, section 604 of the Code being a legislative limitation upon such power; and (2) that as to the second cause of action, under section 605 of the Code, the allegations were not supported by the proofs, and were fully denied in the answer.

The contentions of the plaintiff in this court were that at common law, and also under section 2788 of the Code, the Attorney General was at liberty in his discretion to bring the action. The argument was to the effect that, as the Attorney General in England was authorized and empowered to institute proceedings of his own motion to compel the dissolution of corporations, so the Attorney General of the state might exercise the same powers, as the common law is in force in North Carolina, except where it is in conflict with the genius of our institutions; and that there would be no inconsistency between the laws of England on this subject and those of our own state. On the contention that the Attorney General could proceed under section 2788 of the Code, it was insisted that that section was, through mistake or inadvertence of the code commissioners, taken from the Code of Civil Procedure (section 367) and placed in the Code under the chapter entitled "Entries and Grants," and that in so doing the words "letters patent" were made to assume a restricted meaning—one applicable to grants alone; and, further, that if section 367 of the Code of Civil Procedure (now section 2788 of the Code) had been inserted in its proper place in title 15, c. 1, of the Code (actions in place of *scire facias*, *quo warranto*, etc.), the words "letters patent" would be broad enough to include the charters of incorporated companies; and that section 604 of the Code (Code Civ. Proc. 363) might be construed as a direction from the General Assembly to the Attorney General to proceed in cases which they had examined into, in addition to the general power given in section 2788 (section 367, Code Civ. Proc.). Neither one of the contentions, in our opinion, can be sustained. The whole subject of this controversy is now of legislative authority, for section 603 of the Code declares that "the writ of *scire facias*, the writ of *quo warranto*, and proceedings by information in the nature of *quo warranto* are abolished, and the remedies obtainable in those forms may be obtained by civil actions under this

subchapter." The next section of the Code (604) provides that "an action may be brought by the Attorney General in the name of the state, whenever the Legislature shall so direct, against a corporation for the purpose of vacating or annulling the act of incorporation or an act renewing its corporate existence, on the ground that such act or renewal was procured upon some fraudulent suggestion or concealment of a material fact by the persons incorporated, or by some of them or with their knowledge and consent." That section of the Code on its face has reference to corporations chartered by the General Assembly; but the Legislature, at its session of 1889 (page 504, c. 533), amended it by adding after the words "the act of incorporation or an act renewing its corporate existence" the words "or its letters of incorporation." That amendment, in our opinion, referred to the manner of chartering corporations, not by the General Assembly, but under chapter 16 of the Code. If the contentions of the plaintiff were true, the amendment of 1889 would have been made to section 2788 of the Code. Then, too, if the Attorney General has the right to institute proceedings in the nature of *quo warranto* against corporations in cases where the charters were obtained and granted through fraudulent representations or suggestions under section 2788, then why should it be thought necessary by the General Assembly that that body should provide for such a proceeding by special enactment—section 604 of the Code? And, further, the Attorney General cannot bring an action in the nature of *quo warranto* for the purpose of vacating the charters of corporations in the cases mentioned in section 605 of the Code unless and until he gets the leave of the Supreme Court, or one of the justices, for that purpose. The clear meaning of section 604 before the amendment of 1889 (page 504, c. 533), was that whenever the General Assembly had chartered a corporation that charter should not be annulled or vacated on the Attorney General's own motion on the alleged ground that the charter had been procured by fraud. The investigation of such a charge is reserved for the future action of the Legislature itself. The amendment of 1889 to section 604 of the Code had the effect, and was intended, to put the charters of incorporated companies procured under chapter 16 of the Code on the same footing with charters granted by the General Assembly. The ruling of his honor, therefore, that the Attorney General was not authorized to bring this action on the allegation that the defendant's charter was procured through a fraudulent suggestion or representation, was correct.

As to the second cause of action, founded on section 605 of the Code, the Attorney General had the leave of the chief justice of this court to commence such action. But we see enough from a reading of the record and evi-

dence that his honor was correct in holding that the allegations of the second cause of action were not supported by the evidence, and that they were fully denied in the answer.

No error.

(134 N. C. 131)

MIAL v. ELLINGTON et al.

(Supreme Court of North Carolina. Dec. 2, 1903.)

PUBLIC OFFICE—LEGISLATIVE CONTROL—PROPERTY RIGHTS.

1. An officer appointed for a definite time to a public office has not a vested property interest therein, or contract right thereto, of which the Legislature cannot deprive him.

Montgomery and Douglas, JJ., dissenting.

Appeal from Superior Court, Wake County; Peebles, Judge.

Action by the state, on the relation of A. T. Mial, against J. C. Ellington and others. Judgment for defendants, and relator appeals. Affirmed.

This is a civil action in the nature of a quo warranto, tried upon the following agreed facts: At the session of 1889 (Pub. Laws, p. 360, c. 363) an act was passed entitled, "An act providing an alternative method of constructing and keeping in repair the public roads of Raleigh township, Wake county." It was provided by said act that the justices of the peace of Raleigh township should meet, and, if a majority so decided, adopt the method of keeping in repair the public roads of said township in accordance with the provisions of said act; that, when they had so adopted said method, it was by said act made the duty of the county commissioners at their regular meeting, and biennially thereafter, to appoint a supervisor of roads for said township; that said supervisor should hold his office for two years; that, in the event of a vacancy, the same should be filled by said board of commissioners. Provision was made for removal for cause, and upon notice. Said supervisor was required to qualify by taking the oath of office, and giving bond in an amount to be fixed by the board. The duties prescribed for said supervisor were that he should formulate a plan for the permanent improvement of the public roads of said township outside the city of Raleigh by the use of the labor of county convicts and workhouse hands, etc. He was required to disburse all funds paid to him upon the warrant of the county commissioners for the purpose of carrying out the provisions of the said act, and to keep an account thereof, as well as a list of all tools, etc., in his possession, and to make a report thereof to the commissioners. The duties of said supervisor in all other respects were specifically pointed out in the several sections of said act. His compensation was to be fixed by

the board of commissioners, but the same was not to exceed \$750 per annum. Pursuant to the provisions of said act, the method prescribed therein for working the roads of Raleigh township was duly adopted by the justices of the peace, and a supervisor duly elected. At the session of 1891 (Pub. Laws, p. 182, c. 218) the maximum limit of the salary of the supervisor was fixed at \$1,200. At the session of 1897 (Pub. Laws, p. 621, c. 434) the provisions of said act were extended three miles beyond the present limits of Raleigh township, in each direction. That at the regular meeting of the board of commissioners of Wake county held in December, 1902, one Bryant Harrison was appointed by the said board to be supervisor of roads of Raleigh township for a term of two years, commencing January 1, 1903. That the said board fixed his salary at \$70 per month, and that the said Harrison duly qualified and entered upon the discharge of his duties as such officer. That at the February meeting of said board of commissioners the said Harrison resigned the said office, to take effect on March 1, 1903, and thereupon the board accepted said resignation, and called a special meeting, to be held on February 21, 1903, to appoint a successor. That at said special meeting the relator, A. T. Mial, was duly appointed to fill out the said unexpired term, and his salary fixed at \$70 per month. That he subsequently gave the required bond, took the oath of office, and was duly inducted therein, and entered upon the discharge of his duties as such officer. That at the session of 1903 the General Assembly enacted chapter 551, p. 931—an act entitled "An act to improve the public roads of Wake county." By said act it was provided that the board of county commissioners of Wake, in order to provide for the proper construction, improvement, and maintenance of the public roads of the county, "shall on or before January 1, 1904, elect a superintendent of roads for the county, who shall hold office until December, 1904, and until his successor has been elected and qualified; and at their regular meeting in December, 1904, and biennially thereafter, they shall elect a successor to said office. The superintendent of roads shall be paid such compensation as shall be fixed by said board out of the county road fund, and hold office for two years and until his successor has been elected and qualified. * * * It shall be the duty of said superintendent of roads, subject to the approval of the board of county commissioners, to supervise, direct and have charge of the maintenance and building of all public roads in the county, and he shall submit to the county board of commissioners a monthly report concerning the work in progress and the moneys expended, and he shall submit a quarterly report on the condition of the public roads and bridges and plans for their improvement. That the board of commissioners shall divide

1. See Constitutional Law, vol. 10, Cent. Dig. §§ 364, 367.

the county into three road districts, to be known as the Raleigh, the Northern and the Southern road districts, respectively. The boundary of the Raleigh road district shall be the circumference of a circle, the radius of which shall extend eight miles from the capitol building, in the city of Raleigh, in every direction; and the boundaries of the other districts shall be fixed by the board of county commissioners, and said board shall have power to create new road districts whenever in their opinion there is necessity for the same, and to alter the boundaries of any district, except the Raleigh road district, when they may consider it advisable. For each of the road districts the county commissioners shall elect, at the time herein prescribed for the election of the road superintendent, a district supervisor, who shall hold office for the same term and in the same manner that he holds, and until their successors are elected and qualified. Each supervisor shall give bond in the sum of \$1,000 for the faithful performance of the duties of his office, the truthful accounting for all moneys coming into his possession, and the proper care of all teams, wagons, machinery, tools and implements entrusted to his charge; and they shall furnish inventories of such material, tools, implements, machinery and utensils of every nature that shall come into their hands upon their entrance upon and retirement from office; they shall be paid such compensation as shall be fixed by the board of county commissioners, and may be removed from office in the same manner provided for the road superintendent. The county commissioners shall furnish each supervisor with a complete outfit of teams, carts, machinery, implements, tools and utensils for use by him upon the roads of his district, and the machinery, tools, implements and property now belonging to the Raleigh road district shall not be used upon the roads of any other district, but shall be kept for the exclusive use of that district. The work of the supervisors in each district shall be under the direction and control of the superintendent of roads, and they shall faithfully conform to his directions and the requirements of this act. There shall be kept continuously employed upon the roads of each district a squad of not less than fifteen hired hands, whose compensation shall be fixed by the board of commissioners." That at the regular meeting of said board of commissioners held in April, 1903, the said board caused public notice to be given that at the regular May meeting of the said board a superintendent of roads for Wake county, and three supervisors for the respective road districts of said county, would be elected by the said board, under said chapter 551, p. 931, Laws 1903, and, in pursuance of said notice, at said May meeting the board of commissioners elected the defendant J. C. Ellington superintendent of roads for Wake county, and the defendant

Alfred Jones supervisor for the Raleigh road district, and I. N. Bailey and A. R. Holloway supervisors for the Northern and Southern road districts of Wake county, respectively. That the relator, A. T. Mial, was not a candidate or applicant for either of these positions. That the defendants J. C. Ellington and Alfred Jones prior to the commencing of this action gave the bond and took the oath of office, and did all other acts required of them by the said act of March 6, 1903. Thereafter, on the 12th day of May, 1903, acting under the order of the defendants the board of county commissioners of Wake county, the said J. C. Ellington took possession of the teams and other property and effects belonging to Raleigh township, and then in the custody of the relator, A. T. Mial, by virtue of his office aforesaid, in the absence of said Mial and without his consent; and on the said 12th day of May the defendants the board of county commissioners of Wake county withdrew all the convicts, guards, and officers in their custody, and which worked upon the roads of Raleigh township, and over whom the relator, A. T. Mial, had supervision, and placed them under the charge and supervision of the defendant J. C. Ellington. That thereafter, on said May 12, 1903, the relator, A. T. Mial, demanded the return to him of all of the said property and effects, and that they give to him control of the convicts, guards, and officers, and that the same was refused by the defendants. That at the said May meeting, 1903, the board of commissioners of Wake county, in pursuance of the said act of March 6, 1903, fixed the boundaries of the Northern and Southern road districts of Wake county (the boundaries of the Raleigh road district having been fixed by the act), and included the territory formerly within the Raleigh township, under the said act of 1889, and all the acts amendatory thereof, and also included certain territory in addition thereto. The court, upon the foregoing agreed facts, rendered judgment for the defendants, and the relator appealed.

Battle & Mordecai and Womack & Hayes, for appellant. B. M. Gatling, for appellees.

CONNOR, J. We have no disposition, in the decision of this case, to place the conclusion to which we have arrived upon the ground that the position of supervisor of the roads, the title to which is in controversy, is not a public office. Adopting the settled definition of a public officer, we hold that the position comes clearly within such definition. Nor are we disposed to enter into a discussion of the many fine and delicate distinctions which have been made between the validity of an act which distributes the duties of an office, and one which abolishes the office. We prefer, rather, to discuss and decide the question which is fairly presented by this record—whether an officer appointed for

a definite time to a legislative office has any vested property interest or contract right to such office, of which the Legislature cannot deprive him. The contention of the relator is based upon the proposition which was decided by this court in *Hoke v. Henderson*, 15 N. C. 1, 25 Am. Dec. 877, which is thus stated by Ruffin, C. J.; "The sole inquiry that remains is whether the office of which the act deprives Mr. Henderson is property. It is scarcely possible to make the proposition clearer to a plain mind, accustomed to regard things according to practical results and realities, than by barely stating it. For what is property; that is, what do we understand by the term? It means, in reference to the thing, whatever a person can possess and enjoy by right; and, in reference to the person, he who has that right to the exclusion of others is said to have the property. That an office is the subject of property, thus explained, is well understood by every one, as well as distinctly stated in the law-books from the earliest times. An office is enumerated by commentators on the law among incorporeal hereditaments, and is defined to be the right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging. A public office has been well described to be this: When one man is specially set by law, and is compellable to do another's business against his will and without his leave, and can demand therefor such compensation by way of salary or fees as by law is assigned, to the doing of which business no other person but the officer, or one deputed by him, is legally competent." This proposition was stated by the great Chief Justice and maintained in an elaborate opinion at the December term, 1833, of this court. That it has frequently been cited with approval, and, with some exceptions, followed, by this court, cannot be denied; nor can it be successfully denied that there have always been a number of the ablest members of the bar in North Carolina who have questioned its soundness. The contrary view is thus stated by Sandford, J., in *Conner v. City of New York*, 2 Sandf. 370: "We think it must be assumed that there is no contract, express or implied, between a public officer and the government, whose agent he is. The latter enters into no agreement that he shall receive any particular compensation for the time he shall hold office, nor, in the case of a statutory office, that the office itself shall continue any definite period. Where the Constitution limits the compensation, it is beyond legislative control, but that makes no contract. The people have the control, in their sovereign capacity, as the Legislature has in statutory offices. It is not the question whether fees or salary earned may be divested. The right to receive such fees may be conceded as perfect, without affecting the present inquiry." In *Taylor v. Beckham*, 178 U. S. 577, 20 Sup. Ct. 900, 1009, 44 L. Ed. 1187,

Fuller, C. J., thus states the law as held and enforced by that court: "The decisions are numerous to the effect that public offices are mere agencies or trusts, and not property, as such. Nor are the salary and emoluments property, secured by contract, but compensation for services actually rendered. Nor does the fact that a constitution may forbid the Legislature from abolishing a public office, or diminishing the salary thereof, during the term of the incumbent, change its character or make it property. True, the restrictions limit the power of the Legislature to deal with the office, but even such restrictions may be removed by constitutional amendment. In short, generally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right."

We have thus presented the two views upon this most important question, and we are confronted with the necessity of either overruling and rejecting the theory upon which *Hoke v. Henderson* is based, or that which is stated in the cases cited as what may be called the American doctrine in respect to the relation which the public officer bears to the state. It will save any possible confusion or misunderstanding to say that nothing said by us in regard to the power of the Legislature applies to offices provided for by the Constitution. These are beyond the power of the Legislature to affect, either in respect to the term, or, except within the limitations fixed, the salary. This not because there is any property right in the office, but because the people, in their Constitution, have made provision for and regulated their terms and salaries.

The proposition involved in this appeal on behalf of the plaintiff is that neither an office, nor the duties thereof, created by an act of the Legislature fixing the term and compensation, can be transferred to some other person or affected during the term for which the incumbent has been elected; that such office is property, within the protection of the constitutional provision that no person shall be deprived of his property except by due process of law, and that no state shall pass any law impairing the obligation of a contract, which, of course, excludes the power of the Legislature to take property from one man and give it another.

We recognize the gravity of the proposition that we shall reverse a decision of this court delivered by Chief Justice Ruffin, with the approval of Justices Daniel and Gaston, which, we concede, has received the unanimous approval of this court in a number of cases, and a majority thereof in many others. If this were a question involving the title to property, upon the decision of which property rights have been acquired, settlements have been made, and the security and peace of families were dependent, we should feel it our duty to leave it to the legislative department of the government to

bring the law into harmony with sound principle and the best thought and experience of the age in which we live. Being, however, a question of public constitutional law, involving the sovereignty of the state, if it is made to appear that the principle upon which *Hoke v. Henderson* is founded stands without support in reason, and is opposed to the uniform, unbroken current of authority in both state and federal courts, it becomes our duty to overrule it, and place our jurisprudence in line with that of the other states and the federal government.

It is said by Douglas, J., in *Caldwell v. Wilson*, 121 N. C. 487, 28 S. E. 561, that, "with the exception of this state, it is the well-settled doctrine in the United States that an office is not regarded as held under a grant or contract, within the general constitutional provision protecting contracts; but, unless the Constitution otherwise expressly provides, the Legislature has power to increase or vary the duties or diminish the salary or other compensation appurtenant to the office, or abolish any of its rights or privileges, before the end of the term, or to alter or abridge the term, or to abolish the office itself. * * * Except in North Carolina, it is well settled that there is no contract, either express or implied, between a public officer and the government, whose agent he is; nor can a public office be regarded as the property of the incumbent."

We deem it proper, in view of the conclusion to which we have arrived, to review at some length the elementary principles involved, and the authorities in the United States.

It is stated by Mr. Freeman, in his note to *Hoke v. Henderson*, 25 Am. Dec. 704, that, "with all deference to the North Carolina courts, the conclusion may yet be drawn, with Mr. Pomeroy, that 'it may therefore be considered as a settled point of constitutional law—settled both by the national and state courts—that a public office bears no resemblance to a contract, and that the Legislatures have full power over the public offices of a commonwealth, except so far as they may be restrained by the local constitutions. The clause of the United States Constitution which prohibits state laws impairing the obligation of contracts has no application whatever to this subject.'"

Chief Justice Marshall, in *Dartmouth College v. Woodward*, 4 Wheat. 627, 4 L. Ed. 629, said: "Public offices are not within the inhibition of the Constitution of the United States against laws impairing the obligation of contracts. That the inhibition does not extend to offices within a state for state purposes. That the Legislature must necessarily control such offices, and may change and modify the laws concerning them as circumstances may require. That grants of political power, to be employed in the administration of the government, are to be regulated by the Legislature of each state

according to its own judgment, unrestrained by any limitation of its power imposed by the Constitution of the United States." In the same case Mr. Justice Story said: "The state Legislatures have power to enlarge, repeal, or limit the authority of public officers in their official capacity in all cases when the Constitutions of the states, respectively, do not prohibit them; and this, among others, for the very good reason that there is no express or implied contract that they shall always, during their continuance in office, exercise such authorities. They are to exercise them only during the good pleasure of the Legislature." In *Butler v. Pennsylvania*, 10 How. (51 U. S.) 402, 13 L. Ed. 472, Mr. Justice Daniel says: "The contracts designed to be protected by the tenth section of the first article of that instrument are contracts by which perfect rights—certain definite, fixed private rights—of property are vested. These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or state government for the benefit of all, and, from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require. The selection of officers who are nothing more than agents for the effectuating of such public purposes is matter of public convenience or necessity, and so, too, are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to reappoint them, after the measures which brought them into being shall have been found useless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well-being of the public. * * *

We have already shown that the appointment to and tenure of an office created for the public use, and the regulation of the salary affixed to such an office, do not fall within the meaning of the section of the Constitution relied on by the plaintiffs in error; do not come within the import of the term 'contracts,' or, in other words, the vested, private, personal rights thereby intended to be protected." Mr. Justice Lamar, in *Crenshaw v. United States*, 134 U. S. 99, 104, 10 Sup. Ct. 431, 432, 33 L. Ed. 825, says: "The question is whether an officer appointed for a definite time, or during good behavior, had any vested interest or contract right in his office, of which Congress could not deprive him. The question is not novel. There seems to be but little difficulty in deciding that there was no such interest or right." In *Newton v. Commissioners*, 100 U. S. 559, 25 L. Ed. 710, Mr. Justice Swayne says: "The legislative power of a state, except so far as restrained by its own Constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service. And it may increase or diminish

the salary or change the mode of compensation. * * * In all these cases there can be no contract and no irrepealable law, because they are 'governmental subjects,' and hence within the category before stated. * * * A different result would be fraught with evil."

We do not find a suggestion from the federal judiciary which in the slightest degree questions the authority of the cases cited. The only case to which our attention has been directed in which *Hoke v. Henderson* is referred to by the Supreme Court of the United States in connection with an office, is *Ex parte Hennen*, 13 Pet. (38 U. S.) 230, 10 L. Ed. 138. That was a rule upon a district judge to show cause why he should not reinstate a clerk who had been removed by him. There was no constitutional principle involved. It was simply a question whether the judge, under the statute, had the power of removal. The court said: "The tenure of ancient common-law offices, and the rules and principles by which they are governed, have no application to this case. The tenure in those cases depends in a great measure upon ancient usage. But with us there is no ancient usage which can apply to and govern the tenure of offices created by our Constitution and laws. They are of recent origin, and must depend entirely upon a just construction of our Constitution and laws." The court proceeds to say: "The case of *Hoke v. Henderson*, 15 N. C. 1 [25 Am. Dec. 677], decided in the Supreme Court of North Carolina, is not at all in conflict with the doctrine contained in the cases referred to. That case, like the others, turned upon the Constitution and laws of North Carolina; and by the express terms of the law the tenure was during good behavior, and was, of course, governed by very different considerations from those which apply to the case not before the court." The rule was discharged. There was no suggestion of a property right in the office.

Returning to the state courts, we find in *Conner v. City of New York*, *supra*, after discussing the opinion in *Hoke v. Henderson*, the learned justice says: "It appears to us, with much respect for the learned tribunal which pronounced this judgment, that it was unduly influenced by the common-law rule derived from prescriptive offices, and operating in a government whose genius and spirit are perhaps in no more respect unlike ours than in this very subject—the source and nature of the rights and interests acquired by public officers. In enumerating the qualities of an office, considered as property, the court admitted that it was inalienable, and in many instances incapable of being managed by a substitute, and, in the only point giving it the semblance of value, subject entirely to legislative control. If to these be added the consideration that it is a political agency, and not like a private contract of hiring for a definite period, we think there

will remain no incident of property, in its correct signification." This cause being before the Court of Appeals in 5 N. Y. 301, Ruggles, C. J., concludes the opinion of the court as follows: "Mr. Justice Sandford has referred to so fully, and reviewed so judiciously, the authorities on the proposition under consideration, that it appears unnecessary to re-examine them. My judgment accords with his conclusion, viz., that 'these authorities, with the nature of the duties and employment of a public officer, seem conclusively to show that such an officer has no property in the prospective compensation attached to his office, whether it be in the shape of a salary or fees.'"

In 1834 *Nicholl, J.*, in the case of *State v. Dewa, R. M. Charit. (Ga.) 397*, in discussing the same question, uses the following language: "That a public office is the property of him to whom the execution of its duties is intrusted is repugnant to the institutions of our country, and is at issue with that universal understanding of the community which is the result of those institutions. Public officers are, in this country, but the agents of the body politic, constituted to discharge services for the benefit of the people, under laws which the people have prescribed. So far from holding a proprietary interest in their offices, they are but naked agents, without an interest. As public agents, they are intrusted with the exercise of a portion of the sovereignty of the people—the *jus publicum*—which is not the subject of grant, and can be neither alienated nor annihilated; and it would be a repugnant absurdity, as incomprehensible as it would be revolting, that they can have a private property in that sovereignty. Unlike those officers in England whose offices are treated as property, they do not hold under grant, but their authority or function to discharge the duties of their offices is delegated to them by commission. In those instances in which, in England, the right to offices has been regarded as property, the instrument of conveyance has been technically a grant—a conveyance by which an estate is passed or purchased, and employing the technical terms of a grant, '*dedi et concessi*.' But from the organization of the first republican government of this state, officers have been appointed by commission—a term which, whether regarded according to its ordinary meaning or its legal sense, imports a delegation of authority. And our earliest books draw a distinction between a grant of an office and a commission, and inform us that the former, as its name implies, is not revocable, but that the latter, which is only the delegation of an authority, is. The title exhibited by the defendant himself in his return, and by which only he can vindicate his possession, is that he has been duly elected sheriff, and has been duly commissioned and qualified. He claims, therefore, not by grant, but under commission, and that com-

mission commits to him only an authority, without an interest. The title of the defendant is not by a grant which passes an estate, but by a commission, which is a delegation or warrant of authority, and which, so far from passing an estate, is founded upon and is an affirmation of the fact that the estate is not in him, but in those from whom the power proceeds. It confers upon him title to exercise the authority, but the subject of that authority is in the principal, and under his control, and the very authority of the agent is evidence of it. Every authority implies a perfect right in the grantor to the extent of that authority, at least as between him and the agent, and it is perfectly insensible that, because of such agency, the agent becomes armed with a control over the exercise of that right." It will be observed that Judge Ruffin says, "An office is enumerated by commentators on the law among incorporeal hereditaments." Judge Nicholl, dealing with that phase of the question, says: "As property, offices are classed under the head of incorporeal hereditaments, and must be held under a conveyance to a man and his heirs, or at least a freehold interest must be held in them. Nor can an action be maintained for an injury resulting from a disturbance or interference with an office, unless it be an incorporeal hereditament or a freehold." It is well settled that in the United States a public office is not, and cannot, in the very nature of our government, be, an incorporeal hereditament. 3 Kent (13th Ed.) 454.

This question came before the Supreme Court of South Carolina in *Alexander v. McKenzie*, 2 S. C. 81, when Willard, J., delivered an exhaustive opinion. He says: "*Hoke v. Henderson*, 12 N. C. 1 [25 Am. Dec. 677], holds the contrary doctrine, but is without the support of reason or authority. Misapprehension of the English doctrine on this subject has frequently given rise to erroneous views of the powers of political bodies." The court adopted the view of the New York court in *Conner v. City of New York*, supra.

In *Standeford v. Wingate*, 68 Ky. 440, the Supreme Court of Kentucky thus states the conclusion reached upon the question: "An office established and held for the public good is not a contract, nor is its tenure secured by any binding contract." Roberson, J., in the opinion of the court, at page 448, says: "Within the range of our researches, the only adjudged case which could give any countenance to such an unreasonable doctrine is that of *Hoke v. Henderson*, in which, as reported in 12 N. C. 1 [25 Am. Dec. 677], the Supreme Court of North Carolina decided that the term of a legislative office could not be reduced below that which was prescribed when the incumbent was elected. That anomalous decision, on a Constitution not in all respects identical with ours, as bearing on the same question, is not,

in our opinion, sustained by consistent argument."

The Supreme Court of Maine, in *Prince v. Skillin*, 71 Me. 361, 36 Am. Rep. 325, says: "All offices, except when legislative authority is limited or restricted by constitutional provisions, are subject to the will of the Legislature. There is, with this exception, no vested right in an office or its salary."

In *Kendall v. Canton*, 58 Miss. 526, Chalmers, J., in the opinion of the court, says: "Counsel for the plaintiff are correct in saying that while an election or appointment to office is not a contract, in its broadest sense, it does so far partake of the attributes of a contract as to entitle the incumbent to recover all salary accruing during his incumbency. But there is no demand here for salary earned and in arrear. The action sounds wholly in damages, and proceeds upon the idea of a vested right to hold for the full term for which the plaintiff had been elected. Nothing is better settled than the legislative power to terminate at pleasure the incumbency of a statutory office, either by an abolition of the office itself, or by a change in the tenure or the mode of appointment."

Cole, J., in *State v. Douglas*, 26 Wis. 428, 7 Am. Rep. 87, says: "It was not claimed that the plaintiff had any vested right in his office which the Legislature could not abrogate or destroy. Such a position would be clearly untenable upon the authorities, and, as a principle, utterly inadmissible under our form of government."

In *State ex rel. v. Davis*, 44 Mo. 129, the court, speaking of the plaintiff's case, says: "It proceeds upon the theory that a person in the possession of a public office created by the Legislature has a vested interest—a private right of property—in it. This is not true of offices of this description in this country. They are held neither by grant nor by contract. A mere legislative office is always subject to be controlled, modified, or repealed by the body creating it. In England, offices are considered incorporeal hereditaments, grantable by the crown, and a subject of vested or private interests. Not so in the American states. They are not held by grant or contract, nor has any person a private property or vested interest in them, and they are therefore liable to such modifications and changes as the lawmaking power may deem it advisable to enact."

In *Robinson v. White*, 26 Ark. 139, the Supreme Court of that state has decided that "the office of assessor is a statutory office, and the Legislature has absolute control over all statutory offices, and may abolish them at pleasure, and in so doing no vested right is invaded."

In *People ex rel. v. Van Gaskin*, 5 Mont. 352, 6 Pac. 30, the conclusion to which the court arrived is stated to be that, "in the absence of constitutional restrictions, a Legislature, having power to create a particular

office and to regulate the manner in which it should be filled, and the term and duties of the incumbent, has the power to lengthen or abridge such term, or to declare the office vacant and appoint another to fill the vacancy. The exercise of such power by the Legislature would not be in violation of section 10, art. 1, of the United States Constitution, prohibiting a state from passing any law impairing the obligations of contracts, or of the fifth amendment thereof, providing that no one shall be deprived of property without due process of law."

The Supreme Court of Nevada, in *Denver v. Hobart*, 10 Nev. 28, says: "The Legislature having by the act of March 4, 1865, vested certain duties upon the Lieutenant Governor, and allowed him a salary for his services, it was within the power of the Legislature to take those duties and the salary away from him before the expiration of his term of office, and confer them upon another."

Shaw, C. J., in *Taft v. Adams*, 3 Gray (Mass.) 126, 130, says: "When an office is created by law, and one not contemplated nor its tenure declared by the Constitution, but created by the law solely for the public benefit, it may be regulated, limited, enlarged, or terminated by law as public exigency or policy may require."

In *Wyandotte v. Drennan*, 46 Mich. 478, 9 N. W. 500, *Cooley, J.*, says "This is a position that has frequently been taken, and almost as often overruled. Nothing seems better settled than that an appointment or election to public office does not establish contract relations between the person appointed or elected and the state. Offices are created for the public good, at the will of the legislative power, with such powers, privileges, and emoluments attached as are believed to be necessary or important to make them accomplish the purposes designed. But, except as it may be restrained by the Constitution, the Legislature has the same inherent authority to modify or abolish that it has to create, and it will exercise it with the like considerations in view."

In *Attorney General v. Jochim*, 90 Mich. 358, 58 N. W. 611, 23 L. R. A. 699, 41 Am. St. Rep. 606, the court uses the following language: "The Legislature may remove officers not only by abolishing the office, but by declaring it vacant. * * * And it may lodge the power to remove from statutory offices in boards or other officers subject to statutory regulations. And, while it cannot remove the incumbent of constitutional offices, it is not because of an inherent difference in the qualities of the office, but because the power to remove is limited to the power that creates. The constitutional officer is an agent of the government. There is the same lack of the ingredients of contract, and the same power to abolish the office or remove the officer by amendment of the Constitution." In this case the fourteenth amendment was invoked, and expressly held not ap-

plicable. "A public office cannot be called 'property,' within the meaning of these constitutional provisions. If it could be, it would follow that every public officer, no matter how insignificant, would have a vested right to hold his office until the expiration of the term. Public offices are created for the purpose of government." *Id.*

Andrews, J., in *Nichols v. MacLean*, 101 N. Y. 526, 5 N. E. 347, 54 Am. Rep. 730, says: "It is true that in this country offices are not hereditaments, nor are they held by grant. The right to hold an office, and to receive the emoluments thereof belonging to it, does not grow out of any contract with the state; nor is an office property in the same sense that cattle or land are the property of the owner." *Kreitz v. Behrensmeyer*, 149 Ill. 496, 36 N. E. 983, 24 L. R. A. 59; *Jones v. Shaw*, 15 Tex. 577.

"An appointment is neither a contract, nor is the office or its prospective emoluments the property of the incumbent. Upon general principles of law, the office itself and its emoluments are within the control of the government; and the legislative branch of the government, whenever, in its judgment, public policy requires it, may declare the office vacant, or transfer its duties to another officer, before the expiration of the term for which he was appointed." *Kenny v. Hudspeth*, 59 N. J. Law, 320, 36 Atl. 662.

In *Foster v. Jones*, 79 Va. 642, 52 Am. Rep. 637, the court uses the following language: "We think it may be fairly assumed in the outset to be an undeniable proposition that the two branches of the Legislature, as the direct representatives of the people, have the right, where no restrictions have been imposed upon them, either in express terms or by necessary implication, by the Constitution, to create and abolish offices accordingly as they may regard them as necessary or superfluous. And they may also, under like circumstances, deprive the officers of their salaries, either directly, by removing them from office, or indirectly, by so changing the organization of the departments to which they are attached as to leave them without a place." *Mechem on Pub. Officers*, § 463 et seq.; *Throop on Pub. Off.* § 1719; 23 Am. & Eng. Enc. of Law, 328.

In the case of *State v. Hawkins*, 44 Ohio St. 109, 5 N. E. 233, *Minshall, J.*, says: "The incumbent of an office has not, under our system of government, any property in it. His right to exercise it is not based upon any contract or grant. It is conferred on him by the public trust, to be exercised for the benefit of the public. Such salary as may be attached to it is not given him because of any duty on the part of the public to do so, but to enable the incumbent the better to perform the duties of his office, by the more exclusive devotion of his time thereto."

In the case of *Donahue v. Will Co.*, 100 Ill. 94, it is said: "It is impossible to conceive

how, under our form of government, a person can own or have title to a governmental office. Offices are created for the administration of public affairs. When a person is inducted into an office, he thereby becomes empowered to exercise its powers and perform its duties, not for his, but for the public, benefit. It would be a misnomer and a perversion of terms to say that an incumbent owned an office, or had any title to it."

"Some of the decisions have adopted the theory that an office is property, under a mistaken view that the common-law doctrine that an office is a hereditament applied to offices of this country, which is undoubtedly fallacious. * * * Public offices belong to the people, and are to be both conferred and taken away according to their will and appointment, and a person who accepts a public office does so subject to all the constitutional and legislative provisions in relation thereto." *Moore v. Strickland*, 46 W. Va. 515, 33 S. E. 274, 50 L. R. A. 279. The court in this case refers to *Hoke v. Henderson*, and expressly rejects the doctrine enunciated therein. A careful research fully sustains the remark of Mr. Justice Douglas, *supra*.

Mr. Irving Browne, in his note to *Grant v. Sec. of State for India*, 8 Eng. Rul. Cas. 286, states the doctrine as held in the cases cited by us, with this conclusion: "Both the office itself and the compensation, upon general principles of law, are naturally within the control of the government, to diminish, increase, or abolish. This is the general doctrine as to statutory offices in this country. An appointment to an office is not a contract, the impairment of the obligation of which is forbidden by the federal Constitution." He notes the single exception in the North Carolina court, and says: "In all the other states the Legislature may do what it pleases with such offices, unless it is expressly restrained by the Constitution; an office not being regarded as property, nor the subject of contract, in any sense."

It will be observed that Chief Justice Ruffin cites no authority for the proposition maintained by him. He contents himself with the statement that "an office is enumerated by commentators on the law among the incorporeal hereditaments." And while, therefore, they are property, he says that "most of the rules regulating them have reference to the discharge of the duties and the promotion of the public convenience. They are pro commodo populi; hence they are not the subject of property, in the sense of that full and absolute dominion which is recognized in many other things. They are only the subject of property as far as they can be so in safety to the general interest involved in the discharge of their duties." He concedes that the office may be abolished. "With these limitations, and the like," says he, "a public office is the subject of property, as everything corporeal and incorporeal from which man can earn a livelihood and make a gain. And

to the extent of his salary, it is private property, as much as the land which he tills, or the horse which he rides, or the debt that is owing to him." We must confess our inability to see how the right to the salary can have any higher or stronger ground upon which to rest than the right to the office. The salary is but an incident to the office. The chief justice does not express himself with his usual force and clearness when he says that offices "are not the subject of property in the sense of that absolute dominion which is recognized in many other things," and yet, "to the extent of his salary, it is private property, as much as the land he tills, or the horse which he rides, or the debt which is owing to him." When he concedes that the office may be abolished, such concession very greatly weakens the force of his conclusion.

In *Mills v. Williams*, 33 N. C. 558, Pearson, J., in his usual clear and concise style, thus states the distinction between legislation which is contractual and that which is not. In discussing the power of the Legislature to repeal an act establishing a county, he says: "The substantial distinction is this: Some corporations are created by the mere will of the Legislature, there being no other party interested or concerned. To this body a portion of the power of the Legislature is delegated, to be exercised for the public good, and subject at all times to be modified, changed, or annulled. Other corporations are the result of contract" (referring to private corporations). The same distinction was made and the same principle clearly enunciated by Ruffin, C. J., in *University v. Maulsby*, 43 N. C. 257. He says: "But the court is further of the opinion that the university is a public institution and body politic, and hence subject to legislative control; * * * and therefore the corporation was not only originally the creature of the Legislature, but is dependent on its will for its continuing existence."

"A grant of land by a state is a contract, because in making it the state deals with the purchaser precisely as any other vendor might; and, if its mode of conveyance is any different, it is only because, by virtue of its sovereignty, it has power to convey by other modes than those which the general law opens to individuals. But many things done by the state may seem to hold out promises to individuals, which, after all, cannot be treated as contracts without hampering the legislative power of the state in a manner that would soon leave it without the means of performing its essential functions. The state creates offices, and appoints persons to fill them; it establishes municipal corporations, with large and valuable privileges for its citizens; by its general laws it holds out inducements to immigration; it passes exemption laws, and laws for the encouragement of trade and agriculture; and under all these laws a greater or less number of citizens

expect to derive profit and emoluments. But can these laws be regarded as contracts between the state and the officers and corporations who are, or the citizens of the state who expect to be, benefited by their passage, so as to preclude their being repealed? On these points it would seem that there could be no difficulty. When the state employs officers or creates municipal corporations as the mere agencies of government, it must have the power to discontinue the agency whenever it comes to be regarded as no longer important. 'The framers of the Constitution did not intend to restrain the state in the regulation of their civil institutions adopted for internal government.' They may therefore discontinue offices, or change the salary or other compensation, or abolish or change the organization of municipal corporations, at any time, according to the existing legislative view of state policy, unless forbidden by their own Constitution from doing so." *Cooley's Const. Lim.* (7th Ed.) 387.

We do not think it would be profitable to enter into a discussion of the various phases in which the question has come before this court. It is a part of the judicial history of the state. It is evident that the effort to carry it to its logical conclusion has rendered it necessary to make many delicate distinctions as to the respect in which and to what extent the word "property" applies to an office, its duties, its emoluments, and when and how an office may be abolished, or the office retained and its duties either transferred to another, or distributed among other governmental agencies. We have no disposition to review these cases, but prefer to adopt what may appropriately be called the American doctrine upon the subject, so clearly set forth in a number of the many decisions which we have quoted. Certainly in one eventful period of the history of the state it did not occur to any one to carry the doctrine of *Hoke v. Henderson* to its logical conclusion. Without entering into any discussion of the subject, we may, for the purpose of this argument, assume that the state of North Carolina has never at any time from its earliest existence lost or forfeited its statehood, its political integrity, nor has the allegiance of its citizens or the officers of the state been changed to any other government, except in so far as the state occupied relations to other governments. The tenure of judicial offices in North Carolina prior to 1868 was for life or good behavior. At the end of the Civil War a convention was held, and certain amendments made to the Constitution; retaining, however, this provision. The Constitution thus amended was ratified by the people, and a state government duly organized thereunder. Judges were elected and qualified, and were thereby entitled to hold such offices for life. In 1868 a second convention was held, the mode of election changed, the tenure changed from life to a term of eight years, and this

court, then composed of Pearson, C. J., and Justices Reade and Battle, and the superior court bench, upon which were several of the ablest lawyers in the state, without question, recognized the right of the people by constitutional amendment to deprive them of their offices. It did not occur to either of these judges that they held their office under any contract, or that they had any property interest therein. So far as the record of our judicial history shows, no question was made of the right of the people, by amendment of their Constitution, to change the tenure and mode of election of their judges without in any respect abolishing or changing the duties of the office. The Supreme Court and superior courts of North Carolina, with few exceptions, were given the same jurisdiction by the Constitution of 1868 which they had under the old Constitution. Whatever status the state may have occupied in its federal relations from 1861 to 1868, its judges held their office for life or good behavior, and never by any action on their part forfeited such office to the state; hence, when the state resumed its federal relations with the United States government, it did so in respect to its original statehood, and not by virtue of any new source of political life; and, if *Hoke v. Henderson* had been the controlling principle, they were entitled and it was their duty to continue to hold their office and discharge its duties in accordance with the tenure by which they were originally conferred. Of course, we refer to this portion of our history without reference to the actual conditions existing, and upon the theory that the state, in its sovereign capacity, having withdrawn its allegiance from, in the same capacity resumed it to, the federal government. *Texas v. White*, 7 Wall. 700, 19 L. Ed. 227; *Id.*, 6 Rose's Notes, 1066. It has never been seriously contended that the judges in North Carolina were not from 1868 to 1868 rightfully in the discharge of their duties, or that the title to their offices was in any respect invalidated. It is a part of the history of this country that in a large majority of the original 13 states forming the Union the judicial tenure was, as in North Carolina, for life or good behavior. A large number of those states have, since the adoption of the federal Constitution, amended their Constitutions, making the judicial tenure for a term of years; and in no instance, so far as our research informs us, was the contention made that the offices were the property of the judges, held by grant. The only reference to the question which we find (and that was a mere suggestion) is in *Com. v. Mann*, 5 Watts & S. 418, and it is disposed of by the court in the following language: "The point that it is a contract, or partakes of the nature of a contract, will not bear the test of examination."

While we are not insensible to the responsibility which we assume in overruling a case which has been recognized as a control-

ling authority upon this subject for more than half a century, we feel that we are discharging a duty which the court of last resort owes when it has become apparent that the case brought into question is not supported by sound reason, and is in conflict with the uniform and unbroken current of authority in the federal and state jurisdictions. In so far as *Hoke v. Henderson* is based upon a construction of the federal Constitution, it is our duty to recognize and enforce the construction put upon that Constitution by the Supreme Court of the United States. We assume that, if by any lawful procedure the question could come before the Supreme Court of the United States, whether an office created by the Legislature of North Carolina was property, within the tenth section of article 1, and the fourteenth amendment to the Constitution, that court would not hesitate to follow its decisions, rather than those of this state. But it is said that we should not disturb a decision so long acquiesced in and so often followed. "If a decision is based upon reasoning that can be shown to be erroneous (that is to say, contrary to the spirit and analogies of the law), it will be disregarded in other jurisdictions, and may even be overruled in the same jurisdiction." *Wambaugh's Study of Cases*, 53. In *Myers v. Craig*, 44 N. C. 169, this court, referring to a well-considered opinion theretofore rendered, speaking through Pearson, J., says: "It is clear *Sprull v. Leary* [35 N. C. 225] is not sustained by *Flynn v. Williams* [23 N. C. 509], and, after much research, no authority has been found to support 'the artificial and hard rule, the practical operation of which at this day would be to enable one man to sell another man's land, without compensation.'" This was regarded as sufficient reason for overruling a well-settled authority in this state in respect to the title to land. In speaking of the sanctity of judicial precedents, a great jurist uses the following language: "On the other hand, I hold it to be the duty of this court, as well as every other, to revise its own decisions, and, when satisfied that it has fallen into a mistake, to correct the error by overruling its own decisions." Another justice says: "It is going quite too far to say that a single decision of any court is absolutely conclusive as a precedent. It is an elementary principle that an erroneous decision is not bad law; it is no law at all." It may be final upon the parties before the court, but it does not conclude other parties having rights depending upon the same question. "It is, no doubt, true that even a single adjudication of this court upon a question properly before it is not to be questioned or disregarded except for the most cogent reasons, and then only in a case where it is plain that the judgment was the result of a mistaken view of the condition of the law applicable to the question. But the doctrine of stare decisis, like almost every other legal rule, is not without its exceptions. It

does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is contrary to reason. The authorities are abundant to show that in such cases it is the duty of the courts to re-examine the question. Chancellor Kent, commenting upon the rule of stare decisis, said that more than a thousand cases could then be pointed out in the English and American courts which had been overruled, doubted, or limited in their application." *Rumsey v. Railroad*, 133 N. Y. 79, 30 N. E. 654, 15 L. R. A. 618, 28 Am. St. Rep. 600.

If it is true that a public office is private property, the state, instead of being sovereign, finds herself, in her effort to perform her governmental functions, bereft of her sovereignty, her hands tied, her progress obstructed, for that those whom she has commissioned to be her servants have, by grants of parts and parcels of her sovereignty, become her masters, and, converting her commissions into grants, forbid her to proceed or go forward. That this is not fancy, or an imaginary result of enforcing the principle which we are asked to perpetuate, the reports of decided cases in this court amply show. When it was sought to change the mode of governing the asylums and other state institutions as the General Assembly deemed best for the public good, it was claimed and held that the state was powerless, because the directors had a grant based upon contract, by which they were entitled to manage its institutions for a number of years. *Wood v. Bellamy*, 120 N. C. 212, 27 S. E. 113; *Lusk v. Sawyer*, 120 N. C. 225, 27 S. E. 1007. It was held in *Day's Case*, 124 N. C. 369, 32 S. E. 750, that "although a new method of distributing the powers and duties of the government and conduct of the State's Prison may be desirable, and the method undertaken to be adopted by the act of 1899 may be best, yet such changes cannot be made until the expiration of the contract with the incumbent." The system of criminal courts created by legislative enactment could not be changed, or the counties in the districts adjusted to suit the needs of the people, because solicitors had contracts with the state, and held, under grants, public offices. *Wilson v. Jordan*, 124 N. C. 683, 33 S. E. 139; *McCall v. Webb*, 125 N. C. 243, 34 S. E. 430. The right of the state to control, as in the judgment of the representatives of the people it thought best, its property interest in a railroad, was perverted because the directors had, by grant, property in the office for a term of two years. *Bryan v. Patrick*, 124 N. C. 651, 33 S. E. 151. The power to repeal an act, abolish the office of railroad commissioner, and establish a new commission—an agency of purely legislative creation—was denied for the same reason. *Abbott v. Beddingfield*, 125 N. C. 256, 34 S. E. 412. What the representatives of the people deemed an improvement in the public school system was

prevented because, with the grant of a public office in his hand, a school committee man asserted his property right to the office. *Greene v. Owen*, 125 N. C. 212, 34 S. E. 424; *Dalby v. Hancock*, 125 N. C. 325, 34 S. E. 516; *Gattis v. Griffin*, 125 N. C. 333, 34 S. E. 429. We do not cite these cases for the purpose of criticising them. For the purpose of the discussion, we regard them as the logical deduction to be drawn from the principle that a person may have a contractual right to or property in public office.

The facts in this case strikingly illustrate the wisdom of holding that a public office is not private property, thus preventing the state and its agencies from performing its functions in respect to its internal government. It became evident to the Legislature that it would be wise to inaugurate a system of working the public roads of Raleigh township by the use of the convicts. For the purpose of doing so, a scheme was devised and enacted into law. Officers were provided for, and their mode of election and term of office fixed. In process of time, it became necessary to enlarge the operations to other parts of the county. The plan which had been adopted was found to be wise, and it was desired to enlarge its sphere. It thus became necessary to have other officers; to distribute the duties and subdivide their work. For this purpose the law of 1903 was enacted. The whole scheme looked to and had for its object the public good—the improvement of the public roads—not the creation of offices to be granted to the mere agents employed for this purpose. The relator finds no place in the new scheme for working the roads. He has no duties or powers, and no salary is provided for him. If his contention be correct, the working of the public roads must be stopped until his term of office expires. This is the logical result of his contention that he has a property right in the office; that he has risen above his source; that, instead of being a mere servant or agent commissioned to discharge certain public duties, he has become the owner of part of the sovereignty of the state, and at his will a great work of public improvement must stop. This does violence to our conception of the relations which public servants bear to the people or their government. The following language used by Judge Nicholl in *State v. Dewa*, supra, so clearly sets forth the reason upon which the true principle is founded, that we quote at some length: "The appointment of him, as well as other officers, is not a grant in derogation of the rights of the public, but the constituting by the people, in the exercise of their sovereignty, of an agent to carry their sovereignty into effect. In creating an office, the body public does not restrict its sovereignty, or the power of the Legislature through whom that sovereignty is expressed and exercised. The purpose is to extend the sphere of its action, or at least to give it operation. But if it be

true that the officer has a property in his office, that that property embraces its duties as they were prescribed by law at the moment he was commissioned and qualified, and that those duties cannot be changed without a forbidden disturbance of private property, the consequence is that by his appointment the officer becomes placed above the sovereignty of the people during the term for which he is elected."

While it is our duty to search for, and, if happily we find the law, to apply it to the case, we think it not improper, in view of the range which the discussion of the principle involved in this case has taken in our Reports, to say, in response to the argument that if the Legislature be permitted to change, modify, abolish, or otherwise deal with public office and its incumbents, uncertainty in security and constant disturbance in the administration of the domestic affairs of the state will follow, that ours is a government "of the people, by the people, and for the people"; that, except in so far as they have, in their organic law, limited their power to speak and act through their representatives, sovereignty rests with them. We, who are commissioned to perform judicial functions, may not claim to be wiser than they, or find any other guide for our conduct than the Constitution which they have ordained. If the people have not authorized their legislative department to parcel out their sovereignty by grants of public offices as private property, we dare not do so. The Legislature, having been intrusted with the power of either electing or providing for the election of officers of legislative creation, must, as the representatives of the people, be intrusted to make such changes in the tenure, duties, and emoluments of such offices as, in its judgment, the public interest demands. This power having been vested in that department of the government, it is our duty to obey and enforce the law as the "state's collected will."

To conclude the matter, the doctrine of *Hoke v. Henderson* is based upon the proposition that public office is private property, with all the results that logically flow therefrom. In so far as that case holds this proposition to be law, we expressly overrule it, and declare that no officer can have a property in the sovereignty of the state; that, in respect to offices created and provided for by the Constitution, the people, in convention assembled, alone can alter, change their tenure, duties, or emoluments, or abolish them; that, in respect to legislative offices, it is entirely within the power of the Legislature to deal with them as public policy may suggest and public interest may demand.

The judgment of the court below is affirmed.

CLARK, C. J. (concurring). The court that decided *Hoke v. Henderson*, 15 N. C. 1, 25 Am. Dec. 677, did not deem themselves in-

fallible, for they overruled divers of their own opinions as erroneous, and succeeding courts have overruled other opinions of that court. There is no peculiar sacredness attached to *Hoke v. Henderson*. No other court whatever, anywhere or at any time, has followed it as authority. All have concurred in disregarding it, and not a few have sharply criticised it, a few of which criticisms have been collected. 127 N. C., at pages 252, 253, 37 S. E. 263. If Mr. Reverdy Johnson paid the decision the scant compliment of mentioning it in his argument in *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366, the opinion of the court did not treat it with as much consideration. It is not referred to.

Nor has the case always been followed even by this court. It owes its prominence, not to the original decision in 1833, which was not followed for near 40 years, but to its revival and wider application after the political changes in 1870 and 1898. Its fundamental doctrine, that office is not an agency, but property obtained by contract and therefore protected by the contract clause of the federal Constitution, was most effectually denied by every judge when he took his seat on the Supreme or the Superior Court bench in 1868, since he did so in disregard of that holding. The convention of 1868 could no more abrogate a contract (if office was a contract) than it could any other contract made in 1865-68. The court has often ignored it, notably in *Mills v. Williams*, 83 N. C. 558. *Bunting v. Gales*, 77 N. C. 253, and *Winslow v. Morton*, 118 N. C. 486, 24 S. E. 417; and there are other cases in which it has been only partially upheld. Having discussed these cases in numerous dissenting opinions from *Day's Case*, 124 N. C. 362, 32 S. E. 748, down to *Taylor v. Vann*, 127 N. C., at pages 243-253, 37 S. E. 263, in which last many of the opinions sustaining the legislative power over offices created by legislation are again collected, it is not necessary that I should now discuss them.

As the essence of the decision in *Hoke v. Henderson* is that office is property based on contract, and hence protected by the United States Constitution (for there is no such clause in the state Constitution), the General Assembly could not, if that view was correct, make any rule nor pass any law to disregard it. If they could, then all future contracts of any kind whatsoever could be taken out of the protection of the federal Constitution by a simple statute that all future contracts shall not have that protection. So far from the Legislature acquiescing, every case, from *Hoke v. Henderson* itself down to *Mial v. Ellington*, the present case, was necessarily presented by legislative action taken in disregard of *Hoke v. Henderson*. As long as the court held to the doctrine of that case, the Legislature could make no rule to the contrary, beyond persistently disregarding it, as it has often done, as evidenced by numer-

ous decisions. There is no way to get rid of the decision except by the court which made it repudiating it, for the reasons given in the very able opinion filed in this case by Mr. Justice CONNOR.

The Legislature shapes the administrative and political policy of the state, and its members are elected at short intervals for the purpose of conforming the direction of public affairs to the changing sentiment of the people and the progress of events. This policy must be put into operation through officers who are simply agents of the government. If a legislature elected for two years can put in its agents for life or long terms, and keep them in by the court's holding that office is a contract and incumbents are irremovable, such temporary legislature can dominate the people for any period it may see fit to fix for the duration of offices filled or created by it. This is a denial of the foundation principle of all American government—the sovereignty of the people. The fact that the Constitution fixes the term of certain officers, and forbids a diminution of their salaries, is of itself conclusive that all other officers and their salaries are not thus protected, but are subject to change and control by the people, acting through subsequent legislatures.

It must be remembered that, when *Hoke v. Henderson* was decided, the United States Supreme Court had not then held, as it soon afterwards did in *Butler v. Pennsylvania*, 10 How. 402, 416, 13 L. Ed. 472, that an office was not a contract, and not protected by the contract clause of the federal Constitution. This doctrine that court has uniformly maintained ever since, notably in *Newton v. Commissioners*, 100 U. S. 548, 25 L. Ed. 710, *Blake v. U. S.*, 103 U. S. 227, 26 L. Ed. 462, *Crenshaw v. U. S.*, 134 U. S. 99, 10 Sup. Ct. 431, 33 L. Ed. 825, and many other cases, including the late decision in *Taylor v. Beckham*, 178 U. S. 577, 20 Sup. Ct. 1006, 44 L. Ed. 1187. Had those decisions or any one of them, been rendered in 1833, it is quite certain *Hoke v. Henderson* would have been decided the other way, for the construction placed by the United States Supreme Court upon any clause of the federal Constitution is conclusive upon all other courts.

For well-nigh 40 years *Hoke v. Henderson* was applied to no controversy over an office. In *Mills v. Williams* (1851) 83 N. C. 558, it was not cited, but disregarded and practically overruled, both in the reasoning of the opinion and its effect, which was to hold that all the duties and emoluments of the office of sheriff of Polk county were transferred intact to the sheriff of Rutherford county. In *Cotten v. Ellis*, 52 N. C. 548, it is true *Hoke v. Henderson* was cited, but the decision rested on a different point—that the state could not vacate a federal office. The Legislature of 1865 disregarded *Hoke v. Henderson* by vacating legislative offices, and

even filling such judgeships as it saw fit with new men. In 1868 the convention again did the same thing by the judges which *Hoke v. Henderson* held could not be done by the clerks, i. e., changed the appointive life tenure into an elective term of years. This could not have been done if office were a contract, for the federal Constitution forbids any "state to pass any law to impair the obligation of a contract." The restriction was upon the state, not merely upon its Legislature. The prohibition applies to a convention as well as to the Legislature. *Louisiana v. Taylor*, 105 U. S. 454, 26 L. Ed. 1133, and other cases cited; *Abbott v. Beddingfield*, 125 N. C., at page 285, 84 S. E. 412. As already stated, every judge who took his seat upon the bench in 1868 took it in defiance of *Hoke v. Henderson*. The officers turned out in 1868 held, not by virtue of any authority recognized in 1861-65, but they had all been inducted in 1865, after the war closed, or later.

After being thus silent and practically disregarded, without a single application of it, for near 40 years, *Hoke v. Henderson* was resurrected after the change in the political majority of the General Assembly in consequence of the elections of 1870 and 1872. Its invocation and somewhat more extended application thwarted the effort of the people, through their new representatives, to control the policy of the state by changing the incumbents of offices created by the Legislature with men of views in accord with the change expressed at the ballot box. Later on, however, *Hoke v. Henderson* was practically ignored, or much limited, in *Bunting v. Gales*, 77 N. C. 283, *Winslow v. Morton*, 118 N. C. 486, 24 S. E. 417, and other cases.

In *Wood v. Bellamy*, 120 N. C. 212, 27 S. E. 113, there was an application of *Hoke v. Henderson* in a case where new incumbents were placed in offices as to which there had been no change of duties, but a change of names only. This decision was within the limits of the original decision. It was the subsequent cases, beginning with *Day's Case*, in 124 N. C. 362, 82 S. E. 748, which carried it further, causing it to be denied, and its ultimate and inevitable overthrow. In *Ward v. Elizabeth City*, 121 N. C. 1, 27 S. E. 993, attention was for the first time called to the fact that the decision in *Hoke v. Henderson* had been denied in all other states, and, while admitting that it had been recognized in this state, it was held that *Ward* was not protected by it. In *Caldwell v. Wilson*, 121 N. C. 425, 28 S. E. 554, in a very able opinion, it was again shown (at pages 467, 468, 121 N. C., pages 560, 561, 28 S. E.), that *Hoke v. Henderson* was contrary to all precedents elsewhere, and the opinion was expressed that the doctrine had been "carried to its fullest legitimate extent" here, and *Wilson*, like *Ward*, was held not protected by it in his office.

With the subsequent expansion of the doc-

trine to new territory and wider fields, it can serve no purpose now to deal. Those matters have been fully discussed in the opinions and dissenting and concurring opinions filed in the various "officeholding cases" from *Day's Case*, supra, in which the Legislature was denied power to control the penitentiary, down through various offices to *Taylor v. Vann*, 127 N. C. 249, 37 S. E. 263, which was as to the costs in an action to recover a \$2 per annum office (member of county board of education) when the term of the officer had expired before judgment. Thus expanded, the doctrine necessarily destroyed itself. The people of the state could not and would not be prohibited and controlled in the management of their own institutions and their public policies by judge-made law, which was denied by all other courts, including the highest at Washington. The doctrine has existed nowhere else. The conflict between the court and the General Assembly could not continue. No act of the Legislature could terminate it. Every time the question has been presented in all these years, it has been raised upon an act of the Legislature which had been passed in disregard of *Hoke v. Henderson*. Its assertion could be renounced only by the court. This it has now done, explicitly, clearly, and the doctrine of private property in public office, started on its course by the decision in *Hoke v. Henderson*, will, like the ghost in *Hamlet*, "no longer walk the earth" to disquiet the peace.

MONTGOMERY, J. (dissenting). Mr. Justice CONNOR, in writing for the court its opinion in this case, states clearly and forcibly what is called the "American Doctrine" in reference to the nature and tenure of public office, and makes copious extracts from the decisions of the courts of many of the states of the Union, and from two of the Supreme Courts of the United States, in affirmation of the view of the majority of the court; and it may be taken as true that the Supreme Court of North Carolina is the only court, state or federal, which has held that a legislative office is property, that it is held by contract between the state and the officer, and that the officer can be deprived of his office by judicial determination only. I was aware of this particular isolation of the North Carolina court when I wrote for the court, at its February term, 1897, the opinion in the case of *Wood v. Bellamy*, 120 N. C. 212, 27 S. E. 113. Why, then, did I not, at that time, take the opposite view, and use my voice to ally the decisions of this court, on the subject under discussion, with the universal judicial sentiment of the country? There were two reasons why I could not do so. The first was that for almost three score and ten years the law as it was written in *Wood v. Bellamy*, supra, had been the law under decisions of this court, and those decisions made by judges holding personally different political views, and many of them

known to be of marked judicial temperament, and ranking in the very highest order of legal learning and general scholarship; and, second, those decisions, and especially the one of *Hoke v. Henderson*, 15 N. C. 1, 25 Am. Dec. 677, delivered in 1833, and written by Chief Justice Ruffin, seemed to me to be conclusive on the subject. The judges at that time were Ruffin (Chief Justice), Daniel, and Gaston, a court of which any nation in any age might be proud. The opinion is a model of judicial style, notable for its strong and pure English and for the vigor and force of its reasoning. No synopsis of it can do the author justice. Among the conclusions was this: That an office was property, a vested right, existing under contract between the state and the officer, and that an act of the Legislature which sought to deprive the officer of his property in the office was unconstitutional and void. And that proposition was not doubted by this court until 66 years had elapsed, when the dissenting opinion in *Day's Case*, 124 N. C. 362, 32 S. E. 748, was filed by Justice Clark, the present Chief Justice. Within less than two years before the dissenting opinion in *Day's Case* was filed, the same justice had written the unanimous opinion of this court in the case of *Ward v. Elizabeth City*, 27 S. E. 994, upholding the doctrine of *Hoke v. Henderson*, in the following language: "The only restriction upon the legislative power is that after the officer has accepted office upon the terms specified in the act creating the office, this being a contract between him and the state, the Legislature cannot turn him out by an act purporting to abolish the office, but which in effect continues the same office in existence. This is on the ground that an office is a contract between the officer and the state, as was held in *Hoke v. Henderson*, 15 N. C. 1 [25 Am. Dec. 677], and has ever since been followed in North Carolina down to and including *Wood v. Bellamy*, supra, though this is the only one of the 45 states of the Union which sustains that doctrine."

In writing of that celebrated opinion (*Hoke v. Henderson*) nearly 40 years afterwards, Pearson, C. J., in *Clark v. Stanley*, 66 N. C. 67, 8 Am. Rep. 488, referred to it as "that mine from which so much rich ore has been dug." I cannot think it out of place to quote, from the address of the late Honorable William A. Graham on the life of Chief Justice Ruffin, his remarks in reference to that great case—*Hoke v. Henderson*. The speaker said: "Judge Ruffin's conversancy with political ethics, public law, and English and American history seems to have assigned to him the task of delivering the opinions on constitutional questions which have attracted most general attention. That delivered by him in the case of *Hoke v. Henderson*, in which it was held that the Legislature could not, by a sentence of its own in the form of an enactment, divest a citizen of property, even in a public office, because the proceed-

ing was an exercise of judicial power, received the encomium of Kent and other authors on constitutional law, and I happened personally to witness that it was the main authority relied on by Mr. Reverdy Johnson in the argument for the second time in *Ex parte Garland*, which involved the power of Congress, by a test oath, to exclude lawyers from the practice in the Supreme Court of the United States for having participated in civil war against the government, and in which its reasoning on the negative side of the question was sustained by that august tribunal." The same question was before this court again in the case of *Cotten v. Ellis*, 52 N. C. 545. The court there said, through Pearson, C. J.: "The legal effect of the appointment was to give the office to the applicant, and he became entitled to it as a 'vested right' for the term of three years, from which he could only be removed in the manner prescribed by law, and of which the Legislature had no power to deprive him. This is settled. *Hoke v. Henderson*, 15 N. C. 1 [25 Am. Dec. 677]." And again the question was presented for decision in the case of *King v. Hunter*, 66 N. C. 603, 6 Am. Rep. 754. The opinion in the case was delivered by Judge Reade, who said: "Nothing is better settled than that an office is property. The incumbent has the same right to it that he has to any other property. There is a contract between him and the state that he will discharge the duties of the office (and he is pledged by his bond and his oath), and that he shall have the emoluments (and the state is pledged by its honor). When the contract is struck, it is as complete and binding as a contract between individuals, and it cannot be abrogated or impaired except by the consent of both parties." Again the question was presented in the case of *Bailey v. Caldwell*, 68 N. C. 472, and decided in the same way. Upon the reasoning and the authority of the foregoing cases, the numerous decisions involving the same question, and heard in this court, beginning with *Wood v. Bellamy*, down to this time have been made.

It may not be inappropriate to say that the thorough and elaborate arguments of counsel and the dissenting opinions in the cases that followed *Wood v. Bellamy* very much weakened my view of the correctness of the decision in *Hoke v. Henderson* as applicable to the genius of our institutions and the thought of the age, and I am free to say that if it had been a new question I would have adopted what is called by the court "the American Doctrine." But I cannot get my consent to join in overruling the decisions of this court, beginning with *Hoke v. Henderson*, and at intervals down almost to the present day: First, because the law as settled in those decisions has been too long the law of this state to be overthrown by the judicial decree of judges who may not see the law more clearly than did that great court which made the decision in that celebrated case of *Hoke*

v. Henderson, not to mention succeeding judges who followed the precedent. And, again, the General Assembly has met in session more than 30 times since the decision of Hoke v. Henderson. Its members knew, at any and all of its sessions, that so far as legislative offices, that is, offices not ordained by the Constitution with fixed terms, were concerned, they could alter the effect of the rule laid down in that case by the enactment of a statute, not "retrospective" in its action, thereby interfering with vested rights, but prescribing a rule of property in said office, and modifying the extent of interest and tenure therein "prospectively." *Caldwell v. Wilson*, 121 N. C., at page 469, 28 S. E. 554. By that means, such officers elected or appointed after the going into effect of the act would hold under the statute and subject to its provisions. No such statute has been enacted. The legislative department has acquiesced in *Hoke v. Henderson*, with full knowledge that it had the power to change the effect of the doctrine announced in *Hoke v. Henderson* in the manner and to the extent above specified. A bill for that purpose was introduced at the session of 1901, and received the unanimous report of the committee which had it in charge, but for reasons satisfactory to them it was not enacted into law. Under such an act the officer would take his office with the knowledge and understanding, when he accepted it, that he held it subject to removal under the terms of the act, and no such question could arise as was decided in *Hoke v. Henderson*, where the right to the office was unqualified. In case of removal of any such officer, no constitutional provision, either federal or state, could be invoked to protect his rights of property in case of his removal from office, as he agreed that that might be done when he accepted it. It was the Constitution of North Carolina of 1776, adopted at Halifax, which was referred to in the case of *Hoke v. Henderson* as the instrument which was violated by the act of Assembly, and the provision was section 12 in the Declaration of Rights, which was in these words: "That no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the law of the land." That section is now section 17 of article 1 of the Constitution of North Carolina.

There was some discussion in the opinion of the court, and also in the concurring opinion, of the views and conduct of the judges elected under the state Constitution of 1868. There had never been a decision of the United States Supreme Court holding that an office was property resting in contract. Those judges must have known that fact. In *Hoke v. Henderson* such a holding had been made by our own court, and no doubt the judges elected under the state Constitution of 1868 believed that a convention of the people had

the full right to abolish offices or remove officers, and that in the exercise of that power they had changed the terms of the judges' offices and also removed the incumbents. The doctrine of *Hoke v. Henderson* was that the Legislature could not deprive one of his office, because it was property and rested in contract, but there is not a hint in the case that the people in convention did not have that power.

I am pleased with the spirit and language of Mr. Justice CONNOR, manifested throughout the decision of the case, and especially to that part of it in which reference to the decisions of this court, which are said by some to be an extension of the doctrine of *Hoke v. Henderson*, is made. I quote it: "We do not think it will be profitable to enter into the discussion of the various phases in which the question has come before this court. It is a part of the judicial history of the state. It is evident that the effort to carry it to its logical conclusion has rendered it necessary to make many delicate distinctions as to the respect in which, and to what extent, the word 'property' applies to an office, its duties, its emoluments, and when and how an office may be abolished, or the office retained and its duties either transferred to another or distributed among other governmental agencies. We have no disposition to review these cases, but prefer to adopt what may be appropriately called the 'American Doctrine' upon the subject, so clearly set forth in a number of the many decisions which we have quoted." As to the correctness of the decisions referred to in the above quotation, with the premise admitted that the law of *Hoke v. Henderson* was the recognized law at that time in North Carolina, I am content, as, indeed, I must be, to abide the judgment of the profession, with the hope and in the belief that the judgment of future and of calmer times, if an adverse one, may be expressed more charitably than was that of the opponents of the decisions at the time they were made.

DOUGLAS, J. (dissenting). When the opinion of the court was filed in this case I was so seriously ill as to be helpless, and hence I take advantage of the kindly consent of my associates to now file my dissenting opinion. I would gladly drop the matter, but for the feeling that such action on my part might be misunderstood. In the light of an forgotten past, it seems proper that I should briefly state the facts that constitute my justification in consistently following in my judicial career the principle laid down in *Hoke v. Henderson*, 15 N. C. 1, 25 Am. Dec. 677. Excuse or apology I have none to offer. I understand that the opinion of the court goes to the extent of deciding that no one can have any property in the tenure of an office, and "that in respect to legislative offices it is entirely within the power of the Legislature to deal with them as public policy may suggest

and public interest may demand." This cuts up by the roots the dominating principle of *Hoke v. Henderson*, and of all subsequent cases based thereon. No distinction whatever is made between the different cases involving the application of the principle. It is the principle itself that is denounced as intrinsically vicious, and therefore calling for judicial extirpation. It necessarily follows that in the light of this decision we were just as wrong in 1897 in rendering our unanimous decision in *Wood v. Bellamy*, 120 N. C. 212, 27 S. E. 113, *Lusk v. Sawyer*, 120 N. C. 225, 27 S. E. 1007, and *Person v. Southerland*, Id., as we were in any of those subsequent decisions which became the subject of so much controversy.

There has been no change in the law, and, if the court is right now, it was wrong then in refusing to the dominant power in the Legislature the disposition of the offices to which they were legally entitled. It irresistibly follows that if the court in 1897 had been constituted as it is now, in the light of its present decision, it would have offered no bar to the will of the Legislature, and would have turned over the asylums and other state institutions to those whom we excluded. This seems the very irony of fate.

I will not undertake to defend the principle underlying the decision in *Hoke v. Henderson*, as I can add nothing to what has already been said. My personal views have been fully expressed when speaking for the court in *Greene v. Owen*, 125 N. C. 212, 34 S. E. 424, and *Taylor v. Vann*, 127 N. C. 243, 37 S. E. 263, and in my concurring opinion in *Wilson v. Jordan*, 124 N. C. 707, 33 S. E. 139. I will now confine myself to the reasons actuating me in accepting the principle as settled law when I came upon the bench, and consistently following it thereafter. The court quotes with approval from my opinion, speaking for the court, in *Caldwell v. Wilson*, 121 N. C. 467, 28 S. E. 561, as follows: "With the exception of this state, it is the well-settled doctrine in the United States that an office is not regarded as held under a grant or contract, within the general constitutional provision protecting contracts; but, unless the Constitution otherwise expressly provides, the Legislature has power to increase or vary the duties or diminish the salary or other compensation appurtenant to the office, or abolish any of its rights or privileges, before the end of the term, or to alter or abridge the term, or to abolish the office itself. * * * Except in North Carolina, it is well settled that there is no contract, either express or implied, between a public officer and the government, whose agent he is; nor can a public office be regarded as the property of the incumbent." That is true, but the same opinion went on to say: "But our decision in the case at bar does not conflict with that in *Hoke v. Henderson*. The statute now under consideration is not retrospective, and does not interfere with any vested right. Being a part of

the act originally creating the office of railroad commissioner, it 'prescribed' a rule of property in said office, and modifies the extent of interest and tenure therein 'prospectively.' The defendant, taking under the act, holds subject to the act, and, relying upon his contract, is bound by all its provisions. One of its express provisions was the reserved right of the Legislature to remove, and the power and duty of the Governor to suspend, under a given state of facts. This power of suspension, together with the necessary method of its enforcement, was assented to by the defendant in his acceptance of the office; * * * that the only property he could have in the office was that given to him by the statute, which must be construed in all its parts. His commission, which is his title deed, appears to us with the fateful words of the created act written across its face by the hand of the law." In that case I also said, for a unanimous court: "We realize the responsibilities of this court in settling the line of demarcation between the legislative, executive, and supreme judicial powers, which by constitutional obligation must be kept forever separate and distinct. This vital line must be drawn by us alone, and we will endeavor to draw it with a firm and even hand, free alike from the palsied touch of interest or subserviency and the itching grasp of power. Should the legislative or executive departments of the state cross that line, we will put them back where they belong; but upon us rests the equal obligation of keeping upon our own side. This is a question, not of discretion, but of law; a matter not of expediency, but of right."

From the course of judicial conduct thus explicitly declared, I have never knowingly departed. At the same term it was said by a unanimous court, in *Ward v. Elizabeth City*, 121 N. C. 1, 27 S. E. 993, that "This is on the ground that an office is a contract between the officer and the state, as was held in *Hoke v. Henderson*, 15 N. C. 1 [25 Am. Dec. 677], and has ever since been followed in North Carolina down to and including *Wood v. Bellamy*, *supra*, though this state is the only one of the 45 states of the Union which sustains that doctrine." (The italics are mine.) This language is quoted to show that, whatever differences of opinion may subsequently have arisen as to its application, the existence of the principle itself as the settled law of North Carolina was universally admitted. It was so recognized by the Supreme Court of the United States in *Re Hennen*, 13 Pet. 230, 10 L. Ed. 138, where the court says, on page 281, 13 Pet., 10 L. Ed. 138: "The case of *Hoke v. Henderson*, 15 N. C. 1 [25 Am. Dec. 677], decided in the Supreme Court of North Carolina, is not at all in conflict with the doctrine contained in the cases referred to. That case, like the others, turned upon the Constitution and laws of North Carolina."

The only argument in the opinion of the court that had not been previously advanced

and considered is the change in the personnel of the Supreme and Superior Courts following the adoption of the Constitution of 1868, and the relation of the seceding states to the federal Union. I will not reopen the questions involved in the Civil War and the tangled web of reconstruction. The issues of the war were settled by embattled freemen, who on both sides, believing that their cause was sacred, freely gave to it the last tribute of a loyal heart. All that we need do is to cherish the memory of their heroic deeds and guard their last resting place, feeling that every flower growing on a soldier's grave nestles its roots in a hero's breast, and expands its fairest flowers in the glad sunshine of liberty and peace in a reunited land.

When I first came upon this bench, its only new member, and in every way its junior, I was at once confronted with the class of cases represented by *Wood v. Bellamy*. After the most careful consideration, and certainly with no possible personal bias in that direction, I concurred with a unanimous court in the decision of those cases, thus giving to the great principle enunciated in *Hoke v. Henderson* the deliberate assent of my judgment and my conscience. Even if I had not approved of the decision in principle, I would have hesitated to place myself upon the lonely pedestal of solitary infallibility, assuming that I was wiser than the aggregated wisdom of the court for more than 60 years. I do not look upon the system of jurisprudence as a mere heterogeneous conglomeration of disjointed opinions, but as a harmonious whole, in which every case fits accurately upon those that have preceded it, and in turn becomes the foundation for others. Thus is reared the noble structure with all the beauty, simplicity, and grandeur of a Grecian temple. So feeling, I did not seek to signalize my advent upon the bench by prizing out the foundation stones of the law, but rather by building up, satisfied if I could add to the structure but one stone, small and roughhewn though it be.

The opinion in *Hoke v. Henderson* was delivered at the December term, 1883, of this court by Chief Justice Ruffin, and concurred in by his associates, Judges Daniel and Gaston. This great court sat together unchanged for more than 10 years, and has no superior here or elsewhere, either in the ability and integrity of judicial conduct or the purity of private life. No finer combination of judicial and individual character has ever existed upon any bench. Chief Justice Ruffin stands at the head of the profession in this state, with no possible rival, unless it be Chief Justice Pearson, who paid him the high compliment of saying that while Chief Justice Taylor was the most learned man that had ever been upon this bench, and Chief Justice Henderson its most reflective mind, Ruffin combined both qualities in a higher degree than any one else. Judge Daniel's opinions are models of brevity,

strength, and clearness. Judge Gaston was the beau ideal of North Carolinians, whose character contained the flower and fragrance of every virtue. I have often thought that the splendor of his intellectual qualities was overshadowed by the sublimity of his moral character. It may well be said of him that, among the great men of his generation, few have left a more splendid and none a more stainless name. It is the deliberate judgment of his countrymen that throughout a long and distinguished life he ever bore the trenchant blade of heroic manhood with the spotless shield of Christian chivalry. But it has been intimated that that opinion was not carefully considered, and that those eminent judges, like Homer, might sometimes nod. The opinion itself shows no evidence of haste or want of deliberation. On the contrary, it is regarded as a model by the best of judges, and has repeatedly received the warmest commendation from the highest sources. I know it is said that even Homer sometimes nods; but I never heard of his going to sleep, and continuing in a profound slumber for 70 years. It remained for the courts of North Carolina to take this more than Rip Van Winkle nap, and as we wake up we may well ask, where are Ruffin and Daniel and Gaston and Pearson? Gone! And we who sit in the ever-widening shadow of their fame are asked to say that they knew not whereof they spoke. Let this be said by those who may; it shall not come from me.

Having given to the principles of that opinion the deliberate assent of my judgment and my conscience, in *Wood v. Bellamy* and the kindred cases decided at that term, I deemed it my duty to carry them to their legitimate conclusion. If it was the law when *Wood v. Bellamy* was decided in 1897, it remained the law, in the absence of constitutional or statutory provisions; and those who subsequently invoked those identical principles were entitled to their equal protection. If they were sacred enough in 1897 to keep Bellamy in office, they retained equal sanctity in 1899, when invoked in favor of Day. It may be that the application of those principles was carried too far in some subsequent cases, but I did the best I knew. I admit that sometimes my opinions when once formed may be too firmly fixed. Be that as it may, they are the result of reflection and conviction, and take their texture more from the granite of my native hills than the shifting sand dunes of a storm-swept coast. In these cases I but followed the injunction of this court in *Sutton v. Phillips*, 116 N. C. 502, 21 S. E. 968, wherein it says, on page 508, 116 N. C., page 969, 21 S. E., that "it is best to stand super antiquas vias." I am painfully aware of the frequent appearance of the personal pronoun in this opinion, and deeply regret its apparent necessity.

An examination of the constitutional his-

tory of the state, I think, will clearly show that the principles so clearly enunciated in *Hoke v. Henderson* have not only received the practically unanimous approval of succeeding judges, but have by direct implication been repeatedly ratified by the people themselves. This decision was rendered at the December term, 1833, reported in 15 N. C. 1, 25 Am. Dec. 677. Since that time there have been five separate and distinct constitutional conventions, all of which might, but none of which have, abrogated or modified the principles of that opinion. In 1835 a constitutional convention met on June 4th, and framed amendments to the Constitution of 1776, which were ratified by the people. In 1861 a convention met, and on May 20th passed the Ordinance of Secession, with some other amendments, none of which were submitted to the people. In 1865 a convention met on October 9th, repealed the Ordinance of Secession, and passed an ordinance prohibiting slavery. This convention reassembled in May, 1866, and further amended the Constitution; but with the exception of the above ordinances relating to secession and slavery, the amendments were rejected upon submission to the people. A convention called by Gen. Canby, under the reconstruction acts of Congress, assembled on January 14, 1868, and framed the Constitution of 1868, which was ratified by the people. In 1875 a convention assembled on September 6th, and amended the Constitution in several particulars, their action being ratified by the people at the election in 1876. In addition to these conventions, several amendments have been made by legislative action and popular ratification, such as the celebrated "Free Suffrage" amendment of 1854, and those prohibiting the payment of the special tax bonds, relating to the election of trustees of the University, increasing the number of justices of the Supreme Court, and some relating to other particulars set out principally in chapters 81-88, pp. 111-118, of the Laws of 1872-73. To these may be added the recent amendment restricting the suffrage. The various amendments made many changes of far-reaching importance, including the successive repudiation of the governments of the United States and of the Confederate States, and the enfranchisement and practical disfranchisement of the negro; but the underlying principle of *Hoke v. Henderson* remained unchanged.

Moreover, in the 70 years that have elapsed, 35 different Legislatures have met in the aggregate more than 40 times, and yet no bill to do away with the effect of these decisions has ever got beyond the calendar. Under the decisions of this court, have I not a right to assume that this long and unbroken legislative acquiescence in this decision is an indorsement of its essential principles? The Supreme Court of the United States in *B. & O. Railroad v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772, says,

on page 372, 149 U. S., page 915, 13 Sup. Ct., 37 L. Ed. 772: "Notwithstanding the interpretation placed by this decision upon the thirty-fourth section of the judiciary act of 1789, Congress has never amended that section; so it must be taken as clear that the construction thus placed is the true construction, and acceptable to the legislative, as well as to the judicial, branch of the government." In *State v. Cole*, 132 N. C. 1069, 44 S. E. 391, in an able and learned opinion, this court says on page 1079, 132 N. C., page 395, 44 S. E.: "To the suggestion that the construction put upon the statute in *Fuller's Case* [114 N. C. 885, 19 S. E. 797], decided in 1894, is 'unfortunate,' we note that the personnel of this court has since that time undergone many changes, and the case has at almost every term been cited with approval, and conceded to be the controlling authority for this court. It is also worthy of note that the Legislature has met at five different sessions, and the law in this respect has not been changed. We have no other means of ascertaining what the law is." In *Harvey v. Johnson*, 133 N. C. 352, 45 S. E. 644, another well-considered opinion, this court says, on page 360, 133 N. C., page 647, 45 S. E.: "We have seen that no change has been made by legislation in the law as repeatedly stated by this court, and it may safely be inferred that the Legislature has accepted our construction of the statute as the proper one, and has acquiesced in it as being in accordance with what the law should be."

In addition to this long and uniform legislative acquiescence, we have its express approval by legislative, as well as constitutional, action. The convention of 1875, in amending the Constitution, provided, in what is now section 33 of article 4 of the Constitution, that "the amendments made to the Constitution of North Carolina by this convention shall not have the effect to vacate any office or term of office now existing under the Constitution of the state, and filled or held by virtue of any election or appointment under the said Constitution and the laws of the state made in pursuance thereof." Section 3872 of the Code also provides that "all persons who shall hold any office under any of the acts hereby repealed shall continue to hold the same according to the tenure thereof." Moreover, a bill entitled, "A bill to be entitled 'An act to restore to the General Assembly the power to prescribe and regulate the tenure of public offices and the duties and emoluments thereof'" was introduced into the Legislature of 1901. This bill provided that every office, place, or position created by the General Assembly should be held and deemed a mere agency or trust, and not a contract, and that no person thereafter appointed should be deemed to have any property right or vested interest in any such office, but that any such office, place, or position might be abolished, changed, vacated, or transferred at the pleasure of the

General Assembly. This bill was carefully and elaborately drawn by a most skillful draftsman, and was well calculated to effect its purpose. It was valid under the decision of this court in *Caldwell v. Wilson*, and, if then passed, would by this time have practically controlled nearly every legislative office in the state. Its sole purpose, openly avowed and fully understood, was to abolish the officeholding rule enunciated in *Hoke v. Henderson*. What was its fate? It was introduced into the House on February 18, 1901, and was at once referred to the judiciary committee. On the following day it was reported back favorably by that committee, and later, on the same day, was re-committed to the same committee. On March 15th it was indefinitely postponed, without division, and apparently by a unanimous vote. Conceding to the Legislature that devotion to duty and integrity of purpose which they are entitled to claim, we must assume that, if they had thought the purposes of the bill were in furtherance of the public interests, they would have passed it unanimously. As it is, we are equally forced to assume that their unanimous defeat of the bill was a unanimous approval of the principles of judicial decision which the bill was intended to abrogate.

In view of this long and unbroken acquiescence of the people in constitutional conventions, as well as in the General Assembly, I see neither reason nor authority for overruling the uniform decisions of 70 years. Whether this decision, now rendered by a bare majority of the court, will be permanently accepted as the law of the land, remains to be seen. It may be that in the dawn of another day this court may return to "the teachings of the elders." In the meantime, I must rest in my ignorance, if such it be, in union with the deathless dead, content to be no wiser than Ruffin, no purer than Gaston.

(124 N. C. 415)

COWAN, McCLUNG & CO. v. ROBERTS.
(Supreme Court of North Carolina. March 22, 1904.)

GUARANTY—NOTICE OF ACCEPTANCE—CONSIDERATION—CONDITION—DILIGENCE OF CREDITOR IN COLLECTION.

1. A writing stating that "I hereby guaranty" any debts due or to become due to a certain person, to the extent of \$2,000, and "this obligation to remain in full force" till the debt is discharged and the agreement annulled in writing, being a complete guaranty, was binding on the person executing it both as to the debt due and that contracted thereafter, without notice to him of acceptance by the creditor.

2. The extension of additional credit to a debtor is sufficient consideration for a guaranty of a debt already due, as well as for that which should be thereafter incurred.

3. Where one signed a written guaranty, to be delivered only on condition that it be signed by another, and delivered it to the debtors, who delivered it to the creditor without securing the other signature, and the creditor, hav-

ing no notice of the condition, extended credit on faith of the guaranty, the guarantor is liable.

4. One who guaranties payment of a debt, and not merely that the debtor shall be able to pay, or for collection, is liable without regard to the diligence of the creditor in attempting to collect from the principal debtor.

Montgomery, J., dissenting in part.

Appeal from Superior Court, Buncombe County; Hoke, Judge.

Action by Cowan, McClung & Co. against W. S. Roberts. From a judgment of nonsuit, plaintiffs appeal. Reversed.

This action was brought to recover the sum of \$2,000, alleged to be due by the defendant on a guaranty. The firm of Roberts Bros. on 9th April, 1899, was indebted to the plaintiffs, who were merchants, in the sum of \$1,742.60 for goods theretofore sold and delivered, and were desirous of making further purchases, but the plaintiffs refused to sell any other goods to them unless they would secure by a guaranty their then existing indebtedness and any other amount that might become due for future sales. Roberts Bros. then requested the defendant to give the required guaranty for them, so that they could purchase more goods. The defendant complied with this request by executing a paper writing, of which the following is a copy:

"Knoxville, Tenn., April 8, 1899.

"I hereby guaranty to Cowan, McClung & Co. any debts which Roberts Bros. now owe, or may owe in the future, to the extent of Two Thousand Dollars. This obligation to remain in full force until the debt now due Cowan, McClung & Co. is fully discharged and this agreement annulled in writing.
"W. S. Roberts."

The original paper is in the handwriting of one of the plaintiffs, and was delivered to the plaintiffs by Roberts Bros. On the faith of this guaranty the plaintiffs afterwards sold and delivered to Roberts Bros. several bills of goods amounting in all to \$475.45, which amount they failed to pay at maturity, whereupon the plaintiffs notified the defendant of their default, and when, after demand, he refused to pay the amount specified in the guaranty they brought this action in September, 1899. The firm of Roberts Bros. became insolvent and in August, 1899, were adjudicated bankrupts. No assets were left after allotting the exemptions and paying the costs and charges of administering their estate. There was evidence tending to establish the foregoing facts, and also to show that one of the plaintiffs' salesmen demanded of the defendant the payment of the amount of the guaranty, and the latter stated to him that he had seen the guaranty, and wished to have it adjusted, and expressed surprise that he was "in for so much." He also stated to the salesman that he had signed the

guaranty with the understanding that the members of the firm of Roberts Bros. would have their father, J. J. Roberts, sign the same with him. The defendant and J. J. Roberts agreed to give notes for the amount of the guaranty, but at the last moment J. J. Roberts refused to sign them. It was also in evidence that on the day after the guaranty was signed the defendant asked Roberts Bros. if J. J. Roberts had signed, to which they answered that he had not, as they had concluded not to go to him, but to get Robinson & Baird to sign it, and the defendant then told them to write to the plaintiffs, and have his name taken off the paper. The defendant inquired every week if they had received any answer from the plaintiffs, and not being able to get a satisfactory answer, wrote himself to the plaintiffs on July 7th, and requested them to erase his name, as he would not indorse for them any longer, because they had deceived him. All the goods had then been sold. The plaintiffs introduced in evidence the following letter from the defendant to them, dated July 24, 1890: "Please send me by return mail a copy of that paper with my name attached to it, sent by Roberts Bros. of this place; also amount purchased by them since the date of that paper, and oblige. * * *". And also a letter from them to the defendant dated July 8, 1890, in reply to his letter of July 7, 1890, as follows: "Your favor of July 7, 1890, is at hand. The credit extended to Roberts Bros. was based on your guaranty to the extent of Two Thousand Dollars and we cannot relinquish this guaranty of yours until the debt made under said guaranty is paid. They owe us at this time upwards of Two Thousand Dollars, and we will thank you to see to it that our debt is paid, as we are very sorely pressed for money at this time." The defendant, who was introduced as a witness in his own behalf, testified that he signed the guaranty upon the condition that J. J. Roberts would sign it with him. He was told by Roberts Bros. that they needed the guaranty in order to get more goods to renew their stock. He further stated that Roberts Bros. had told him that they had written to the plaintiffs to erase his name, but that he mistrusted them, and wrote himself after waiting three months. At the close of the testimony the court intimated that it would charge the jury to find the issue for the defendant, in deference to which intimation the plaintiffs, after excepting, submitted to a nonsuit and appealed.

Merrimon & Merrimon, for appellants. F. A. Sondley, for appellee.

WALKER, J. (after stating the case). The defendant's counsel, in his able argument before us, relied upon three grounds of defense: (1) That there was no evidence that the plaintiffs had accepted the guaranty and notified the defendant of their acceptance;

(2) that there was no consideration to support the guaranty as to the debt already due by Roberts Bros. to the plaintiffs, amounting to \$1,742.50; (3) that the guaranty was given upon a condition which was never performed, and that it is therefore void, even in the hands of the plaintiffs.

A guaranty is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is himself in the first instance liable to such payment or performance. *Carpenter v. Wall*, 20 N. C. 279. There is a well-defined distinction between a guaranty of payment and a guaranty for the collection of a debt—the former being an absolute promise to pay the debt at maturity, if not paid by the principal debtor, when the guarantee may bring an action at once against the guarantor; and the latter being a promise to pay the debt upon condition that the guarantee diligently prosecutes the principal debtor for the recovery of the debt without success. *Jones v. Ashford*, 79 N. C. 172; *Jenkins v. Wilkinson*, 107 N. C. 707, 12 S. E. 630, 22 Am. St. Rep. 911. The guaranty may also be absolute in form, or one which binds the guarantor to pay unconditionally, or at all events, upon the default of the principal; or it may be in the form merely of an offer to become bound upon the default of the principal. In the former case—that is, where there is an absolute guaranty or an unconditional promise to indemnify against loss by the principal's default—no notice of acceptance by the guarantee is required, the liability of the guarantor being fixed and determined by the ordinary rules in the law of contracts. In the latter case, when the transaction takes the form of an offer merely to become responsible for the principal, notice of acceptance of the offer is, of course, necessary, in order to charge the party who makes the offer as guarantor, and this is so because the minds of the parties have not met; there is no aggregatio mentium until the offer is accepted. There is a well-recognized distinction, therefore, between an offer or proposal to guaranty and a direct promise of guaranty. The former requires in some cases notice of acceptance, while the latter does not. When the offer to guaranty is absolute, and contains in itself no intimation of a desire for or expectation of specific notice of acceptance, it may be supposed that the offerer has a reasonable knowledge that his guaranty will be accepted and acted upon, unless he is informed to the contrary. 2 *Parsons, Cont.* (8th Ed.) c. 2, § 4, and notes, where the subject is fully discussed. It is said that, if the party distinctly and absolutely guarantees a certain line of credit, it presupposes some sort of a request for a guaranty, emanating from the guarantee, and for this reason no formal acceptance by the guarantee is necessary; but if it be only a proposition to guaranty the credits, and not a positive promise to guaranty them, the ac-

ceptance of the proposition must in some way, and within a reasonable time, be communicated, before the guarantor can be held liable on it. Tiedeman on Com. Paper, § 420. In our case the guaranty is a direct and unconditional promise to answer for the default of the principal to the amount of \$2,000. The words of the contract are in present—"I do hereby guaranty"—and super-added are the words, "This obligation to remain in full force." Language could not be stronger to express the intention to become liable at once without any expectation of notice that the plaintiffs will accept the guaranty. It was not an offer, nor did it imply an offer merely, but it was in itself a complete and binding promise to guaranty, and needed only the sale of the goods by the plaintiffs to make it otherwise effectual. 1 Parsons, Cont. pp. 466, 467.

We cannot distinguish this case from *Straus v. Beardsley*, 79 N. C. 59, where the court says: "If the undertaking be to guaranty the contract which may be made, the obligation is not collateral and contingent, but absolute and unconditional, and no notice is necessary. * * * The undertaking is to pay a certain sum, and by the terms of the condition it is discharged only, when the goods have been delivered under its provisions, by actual payment of the purchase price. If the goods are delivered, the contract is to pay for them, and a compliance with this condition is the only means of discharging the obligation. It thus became the duty of the intestate and his associates to ascertain for themselves if the plaintiffs furnished the goods, and that they were paid for, and no notice or demand was necessary to charge them with the debt." See, also, *Walker v. Brinkley*, 181 N. C. 17, 42 S. E. 383. In *Williams v. Collins*, 4 N. C. 383-386, this court drew the distinction between a guaranty that a certain person will be able to comply with the proposed contract and one wherein the promise is that he shall comply. In the latter case—which is ours—the court held that the guarantor, "To all legal consequences, became pledged absolutely to the same extent as the principal debtor was bound, as soon as the guarantee parted with his property." In *Shewell v. Knox*, 12 N. C. 405, all the judges agreed that, if the guaranty is absolute, and addressed to an individual, no notice of acceptance is necessary; and one of the judges held that it was not necessary even when a letter of credit was given under the circumstances of that case. The general principle as to when notice of acceptance of an offer to contract becomes necessary is considered in the cases of *Crook v. Cowan*, 64 N. C. 743, and *Ober v. Smith*, 78 N. C. 318. The question as to notice of acceptance in cases of guaranty is very ably and exhaustively discussed, with a full review of the English and American authorities, in the case of *Wilcox v. Draper*, 12 Neb. 138, 10 N. W. 579, 41 Am. Rep. 763, and the

conclusion is reached that, when there is a direct promise of guaranty, no notice of acceptance is required. *Allen v. Pike*, 8 Cush., at page 242; *Powers v. Bumcratz*, 12 Ohio St. 273; *Bank v. Coster's Ex'rs*, 3 N. Y. 212, 53 Am. Dec. 280; *Bank v. Phelps*, 86 N. Y. 484; 2 *Addison Cont.* (8th Ed.) p. 84 (*651). The case of *Gregory v. Bullock*, 120 N. C. 260, 26 S. E. 820, does not apply, as the court held that there was no contract at all in that case, and what is said about the guaranty was with reference to the particular facts under consideration, from which it appeared that there was only "a proposal based upon an uncertain event." The guaranty in this case as to both the past and future indebtedness is evidenced by one and the same instrument, and is supported by one and the same consideration, and we do not, therefore, see why the law applicable to the one should not also determine the liability in the case of the other.

We are of the opinion that the testimony of the defendant as to his interviews and communications with the principals, Roberts Bros., and his subsequent promise to pay for the goods after the guaranty had been executed by him, furnishes some evidence to show that he knew the guaranty had been delivered to the plaintiffs, and that they were acting upon it, or intended to do so.

There was a sufficient consideration to support the guaranty as to the debt already due. The agreement as to the existing and the future indebtedness was indivisible, and was based upon one and the same consideration, which was that the plaintiffs should sell more goods to the principals, to enable them to replenish their stock, which he did. It is not necessary that the consideration should be full or adequate, as in the case of bona fide purchasers for value. If there was any legal consideration, it is sufficient. The promise of the guarantees to furnish the goods was such a consideration, and supports the contract of guaranty. 1 Parsons, supra, pp. 466, 467.

The third ground of defense is not tenable. If the written guaranty was given to the principals upon condition that it should not be delivered to the plaintiffs until it was signed by J. J. Roberts, and they delivered it in violation of the condition, and thus, as is said in the "case," practiced a fraud upon the defendant, the defendant is bound, as the plaintiffs did not participate in this alleged fraud; nor is it shown that they had notice of it. The liability of the defendant is founded upon the principle that, where one of two persons must suffer loss by the misconduct or fraud of a third person, or by his breach of confidence—as in our case—the loss should fall upon him who first reposed the confidence, or who, by his negligence, made it possible for the loss to occur, rather than on an innocent third person. The liability of the defendant in this respect is fully established by the case of *Vass v. Riddick*, 89 N. C. 6. See, also, *Bank v. Hunt*, 124 N.

C. 171, 32 S. E. 546; *State v. Lewis*, 73 N. C. 141, 21 Am. Rep. 461. The plaintiffs agreed to sell the goods to the principals not upon the single consideration that the defendant would guaranty the payment of the price, but upon the further and additional consideration that he would guaranty also the payment of the existing indebtedness. He would not have sold but for the last consideration, and therefore, by reason of the guaranty, he has been induced to change his position, and should the guaranty, as to that indebtedness, be declared invalid, he will be prejudiced as he no doubt would have taken immediate steps to collect his claim, if the guaranty had not been given. It will be impossible for him now to save himself, for the reason that the principals have become insolvent, and have been adjudged bankrupts. We have said this much, though we do not concede that, in order to charge the defendant on the guaranty, it is necessary to show a change in the guarantee's position by which he may be prejudiced if the guaranty is held to be void.

We have not commented upon the evidence in this case, from which it appears that the defendant knew, on the day after the guaranty was given, that it had been sent to the plaintiffs, and had not been signed by J. J. Roberts, and, knowing this fact, and "mis-trusting" the principals, as he did, according to his own testimony, he delayed for nearly three months to notify the plaintiffs of the alleged condition annexed to the guaranty, and in the meantime they had sold the goods. When they refused to surrender their security, he finally agreed to pay the bill for the goods sold after the date of the guaranty. This was a clear case of negligence on his part, and the consequences of this negligence must be visited upon him, and must not be borne by the plaintiffs, who are innocent parties. As said in *State v. Lewis*, supra, the defendant acted upon the assurance that another would do an act which he knew might be defeated or prevented by various accidents, and he must therefore take the risk of such assurance being fulfilled. He confided in the principals, Roberts Bros., and the condition that J. J. Roberts should sign with him was communicated to them alone. He failed to use ordinary precaution either to protect himself or to protect the guaranteees. If the defendant, in any phase of the testimony can be regarded as an innocent person in this transaction, it yet remains as an inflexible rule of the law that, where one of two innocent persons must suffer, he who has enabled a third person to occasion the loss must sustain it. This is said to be a doctrine of general application, and is a most just and reasonable one. *State v. Lewis*, supra. To permit the defendant to avail himself of his defense to this action would also contravene that other just and inflexible maxim of the law that no man shall take any advantage of his own wrong.

No question arises in this case as to diligence on the part of the guarantee in collecting the debt from the principals, as this is a guaranty of payment, and not for collection; and, besides, the burden of proof in this respect would be on the defendant. The case shows that notice of the default of the principal was given, and demand made upon the guarantor before the suit was commenced.

Our conclusion is that there was error in the intimation of opinion by the court adverse to the plaintiffs, by which they were driven to a nonsuit. The judgment must therefore be set aside, and a new trial awarded.

New trial.

MONTGOMERY, J. (dissenting in part). Roberts Bros. of Buncombe county, N. C., were in 1899 indebted to the plaintiffs, of Knoxville, Tenn., in the sum of \$1,742.62 for goods sold to them, and, being unable to make further purchases on credit without security, procured their uncle, the defendant, to sign and deliver a guaranty in the following words: "Knoxville, Tenn., Apr. 8, 1899. I hereby guarantee to Cowan, McClung & Co. any debts which Roberts Bros. now owe or may owe in the future to the extent of Two Thousand Dollars. This obligation to remain in full force until the debt now due Cowan, McClung & Co. is fully discharged and this agreement annulled in writing." Afterwards the plaintiffs sold and delivered to Roberts Bros. at different times goods and wares to the value of \$475.45. This action was brought to recover the \$2,000, the amount named in the guaranty. No notice was given by the plaintiffs to the defendant of their acceptance of the guaranty. The guaranty, upon its face, is divisible into two parts. One branch seems to be an obligation for the payment of a debt already existing and due by the principals to the guaranteees, the plaintiffs, and the other branch is in the nature of a security for a debt to be contracted in the future by the principals with the plaintiff. By the terms of the guaranty in respect to the debt already due, the obligation appears to be an absolute guaranty, and, if there was a consideration to support it, the defendant is liable for its payment. There was in fact such a consideration, for the plaintiffs, after the execution of the guaranty, sold and delivered to the principals goods and merchandise of the value of \$475.45, and the defendant testified on the trial that the guaranty was made in order that the debt already due might be secured, and that further fresh purchases of goods might be added to the stock of the principals then on hand. It was not necessary that the defendant should have been benefited in order to raise a consideration for the guaranty on the part of the guarantor. Any advantage accruing to, or any consideration moving toward, the principals from

the plaintiffs was sufficient in law to make the defendant liable on the first branch of his guaranty.

As to the second branch of the guaranty—that is, the guaranty of the amount of the debt to be contracted in the future by the principals—a notice of acceptance by the guarantees, the plaintiffs, was necessary. That branch of the guaranty was not absolute, and in *Gregory v. Bullock*, 120 N. C. 260, 26 S. E. 820, the court said: "The answer is that the alleged guarantee gave no notice of his acceptance within a reasonable time. In *Adams v. Jones*, 12 Pet. 213, 9 L. Ed. 1053, Mr. Justice Story said: 'Notice is necessary to be given the guarantor that the person giving credit has accepted or acted upon the guaranty and given credit on the faith of it. This is no longer an open question in this court.'" In the case of *Clune v. Ford*, 55 Hun, 479, 8 N. Y. Supp. 719, cited in the argument here, the guaranty was in these words: "Dear Sir, We hereby agree to guaranty the expenses of the members of the Gaelic Athletic Association to the sum of \$650 (Six hundred and fifty dollars) or the amount due under that figure." The guarantee was the proprietor of a hotel in New York City at which the members of the association were boarding, and were in arrears for board for the sum of \$475. After the delivery of the guaranty, they incurred the further expense of \$175. The question of notice of acceptance by the guarantee was not raised, the matter of consideration was the only point in the case, and the court held that the incurring of the \$175 expense for the board after the guaranty was given was a sufficient consideration for the amount due in the past. In the case of *Paige v. Parker*, 74 Mass. 211, cited on the argument here, the court held that the guaranty was an absolute one, and therefore that notice was not necessary. The paper writing in that case guaranteed the prompt payment at maturity of any amount that might be due by the principal for goods, wares, and merchandise to be sold by the guarantee to the amount of \$500. The court in that case said that: "However this may be, we are of opinion that the defendant in this case had notice that his guaranty was accepted. An absolute guaranty was written by Blodgett & Co. in their store, and for their benefit. The defendant signed it there, and left it with them as a complete contract, and they retained it. This was an acceptance by them, for which he must be held to have notice." In the case before us the plaintiffs contended that the guaranty was made at the request of the guarantees, and therefore that no notice of acceptance was necessary. But there was no evidence of that fact. The guaranty, it is true, was in the handwriting of the plaintiffs, but it was brought to the defendant by one of the firm of Roberts Bros.; but he made no statement at the time, or at any other time, that the

plaintiffs expected that the defendant singly and particularly would sign it. And, besides, the defendant did not deliver it to the plaintiffs in person, and leave it in their possession as a contract, completed, as was the case in *Paige v. Parker*, supra. There was evidence offered on the trial going to show that the defendant executed the guaranty through a fraud practiced on him by one of the principals. But it was not shown that the plaintiffs had any notice of the fraud. Notwithstanding the fraud practiced on the defendant, he is liable on the first branch of the guaranty, for the reason that the plaintiffs did not participate in the fraud, or have knowledge of it. *Bailes on Surety & Guarantor*, p. 215.

(124 N. C. 466)

CARTER et al. v. WHITE.

(Supreme Court of North Carolina. March 22, 1904.)

LAW OF THE CASE—TRESPASS—PARTITION—AFTER-ACQUIRED TITLE—ESTOPPEL.

1. The decision on appeal from an order continuing to the hearing in an action for trespass an injunction restraining trespass, as to the effect of a judgment and decree in another action and subsequent partition proceedings, is not the law of the case, so as to be conclusive on appeal from the final judgment in the trespass suit.

2. In trespass plaintiffs alleged they were the owners in fee simple and in the possession of the land. Defendant denied the allegation of ownership, and alleged he was the owner of a certain undivided interest. The jury found that defendant was entitled to $\frac{1}{84}$ of the land and plaintiffs to the balance, and there was judgment in accordance therewith. In subsequent partition proceedings the land was accordingly divided between the parties. *Held*, that defendant in an action for subsequently trespassing on the part partitioned to plaintiffs was estopped from claiming an undivided interest in such part under a deed subsequent to the partition, from one having an interest therein at the time of the partition, but who was not a party to the proceedings therefor.

Clark, C. J., dissenting.

Appeal from Superior Court, Currituck County; Council, Judge.

Action by J. C. Carter and others against Leon White. Judgment for defendant. Plaintiffs appeal. Reversed.

See 42 S. E. 442.

The plaintiffs, trustees of Swan Island Club, prosecute this action against the defendant for an alleged trespass upon the land described in the complaint. They demand judgment for damages, and other relief. The defendant, in his answer, denies the ownership as alleged, admits an entry upon the land, and sets up title to an undivided interest therein. Appropriate issues were framed and submitted to the jury. The plaintiffs introduced the record of a civil action lately pending and determined in the superior court of Currituck county, wherein the present plaintiffs James C. Carter and William Minot, Jr., together with W. H. Forbes, trustees of Swan Island Club, were

parties plaintiff, and the present defendant was party defendant. It appears from an inspection of said record that the plaintiffs alleged that they were the owners in fee and in possession of the land described in the complaint, and that the defendant had committed acts of trespass thereon. The defendant, in his answer, denied that the plaintiffs were owners, and alleged that he was the owner in fee of an undivided interest in the land. He admitted the entry, and alleged that the same was lawful. The cause came on for trial at fall term, 1896, and the following issue was submitted to the jury: "To what part of the land described in the complaint are the plaintiffs, trustees, and the defendant, respectively, entitled?" and the jury responded, "The defendant to one fifty-fourth part of the whole, and the plaintiffs to the balance thereof." Judgment was rendered, in accordance with the verdict, "that the defendant owns in fee simple one undivided fifty-fourth part of said land, and the plaintiffs, trustees, the balance of the same." A full description of the land is set out in the judgment. Thereafter the plaintiffs in said action instituted a special proceeding, in which the defendant therein, being the defendant herein, was party defendant for the purpose of having partition of the land. In the petition in said proceedings the plaintiffs alleged that they were tenants in common with the defendant of the land described therein, being the same land described in the complaint in the civil action, and setting forth the interest of the parties. The defendant filed no answer, and the court rendered judgment directing partition, appointing commissioners for that purpose. The commissioners made partition, allotting to the defendant by metes and bounds one fifty-fourth part in value of the land, and to the plaintiffs the balance thereof; and on September 23, 1898, their report was duly confirmed by the court, and the parties adjudged to hold the portions allotted to them by the commissioners. Thereupon the defendant introduced a grant for the locus in quo from the state to John Williams, Thomas Williams, and Jeremiah Land; also a deed from Thomas Land to himself, bearing date February 1, 1899. The defendant showed that Thomas was one of the heirs at law of Jeremiah Land, one of the persons named in the grant. The record also states "that it is admitted the defendant is a tenant in common with them to the extent of the interest conveyed to him under the deed from Thomas Land of February 1, 1899, unless the defendant is estopped by the proceedings set up in this action." It was conceded that the present plaintiffs succeeded to the title of the plaintiffs in said action and proceeding. The plaintiffs moved for judgment, the motion was denied, and the plaintiffs excepted. The court instructed the jury that, if they found from the evidence that Jeremiah Land was one of the original grantees from the

state to the land in controversy, that he died seised of the same, and that Thomas Land, from whom the defendant bought February 1, 1899, was not a party to the proceedings introduced in evidence, the defendant was not estopped. The plaintiffs excepted, and from a judgment for the defendant appealed.

Pruden & Pruden and Shepherd & Shepherd, for appellants. E. F. Aydlott, for appellee.

CONNOR, J. (after stating the case). The plaintiffs contend that the defendant is estopped from asserting title to any portion of or interest in the land in controversy, first, by the verdict and judgment in the civil action rendered at fall term, 1896; and, second, by the final judgment in the special proceedings for partition of September 23, 1898. The defendant admits that he is estopped to assert any title which he owned at the time of the institution of said action and of said special proceeding, or which he has derived from the parties to said action, or any person claiming under said parties, but insists that he is not estopped to assert title derived from Thomas Land, who claims under Jeremiah Land, neither of whom were parties to, or in any manner bound by, the judgment in said action or proceeding. This is the sole question presented upon this record.

Before proceeding to discuss the authorities relied on by counsel, it will be well to note the disposition of this case made by this court at August term, 1902. 131 N. C. 14, 42 S. E. 442. The case, as then presented, was an appeal from an order continuing to the hearing an injunction restraining the defendant from trespassing upon the land pending litigation. The court decided that the judge was in error in making said order. It is not contended that the judgment then rendered was final, or worked an estoppel upon the plaintiffs to further prosecute this action. The appeal was not from any "judgment," but from a "judicial order," as provided in section 548 of the Code. The term "order" is sometimes applied to an interlocutory judgment or decree. Indeed, under the Codes of the several states interlocutory judgments and decrees are no longer recognized, and "orders" have been substituted therefor. 17 Am. & Eng. Enc. 763. The defendant, however, says that this court, in the opinion rendered, decided the question now presented, and that the decision became the "law of the case," and binding upon us in all other and future steps herein. It is well settled that the decision of a question presented by the record and necessary to be decided in the final disposition of the case is conclusive upon the parties. We will not entertain a proposition to "rehear" a case by means of a second appeal. Pretzfelder v. Ins. Co., 123 N. C. 164, 31 S. E. 470, 44 L. R. A. 424; Setzer v. Setzer, 129 N. C. 296, 40

S. E. 62. This principle, however, cannot be so extended as to include such a case as this. The only question presented by the former appeal was whether his honor should have made the interlocutory order continuing the injunction to the hearing, and in no manner involved the final determination of the case or the rights of the parties upon the trial thereof. We therefore conclude that it is our duty to decide this appeal as if presented for the first time, giving to the views expressed by this court such weight as, in our opinion, they are entitled to. The learned justice, writing for the court, says: "In the action of ejectment the only title in issue was that of the defendants. The plaintiff's title was not in controversy." It was there found and adjudged that the defendant was a tenant in common with the plaintiffs. The record shows "that the action was in trespass and not ejectment." The plaintiffs expressly put their title in issue by alleging that "they were the owners in fee simple, and in the possession of the land." The defendant not only joined issue by denying the allegation of ownership, but by affirmative averment put his title in issue, alleging that he was the owner of an undivided interest, stating the extent thereof. It is difficult to see how the title of the parties could have been more clearly put in issue. Under the practice prevailing prior to the adoption of the Code, the defendant's answer would have constituted a general denial, or plea of not guilty, and a special plea of *liberum tenementum*. The cause would have been tried upon the general issue and the special plea. A verdict upon the general issue would not have worked an estoppel, for the reason set forth by Pearson, J., in *Rogers v. Ratcliff*, 48 N. C. 225; *Stokes v. Fraley*, 50 N. C. 377. In the last case he said: "If the defendant had relied on his special plea, there would have been an estoppel in respect of his title." The effect of a verdict and judgment in actions involving title to land under the Code system is discussed by Pearson, C. J., in *Falls v. Gamble*, 66 N. C. 455, where he says: "Had Gamble brought his action against Falls for trespass on the land, and Falls in his answer had admitted the possession of Gamble and the committing the alleged trespass by his orders, and put the defense on his title, * * * a verdict and judgment would have worked an estoppel in the same way that it would have done in the old action trespass *quare clausum* under the plea of *liberum tenementum*. Indeed, under the Code of Civil Procedure, in an action for land, when the complaint avers title in the plaintiff, the answer admits possession, denies the title of the plaintiff, and sets up title in the defendant, a verdict and judgment will conclude the parties and privies in respect to the title. * * * In an action for land, the plaintiff, if he does not wish the action to try title, should merely

allege that he is entitled to the possession, and that the defendant withholds it to his damage; and the defendant, if he does not wish the action to conclude the title, should, in his answer, merely deny the allegation of the complaint so as to make it, in effect, a plea of 'not guilty' or the 'general issue.'" We therefore conclude that the defendant is estopped by the judgment to deny the facts found by the jury, to wit, that the plaintiffs are entitled to $\frac{3}{4}$ of the land. The effect of the judgment was to leave the parties in possession as tenants in common, each having, as between themselves, the interests adjudged by the court upon the verdict.

In the view which we take of the effect of the partition proceeding, it is not necessary to decide the effect of this estoppel upon an after-acquired outstanding title, and we forbear to express any opinion thereon.

The question next arises as to the effect of the final judgment in the partition proceeding, which was put in evidence. It is therein settled that the plaintiffs and the defendant are the owners and entitled to the possession of the several portions of the land allotted to them by the commissioners. The defendant admits that he has entered upon that portion of the land allotted to the plaintiffs, and committed acts of trespass thereon. He seeks to justify such entry by alleging that since said partition he has become the owner of one-ninth undivided interest in said land by virtue of a deed from one Thomas Land, who was at the time of said partition by title paramount the owner of such interest; that neither said Land nor those under whom he claimed were parties to said proceeding. Is the defendant estopped to assert such title against the plaintiffs? The plaintiffs say that he may not do so, for that, first, the final judgment in the proceedings in partition settled the rights of the parties to the entire tract of land, that the quantity to which each party was entitled was fixed by the judgment, and that neither party shall be heard to bring into question the fact so settled and determined either by showing that he then owned a larger interest or that he has acquired an outstanding title; and, second, that there is an implied warranty arising upon the partition, which estops, by way of rebutter, the defendant from setting up such title. In regard to the first question, it is interesting to trace the development of the law on this subject. We are thereby enabled to better understand and distinguish the conflicting decisions. It was held at one time "that a writ of partition, or a petition for partition, which is but a substitute for the former, is a mere possessory action," and that judgment therein did not bar or estop the parties in an action of higher dignity involving title. *Freeman on Co-Tenancy*, § 529. Mr. Freeman says: "In the greater portion of the United States, actions

for partition, like actions in ejectment, have ceased to be merely possessory actions, and have come to involve the right as well as the possession." He has collected in the note (*Nicely v. Boyles*, 40 Am. Dec. 638) an interesting history of the law and a number of decided cases upon the subject. It is not necessary, however, that we go beyond our own Reports to find a strong, able, and exhaustive discussion of this question. Judge Pearson, writing for the court in *Armfield v. Moore*, 44 N. C. 157, not only vindicates the wisdom in which the law of estoppel is founded, "without which it would be impossible to administer law as a system," but applies it to proceedings for partition. This case is one of the landmarks of our jurisprudence, familiar to every lawyer in the state. It is there settled beyond controversy that a final decree or a petition for partition works an estoppel of record upon the parties thereto, and that neither shall be heard to say that any of the facts therein settled were not true. He says: "Here we have facts agreed on by the parties, entered on the record—partition and decree in pursuance thereof, possession in severalty. * * * Mr. Freeman says: 'At the present time there can be no doubt that a judgment in a proceeding for the partition of land is as conclusive upon the matter put in issue and tried as a judgment in any other proceeding, and may be set up as a bar to a writ of entry involving the same question of title. And a suit for partition is perhaps the only proceeding known to the law in which every possible question affecting the title to real estate may be made an issue and determined.'" Freeman on Judgments, § 304. This principle is in no manner affected by what is said by this court in *Harrison v. Ray*, 108 N. C. 215, 12 S. E. 993, 11 L. R. A. 722, 23 Am. St. Rep. 57. That was an action to correct one of the deeds of partition.

The defendant's counsel, in his well-considered brief, insists that the estoppel operates only upon the title which the parties to the record then owned, and does not affect his right to buy in and assert an existing and outstanding title not affected by the judgment. We have found but one case in our Reports in which this question is presented and decided. In *Mills v. Witherington*, 19 N. C. 433, it appeared that partition had been made upon petition of the defendant against the lessor of the plaintiff in the county court; that the report of the commissioners was duly confirmed and final judgment rendered; and the lessor of the plaintiff afterwards obtained a grant from the state for the land which had been assigned to the defendant in severalty, alleging that the same was vacant. In the action of ejectment against the defendant she rested her right to recover on the grant. The defendant set up the judgment in the partition proceeding as an estoppel. Daniel, J., said: "If the land sought to be recovered by the plaintiff was

embraced in the report of the commissioners, which report had been confirmed, and final judgment rendered thereon, then we think the lessor of the plaintiff, who had been a party to that judgment, was concluded, bound, and estopped to controvert anything contained in it. The Legislature, by the act of 1789, gave to tenants in common of real estate the petition for partition in the place of the ancient writ of partition. The final judgment at common law in a writ of partition runs thus, 'Ideo consideratum est quod partitio prædicta firma et stabilis in perpetuum teneatur' (Thomas' Coke, 700); and it was conclusive on the parties and all claiming under them. In *Clapp v. Bromagham*, 9 Cowen, 569, the court say that the judgment in partition, it is true, does not change the possession, but it establishes the title, and in an ejectment must be conclusive. The judgment of the court adjudging a share to belong to one of the parties and allotting it to him to hold in severalty must be sufficient to authorize him to recover it as to all the parties to the record. The judgment is as to them an estoppel. The act of 1789 gives the same force to a final judgment in a petition for partition of real estate. It declares that the division, when made, shall be good and effectual in law to bind the parties, their heirs and assigns." Battle, J., in his note to this case, says, "The doctrine of estoppel as laid down in this case is clearly established." Chapter 47 of the Code is practically a reenactment of the act of 1789. Mr. Freeman, in his work on Co-Tenancy cites this case in support of the proposition that one of several heirs may be bound by a decree of partition, not only as to rights held by him at the time of partition, but also to the rights subsequently purchased of other heirs who were not parties to the partition; citing the case of *Short v. Prettyman*, 1 Houst. 334, in which it was expressly held by the Delaware court that "the decree is binding and conclusive, not only as to the rights which the parties had in the premises at the time of the partition, but also as to the rights which they had subsequently acquired from other heirs of the premises, who were not parties to the partition, and were not bound by the admissions or the decree establishing it." The Supreme Court of Missouri, in *Forder v. Davis*, 38 Mo. 107 (118) says: "We decide nothing here, now, concerning the rights of any stranger to the partition, or of any person not a party thereto. But in reference to this plaintiff we think this judgment operates as a bar against him at law, not only in respect of the estate and title which he then had, but in respect of any title which he might thereafter acquire. There is here no covenant of warranty by deed; but there is such a thing as an estoppel in pais and by matter of record, which, like an estoppel by deed, may have the effect to pass an after-acquired title by operation of law. The partition establishes the title, severs the unity

of possession, and gives to each party an absolute possession of his portion. A partition is sometimes altogether the act of the parties, rather than the act of the law. The binding and conclusive judgment is, in its very nature, very much like the old livery of seisin under a feoffment, which was matter in pais, or like a fine or a common recovery, which was matter of record; and these ancient assurances were of that solemnity and high character that they not only passed an actual estate, and divested what title the party then had, but operated by way of estoppel to pass all future estate and possibility of right which he might thereafter acquire. *Shep. Touchstone*, 2-6, 204-206; *Rawle on Cov. title*, 402. And we see no good reason why this solemn judgment in partition, which the statute declares shall be firm and effectual forever, should not be allowed to have the same operation against all parties to the record." See, also, *Reese v. Holmes*, 5 Rich. Eq. 540. These authorities would seem to establish the law as laid down in *Mills v. Witherington*, supra.

There is another view, however, of the case, which we think equally conclusive. Mr. Freeman says that "the preponderance of the authorities is probably in favor of the theory that, as each co-tenant who has been evicted after a compulsory partition may call upon his co-tenants to contribute their proportions of his loss, each of them is, by his obligation of warranty, estopped from asserting any independent adverse title to the properties assigned to the others." Freeman on Co-Tenancy, § 533. Mr. Washburn thus states the doctrine: "Where partition has been made by law, each partitioner becomes a warrantor to all the others to the extent of his share, so long as the privity of estate continues between them. And, inasmuch as a warrantor cannot claim against his own warranty, no tenant, after partition made, can set up an adverse title to the portion of another for the purpose of ousting him from the part which has been parted off to him. When partition has been made, the tenant to whom a part has been set out is regarded in law as a purchaser for value of the same." Wash. R. P. 723. In *Venable v. Beauchamp*, 3 Dana, 321, 23 Am. Dec. 74, the question is discussed by Marshall, J., and a valuable note is attached by Mr. Freeman. The learned justice says: "But a further, and, as we think, a conclusive, evidence of the relation subsisting after partition is furnished by the universal acknowledgment and assertion of the principle that to every partition the law annexes an implied warranty. The implied warranty which the law annexes to the partition is, it is true, in many respects special. It is so not only with regard to the person or persons who may take advantage of it, but also with regard to the amount of the recompense; the principle being that the loss shall be equally borne by the parties making the partition, and the effect that the losing party may have

a repartition. But, although the effect of the warranty is limited as to the extent of the recompense and the manner in which it is to be made, it is not limited as to the land warranted. It embraces the whole of the land allotted to the warrantee in the partition. As the law makes each partitioner the warrantor of the other as to the extent of the portion allotted to him, whether there be an express warranty in the deed or not, and as no principle is better settled at common law than that a warrantor is barred or estopped to claim against his own warranty, it seems clearly to follow that no party to a partition can be permitted to assert an adverse title for the purpose of ousting another party from his portion, allotted to him by the same partition, though there be no express warranty in the deed." We quote this language at length, as it meets the very ingenious suggestion of the defendant's counsel that the implied warranty should not operate as an estoppel, because in the event of the eviction by a stranger, the defendant will only be liable to the plaintiffs for $\frac{1}{4}$ of the value of the whole land, therefore he should be estopped only to that extent. The effect of a warranty as an estoppel upon the warrantor is so fully and ably discussed by Mr. Justice Walker in *Hallyburton v. Slagle*, 132 N. C. 957, 44 S. E. 659, that we deem it unnecessary to do more than to refer to his opinion in that case.

We have examined with care every case cited by the defendant's counsel, and, while some of them do lay down the law as contended by him, they are based upon constructions of statutes, as in Massachusetts. Those not thus distinguished are not in harmony with the best considered authorities and decided cases. We therefore conclude that by the judgment in the special proceeding for partition the defendant is estopped to assert his after-acquired title against the plaintiffs. It is immaterial whether this conclusion is based upon the first proposition or the last, as they bring us to the same result, and are consistent with each other. His honor should have instructed the jury in accordance with the plaintiffs' prayer, and for error in failing to do so there must be a new trial.

CLARK, C. J. (dissenting). The identical point now presented was passed upon in the former appeal in this case (131 N. C. 14, 42 S. E. 442), and the decision then made by a unanimous court should be the law of this case. It was there said: "In partition proceedings between tenants in common no title passes; only the unity of possession is dissolved, and the title vests in severalty, the common source of title resting undisturbed. *Lindsay v. Beaman*, 128 N. C. 189, 38 S. E. 811. Land's interest never passed to plaintiffs, and was not represented, nor was he a party; therefore he was not bound by the action or special proceeding. As to him, they were void, and he had a right of entry and

possession equally with the other tenants in common, whosoever they might be. By his deed passed all the right of Land to the defendant, who then stood in Land's shoes, and had all the rights and remedies of Land, independent of and notwithstanding the judgment in said action and decree of partition." Thus the identical point now presented has been decided, and in this action the matter is *res judicata*. It cannot be presented by a second appeal. The remedy, if error was committed by this court, would have been by a petition to rehear. *Holley v. Smith*, 132 N. C. 36, 43 S. E. 501; *Perry v. Railroad*, 129 N. C. 333, 40 S. E. 191, and cases there cited. Nor does it vary this rule that the former decision was upon an appeal from the continuance of the restraining order in this cause and this appeal comes up on appeal from a final judgment. The present appeal is solely upon exceptions that the judge charged in exact accordance with the former ruling of this court and his refusal to charge contrary thereto. *Setzer v. Setzer*, 129 N. C. 296, 40 S. E. 62.

Besides, the former decision was correct. *Richardson v. Cambridge*, 79 Am. Dec. 767, is a case on all fours, and sustains our former ruling. See, also, *Christy v. Water Works*, 68 Cal. 73, 8 Pac. 849. In 17 Am. & Eng. Enc. (1st Ed.) 819, it is said: "A party to a partition, who subsequently acquires a new and independent title, which was in no way represented by any of the parties to the suit, may be permitted to assert it." *Henderson v. Wallace*, 72 N. C. 451, holds that one not a party or privy to partition proceedings is in no way affected by the decree. To same effect 21 A. & E. (2d Ed.) 1186: "The familiar principle that judgments and decrees bind only parties and privies is as applicable to judicial proceedings in partition as to other litigation"—and cases there cited. Land, not having been a party to the partition decree in 1895, his interest was not affected by it. He could recover it or sell it to another, and the defendant could acquire and assert it as well as another. This is not the case of "feeding an estoppel." In *Harrison v. Ray*, 108 N. C. 215, 12 S. E. 993, 11 L. R. A. 722, 23 Am. St. Rep. 57, it is held that in voluntary, actual partition the deeds convey no title, but simply ascertain by metes and bounds the interest of each. This has been cited and affirmed by Douglas, J., in *Carson v. Carson*, 122 N. C., at page 648, 30 S. E. 4; by Shepherd, J., in *Fort v. Allen*, 110 N. C., at page 192, 14 S. E. 685, and again as recently as *Harrington v. Rawls*, 131 N. C. 40, 42 S. E. 461, and was stated also in *Lindsay v. Beaman*, 128 N. C. 189, 38 S. E. 811. In 21 A. & E. (2d Ed.) 1193, it is said that "both in voluntary and judicial partition" the decree "does not create or divest any title to, or other right in, the property, but merely severs the unity of possession, and determines the share which each tenant is entitled to possess in severalty." The title of Land could not be

divested by the proceeding to which he was not a party, and the purchase of it by White after the decree was not the purchase of an outstanding incumbrance or title, but the purchase of an intact interest in the property, which was not the subject of the litigation and decree to which White had been a party in 1895. In that proceeding he only set up the title to the interest he then had. The interest of Land would be good if now held by him, and White cannot be affected by that decree, as assignee of Land's interest, any more than would be any other purchaser from Land.

(134 N. C. 426)

MILLSAPS et al. v. ESTES et al.

(Supreme Court of North Carolina. March 20, 1904.)

WILLS—CONSTRUCTION—LIFE ESTATE—SUBMISSION TO ARBITRATION OF INFANT'S CAUSE—JUDGMENT—VALIDITY.

1. A submission to arbitration of an infant's cause by the infant himself or by his next friend or attorney for him is absolutely void.
2. A judgment founded on a void submission to arbitration is void, and not merely voidable.
3. A will giving to a devisee certain real estate to be and inure to the use of the devisee "during his natural life, not subject to be sold and conveyed by him, but, in case he should have legitimate children, it is to belong to them," gives to the devisee only a life estate in the land devised.

Appeal from Superior Court, Swain County; Hoke, Judge.

Action by Orphia Millsaps and others against G. D. Estes and others. From a judgment for defendants, plaintiffs appeal. Reversed.

This is an action brought by the heirs of W. R. Millsaps to recover possession of a certain tract of land, together with damages for waste, and also to have certain deeds from said Millsaps to the defendants declared void and canceled, and was heard at the July term of Swain county court before Hoke, J. Plaintiffs claim title under the following clause in the will of John A. Millsaps: "I will and bequeath to my half brother, W. R. Millsaps, all that tract of land [described], to the use of said W. R. Millsaps during his natural life, not subject to be sold or conveyed by him, but in case he should have legitimate children it is to belong to them in like manner." Defendants claim title by purchase from W. R. Millsaps, and set up as defense by way of estoppel a decree in an action begun in 1888 by the same parties against the defendants, which decree declared the deeds from W. R. Millsaps valid, giving defendants title upon their paying a certain sum to plaintiffs, which sum was adjudged by arbitrators to be the difference between the value of the land and the sum actually paid for same to W. R. Millsaps. Said action of 1888 was brought for the infant plaintiffs in the name of Jas. Schuler, next of friend, and the plaintiffs con-

tend that, the application for this appointment of Schuler and his appointment being oral, the same was irregular and void; and allege further that the said action of 1888 was brought to perfect the title to the defendants, and same was a fraud upon the rights of the infant plaintiffs, said W. R. Millsaps, the life tenant, being living at the time. The plaintiffs further contend that the original action was one for waste, and the court did not have jurisdiction to try and adjudicate the title in the same. They further contend that his honor erred in allowing the record in the former action to be amended *nunc pro tunc* as to the appointment of Schuler next of friend, making same in proper form. Defendants claim to be innocent purchasers without notice.

Shepherd & Shepherd, for appellants. A. M. Fry, for appellees.

MONTGOMERY, J. This action was brought by the plaintiffs against the defendants to recover possession of a certain tract of land situated in Swain county, and also to have annulled a certain decree and judgment in an action between the plaintiffs and certain of the defendants, made at spring term, 1892, of Swain superior court, on the ground that the decree was procured through fraud on the part of the defendants, and because of its invalidity, appearing on its face. The defendants admit in their answer that they hold the land under and by virtue of the decree above mentioned, but they deny that the same was procured through their fraudulent conduct, and insist that the decree is regular in form, valid and binding in law. In order that a clear understanding may be had of this controversy, it is necessary to set out the particulars of the decree, the main point of contention in the case, and also the nature of the action in which it was rendered.

In 1872 John A. Millsaps died, leaving a last will and testament, in which he devised the land described in the complaint to his brother William Millsaps, the father of the plaintiffs. The language of that part of the will is as follows: "I will and bequeath to William Millsaps, my half brother, all that part of real estate in the following boundary, to-wit, * * * to be and inure to use of said William Millsaps during his natural life, not subject to be sold and conveyed by him, but in case he should have legitimate children, it is to belong to them in like manner as the other devises above named." The devisee William Millsaps sold and conveyed the land in fee simple to certain of the defendants (the other defendants claiming title to parts of it by deeds from original purchasers from William Millsaps), and delivered possession of the same to the purchasers. Afterwards, and before the death of their father, the plaintiffs, all being infants (and five of whom were infants at the com-

mencement of the present action) commenced an action in Swain superior court in October, 1888, for the purpose of having the deeds aforesaid, which had been executed by their father, canceled, and the life estate of their father in the land declared forfeited because of waste which had been committed on the same by those who had purchased from him, and for damages on account of such waste. In the action commenced in 1888 the plaintiffs in their first allegation in the complaint declared that they were infants under the age of 21 years, and that they brought the action in the name of their next friend, Joseph Schuler. The defendants, in their answer, denied that allegation. In the second allegation of the complaint the death of John A. Millsaps was set out, and the item of the will which we have quoted above was declared, and the defendants admitted the same. In the third allegation of the complaint it was alleged that the devisee William Millsaps went into possession of the land, and that was admitted by the defendants in their answer. In the fourth allegation of the complaint it was declared that the plaintiffs were the children of William Millsaps, born in lawful wedlock, and owners in fee of the land. The whole of that allegation was denied by the defendants. The fifth allegation of the complaint was in these words: "That after the said William Millsaps entered into possession and took charge of said land regardless of the rights of the plaintiffs, he made some kind of conveyances to the defendants in this action, purporting to convey to them the land in fee; that the defendants took said conveyances for said land with full knowledge of the rights of the plaintiffs, and for a consideration, and with full notice of the fact that the said William Millsaps had only a life estate in said land." The defendants denied the whole of that allegation, although they afterwards on the trial showed those deeds as evidence of ownership of the land. In the sixth allegation the waste and destruction of timber and soil are alleged, and the same is denied.

We have already said that the judgment demanded in that action was that the deeds and conveyances made by William Millsaps, the father of the plaintiffs, to the defendants, be canceled; that the life estate of William Millsaps be forfeited; and for damages for the waste committed on the premises. The complaint and answer in that action were filed at spring term, 1890, but no progress seems to have been made until fall term, 1891, when an order in the following words was made: "By consent of all parties this case is referred to S. R. Gibson and A. H. Hayes, as arbitrators, with power to choose an umpire in case they cannot agree, to go upon the premises of the land in controversy in the action, and value the land claimed by each of the defendants, and make report of the said values so ascertained by

them to the next term of this court; and also ascertain and report the amount of money which has been heretofore paid to W. R. Millsaps by each of the said defendants, or those under whom they claim, which shall be embraced in said report as a part of their award; and it is ordered upon the coming in of said report or award, if there shall be a balance found due the plaintiffs upon said land over and above what shall have been found by said arbitrators to have been paid to said W. R. Millsaps, a judgment of this court shall be entered for said balance against each of said defendants for such amounts as shall then be ascertained to be due from them, and retained for further orders." That judgment or order was signed by one of the numerous counsel on each side. Under it the arbitrators acted, and made report to the court. In that report they set forth that there had been paid by the several purchasers, defendants and those who claim under them, to W. R. Millsaps and wife, the sum of \$1,194.00; that the land was worth at a fair cash valuation \$1,550, "leaving a balance due the plaintiffs of \$355.40, to be paid by the defendants as follows: "We consider that Franks has paid full value of the land held by those claiming under said Franks. We consider that G. D. Estes should pay \$255, and W. R. Randall should pay \$45.40, and John Long should pay \$55; making a total of \$355.40." At spring term, 1892, that award was made a judgment of the court. In the judgment it was decreed that the deeds for that part of the land bought by Franks be declared valid, passing all the interest of all the heirs at law of W. R. Millsaps in the land described. It was further adjudged that title be made by the clerk of the superior court, as commissioner, to G. D. Estes, John Long, and W. R. Randall, separately, when they shall have paid the amounts found to be due by them into the office of the clerk of the superior court, and that the clerk's deed shall pass all the interest of the said parties and all the interest of all the heirs at law of the said W. R. Millsaps."

Upon the trial of the present action his honor submitted the issues in the following words to the jury: "(1) Are the proceedings and decree in the superior court of Swain county, declaring titles to land now claimed by the plaintiffs to be in the defendants on payment of certain sums of money, and have the terms of said decree been complied with by the defendants, and money paid according to the terms of said decree? (2) Was money so paid taken and received by the plaintiffs in former actions, and who are now plaintiffs in the present action? (3) Was such proceeding regular in form? (4) Were such proceeding and decree instigated and procured by fraud? (5) Were said proceedings and decree within the scope and purpose of the suit, and within the power and jurisdiction of the court? (6) Are said proceedings

and judgment a valid estoppel of record against the plaintiffs, barring the plaintiffs from maintaining the present action against the defendants? (7) Did the defendants or either of them buy for full value and take their titles for land held by them without notice or knowledge of any charge of fraud or claim of invalidity of said decree? (8) Are the plaintiffs owners of the land sued for and described in the complaint? (9) Are the defendants in wrongful possession of said land? (10) What damages are the plaintiffs entitled to recover?" His honor instructed the jury that if they believed the evidence they would answer the first two issues "Yes," the fourth "No," the fifth "Yes," the sixth "Yes," the seventh "Yes," the eighth and ninth "No," and the tenth "Nothing."

The whole record of the action commenced in 1888 was introduced as evidence in the present action, and it appeared that Estes, Long, and Randall paid into the clerk's office the amounts found to be due by them, respectively, by the arbitrators; and that the clerk of the court, as commissioner, made deeds to them according to the judgment and award. There was also undisputed evidence that the clerk disposed of that fund, the total being \$380.95, as follows: To the attorneys of the plaintiffs, \$178.12; and to the guardian of the plaintiffs, \$193.13.

It is not necessary for us to discuss whether or not his honor should have submitted certain of the evidence in this case on the issue of fraud in the matter of the procuring of the order of arbitration and the proceedings under the same. It is enough for us to say that the order or judgment of the court in the action of 1888, referring the case to arbitrators, and the judgment which followed on the report of the arbitrators, were coram non jure, and on that account totally void. The infants in this action were the real parties to the suit, and not Schuler, who appeared as their next friend; and an infant cannot give his consent to a submission of his cause to arbitration, and any attempt to do so for him is absolutely void. *Rudston v. Yates*, March 11, 1141, 1 Rolle, Abr. Arb., A, 268; *Britton v. Williams*, 6 Munf. (Va.) 453; *Tucker v. Dabbs*, 12 Helsk. 18; *Jones v. Payne*, 41 Ga. 23. There can be cases found in which it is held that an attorney can submit his client's cause pendente lite without the consent if his client, but it will be found on examination that the clients are of full age, as in the case of *Morris v. Grier*, 76 N. C. 410. We have found no case in our researches where an infant's cause of action has been submitted to arbitration.

We have said that this order of arbitration and the judgment founded upon it were not voidable, but were void; and it follows, therefore, that all that was done under them, and all titles to any part of the plaintiff's land procured by any person through them, are invalid, and of no force; and his honor was in error in instructing the jury to answer the

third, fifth, sixth, and seventh issues "Yes." And he was also wrong in instructing the jury to answer the eighth and ninth issues "No," and the tenth issue "Nothing."

Such of the plaintiffs' special prayers for instruction as were of like effect with the opinion we have expressed ought to have been granted. It was argued before this court by the counsel of the defendants (appellees) that outside of the award and judgment upon the award the defendants' deeds from W. R. Millsaps were valid, and passed the title to the land to the defendants, because the language of that item of the will of John A. Millsaps, in which the land described in the complaint was devised, constituted William Millsaps tenant in tail, and under our statute (Code, § 1325) estates in tail are converted into fee-simple estates. We can see no likeness between the estate created in William Millsaps by the will of his brother to that of an estate in tail under the statute *de donis*. In estates tail the tenements were given to a man and the heirs of his body, for instance, and not to a man for his natural life, and then to the heirs of his body or to his children. And the incidents of an estate in tail were that the tenant in tail could commit waste without being called to account for the same; that the wife of the tenant in tail could have her dower in the estate tail; that the husband of the female tenant in tail might be tenant by the curtesy of the estate tail. In our case the language of the will is that the property is to be and inure to the use of the said William Millsaps during his natural life, not subject to be sold and conveyed by him. His estate under the will is but a life estate, and has none of the incidents of an estate in tail.

Error.

(124 N. C. 671)

STATE v. DANIELS.

(Supreme Court of North Carolina. March 22, 1904.)

MURDER—PREMEDITATION—PEREMPTORY INSTRUCTION.

1. Under Acts 1893, p. 76, c. 85, § 3, declaring that the jury must fix the degree of murder, and the statute providing that murder in the first degree may be committed by poisoning, lying in wait, etc., in the perpetration or attempt to perpetrate a felony, or by willful premeditation and deliberation, it is error for the court to instruct that certain facts show premeditation, as a matter of law.

2. The fact that pending a trial for murder, while the jury were on the street, in charge of an officer, the father of deceased bowed to one of the jurors and shook hands with him, where no conversation was had between the parties, though improper and calculated to shake confidence in the integrity of the verdict, was no ground for reversal.

Clark, C. J., dissenting.

Appeal from Superior Court, Duplin County; Geo. H. Brown, Judge.

George W. Daniels was convicted of murder, and appeals. Reversed.

The defendant moved for a new trial upon the ground, among others, of misconduct of the jury. The court heard the testimony, and found the facts as follows: "During the progress of the trial, and before the charge of the court, the jury, in a body, by the officer in charge, were carried to Dr. Jones' office for medical treatment to one juror. While there, some person walked up and spoke to two of the jurors, and shook hands with them, and talked a minute or more; and the jury walked away in one direction, and he walked the other. The court is unable to ascertain who the person was, and to whom he spoke. The court finds, upon the testimony of the officers and two jurors, that W. H. Maxwell, father of deceased, was passing by the jury on the street, bowed to the juror Hollingsworth, and extended his hand, and the juror shook it, but no word was passed. The court finds that on another day, before the charge was delivered, said Maxwell passed the jury near a stable, where they had gone for a private purpose, and shook hands with Juror Miller as he passed, but no word was spoken." The court declined to grant the motion.

Stevens, Beasley & Weeks, for appellant. Carlton & Williams and the Attorney General, for the State.

OONNOR, J. The prisoner was charged with the murder of one Maxwell, and from a conviction of murder in the first degree, and the judgment thereon, appealed. The prisoner's counsel requested several prayers for special instructions, all of which were refused. In the view we take of the case, it is unnecessary to pass upon the exceptions to his honor's refusal to give them. There was, besides the prisoner, but one eyewitness to the homicide. Rufus Stroud, introduced by the state, testified that he saw Maxwell alive last in the woods, dipping turpentine. George Daniels shot him. He saw the prisoner standing in the path; the deceased standing by the side of a pine. The prisoner asked the deceased why he went to his house last night, and the deceased said he did not go. The prisoner said: "You are a damned liar. You did. I am going to kill you. Throw up your right hand." The prisoner then shot him. He was in about 10 or 11 steps from the deceased. Shot once. When he shot, the witness ran off. The deceased ran to him and said, "I am shot." He died in a short time. The deceased was about three feet from the prisoner when shot, and had a turpentine dipper in his hand. There was evidence on the part of physicians that the deceased died from wounds inflicted by the prisoner. The prisoner testified in his own behalf that he was at his tobacco barn the night before the homicide. That he left there that morning about sunup. Susan Whaley and Hannah and their children stayed with him from midnight till he left. All

started to the prisoner's house. He told Susan to prepare breakfast. The night before he had taken his gun to the tobacco barn, and as he passed by the barn, going down the path, he stopped and shot the gun. Went down the path towards the Pink Hill Road, calling the women. Had started to George Turner's, where they said they were going. Was going along the path, about 50 yards from the fence. Saw the deceased. He was about 40 yards in the woods from the road. Was standing on one knee on the ground, and one hand on a log. Did not know he was in the woods at this point. Was calling Susan and Hannah as loud as he could. Some one said, "What is the matter?" Looked in the direction of the voice, and the deceased arose and said, "What do you want?" He said, "I want my people." The deceased said, "You shan't have them. I will protect them." The deceased was coming towards the prisoner with a dipping iron in his hand—a piece of flat iron, 12 inches long, and nearly 1 inch thick to a point, and handle 5 feet long. The deceased said that the prisoner had been talking about him. He was very mad. The prisoner said, "Will, if you don't quit coming on me, I will shoot you." He said, "Shoot, shoot." Was then about 10 or 15 steps off, and had about stopped when the prisoner shot. Had the dipper in one hand, up against the tree, and with his hands spread out against two trees. He was not in striking distance, making no effort to strike the prisoner with the dipper. Had no previous difficulty with the deceased. The prisoner was looking "for his folks." Snapped the gun at him before it fired. The prisoner had not seen the deceased before on that morning. Did not know where he was. Did not know whether the women were in the woods. The prisoner and the deceased were perfectly friendly, had not had any difficulty, and was not mad with him. When he shot, was "scared" of him. He weighed about 140 pounds. "I shot him because I was scared of him, with the dipper, coming towards me. Was on good terms with him. Never went there to shoot him. Did not expect to see him." The prisoner ran off, and went to Jim Maxwell's, and told him he had shot Will Maxwell, and he asked him why, and he told him "that Maxwell was coming with a turpentine dipper at me." Told several others. Went to Stroud and surrendered. "Told him to take me in charge." There was much testimony in regard to the prisoner's mind before and after the homicide. Several witnesses described his conduct, and expressed the opinion that he was crazy, some of the witnesses saying that "he was insane." Dr. Smith, who heard the testimony, gave it as his opinion that "he was not insane." Dr. Kennedy testified that he had known the prisoner four years, and had heard the testimony. "From the evidence of the witnesses, and my previous knowledge

of him, I would not say he was bright. I think he was crazy, from the way he did and the way he acted."

The prisoner excepted specially to portions of the charge. The only exception which we deem it necessary to discuss is to the following instruction: The court stated to the jury that "only two persons have testified that they were eyewitnesses to the homicide. The one is the prisoner, and the other is Rufus Stroud." The court then read the evidence of Rufus Stroud, and charged the jury that, "if you find those facts to be true beyond a reasonable doubt, the prisoner is guilty of murder in the first degree, because they show premeditation and deliberation upon the part of the prisoner." There was evidence proper to be submitted to the jury to show premeditation, and, if believed by them, to justify the verdict of murder in the first degree. Hence there was no error in the refusal of his honor to instruct the jury as prayed by the prisoner in that respect. The sole question, therefore, to be considered, is whether his honor was correct in saying to the jury that, if they found the facts to be as testified by Stroud, "the prisoner is guilty of murder in the first degree, because they show premeditation and deliberation."

Whether an act is the result of premeditation and deliberation is a fact to be found by the jury, and not a conclusion of law to be drawn by the court. In *State v. McDonald*, 133 N. C. 680, 45 S. E. 582, Mr. Justice Walker, writing for the court, said: "When an act becomes criminal only by reason of the intent, unless the intent is proved, the offense is not proved, and this intent must be found by the jury as a fact from the evidence. It is for them to infer, and not for the court." The authorities cited in the opinion fully sustain and illustrate the principle. It may be that, as an inference to be drawn by the jury, we should not hesitate to say that they came to a correct conclusion. In the light of the charge, they were not permitted to draw an inference, but, upon finding the account of the homicide to be true, as testified by Stroud, it became their duty, and they were required, as a conclusion of law, to find the prisoner guilty of murder in the first degree. Assuming that the jury followed his honor's instruction, and "took the law from the court," as it was their duty to do, they did not consider, pass upon, or decide the question of fact, the existence of which is an essential element in the crime charged. They did not and could not inquire whether the act was premeditated. The case as presented may be likened unto a special verdict in which the question is submitted to the court, as one of law, whether, upon the facts found, there was premeditation. The statute (Acts 1893, p. 76, c. 85, § 3) declares that the jury must fix the degree of murder. To do this, they must find the fact that the murder was committed either by means of poisoning, lying in wait, im-

prisonment, starving, torture, or by willful, deliberate, and premeditated killing, or in the perpetration or attempt to perpetrate certain enumerated crimes or other felony. The judge should instruct the jury what constitutes lying in wait or premeditation, but he may not go further, and instruct them, as a conclusion of law, that certain facts show premeditation. Mr. Justice Douglas, writing for the court in *State v. Booker*, 128 N. C. 713, 31 S. E. 376, said: "When the circumstances of the killing do not bring it within the classes which by the statute are made per se murder in the first degree, the state must prove deliberation and premeditation, but this may be done by circumstances, and not necessarily by express and positive evidence." It will be observed that the statute classifies murder in the first degree: (1) By poisoning, lying in wait, etc. Herein the state is not required to prove premeditation, because the manner of doing the act necessarily involves premeditation. The presumption is made, by the statute, irrebuttable. When committed in either of the methods mentioned, it is per se murder in the first degree. A person who lays poison for or waylays or tortures another unto death will not be heard to say that he did not premeditate. *State v. Gilchrist*, 113 N. C. 673, 18 S. E. 319. (2) In the perpetration or attempt to perpetrate a felony. Herein it is not necessary to show premeditation. The killing under these conditions, although without premeditation, is declared to be murder in the first degree. *State v. Covington*, 117 N. C. 834, 23 S. E. 337. (3) By willful premeditation and deliberation. The line which separates felonious homicides committed otherwise than as defined in the foregoing classes, without premeditation, from those accompanied by the additional mental condition called "premeditation," is shadowy and difficult to fix. The law cannot safely prescribe any uniform and universal rule in regard thereto. As in questions of negligence and the like, it can only define the term, and submit the question of its existence to the jury. It is well settled that the state of mind, intent, sanity, etc., is always a question of fact for the jury. The principle is well stated by the present Chief Justice in *Freeman's Case*, 122 N. C. 1012, 29 S. E. 94: "The degree of murder depends upon the facts as the jury find them to be, applying the law laid down by the court upon that state of facts. * * * As the jury is to determine the degree of murder, it is for the jury, not the court, to find from the evidence whether there was the premeditation which would raise the killing from murder in the second degree (presumed from the killing with a deadly weapon) to murder in the second degree." This case comes clearly within the third class. There was no lying in wait. "Whenever the degree of the offense depends upon the particular intent with which an

act is done, the intent to be inferred from the circumstances is for the jury, and every fact which will throw light upon that question may be given in evidence." *Filkins v. People*, 69 N. Y. 101, 25 Am. Rep. 143. *Danforth, J.*, in *McKenna v. People*, 81 N. Y. 360, says: "Whether this intent existed could not be a question of law. It was necessarily to be determined by the jury from all the facts and circumstances of the case, and, if not found, the prisoner could not be convicted. * * * The charge as given may well have been understood by the jury as involving an opinion of the court upon this as well as other elements of the crime. * * * Instead of informing the jury what must be established to make out the offense, and leaving it to them to determine whether it had or had not been done, the judge says, 'Enough has been proved, if you believe the witnesses on the part of the people.' Their attention is directed to evidence of inculpation, merely. Its weight is stated to them as sufficient in law to sustain a conviction for the grave offense, so that the question of fact to which their minds have been turned relates to the credibility of certain witnesses, and not the weight or measure of their testimony, or the existence of the intent. How far that testimony was modified or neutralized by that produced by the prisoner, or what inferences should be drawn from any of it, is virtually excluded from their inquiry."

While his honor correctly instructed the jury in regard to the suggestion of insanity or intoxication as relieving the prisoner from responsibility, it may be that, if the jury found that the homicide was committed in the manner and under the circumstances testified by Stroud, they would, if permitted to consider the entire evidence, have found in the testimony regarding the prisoner's peculiar behavior before and after the killing sufficient evidence to create a reasonable doubt as to the question of premeditation. They may, in this view, have reached the conclusion that, while the evidence in his behalf did not rebut the presumption of malice raised by the law from the use of a deadly weapon, it did create a reasonable doubt whether the prisoner was capable of premeditating and deliberating. However this may be, they were entitled and it was their duty to consider all of the evidence, and find all of the essential facts, before arriving at their verdict. The prisoner, however guilty, is entitled to be tried by "the ancient mode of trial by jury," in which the court decides all questions of law, and the jury all questions of fact. "The jury are the constitutional judges not only of the truth of testimony, but of the conclusions of fact resulting therefrom." *Henderson, J.*, in *Bank v. Pugh*, 8 N. C. 198. For the error in the instruction, there must be a new trial.

We concur with his honor's ruling upon

the motion to set aside the verdict for improper conduct on the part of the father of the deceased and of some of the jurors. We are quite sure that his honor felt, as we do, that such conduct was exceedingly improper, and calculated to shake confidence in the integrity of the verdict, so far, at least, as one of the jurors was concerned. The absolute, unquestioned, and unquestionable integrity of jurors in basing their verdicts upon the law and the evidence is of such vast and vital importance to suitors and people that any conduct which casts upon it the slightest suspicion merits severe condemnation from the courts. While the ancient custom of keeping the jury in close confinement, "without meat or drink," has been abandoned, we should be careful to see to it that while impaneled, and, in a way, set apart from the public, to true deliverance make between the state and the prisoner, the strictest vigilance be had to protect them from suggestions or approach by interested persons. The conduct of the father of the deceased was calculated to arouse suspicion that he desired to exert some influence over some of the jurors. The judge cannot, in the discharge of his duties, keep a jury at all times in his presence, and is directed to place them in charge of a sworn officer. It is the duty of the officer to promptly report to the judge any improper conduct on the part of jurors or other persons in this respect. Judges are often embarrassed to find, after long and expensive trials, verdicts in capital cases brought into question by improper conduct of the jury, often the result of thoughtlessness too frequently not so easily explained. While we approve the course pursued by his honor, we feel, in view of the frequency with which these questions are brought to our attention upon appeals, that it would be well to enforce the law by punishment for contempt, for questionable conduct by or towards jurors while engaged in the trial of capital felonies.

New trial.

OLARK, C. J. (dissenting). The entire evidence, except that of the prisoner himself, is that of Stroud, who testified that he "saw the prisoner standing in the path; the deceased standing by the side of a pine. The prisoner asked the deceased why he went to his house last night, and the deceased said he did not go. The prisoner said, 'You are a damned liar. You did. I am going to kill you. Throw up your right hand.' The prisoner then shot him. He was in about ten or eleven steps from the deceased. Shot once. When he shot, the witness ran off. The deceased ran to him and said, 'I am shot.' He died in a short time." The court read the above testimony to the jury, and told them, "If you find those facts to be true, beyond a reasonable doubt, the prisoner is guilty of murder in the first degree, because they show premeditation and deliberation

upon the part of the prisoner." In this there could be no error, for if, under those circumstances, the prisoner said: "I am going to kill you. Throw up your right hand"—and then shot and killed, there was premeditation and deliberation. There was the declaration of the intention to kill, the ordering the deceased to throw up his hands, and then the aiming, firing, and killing. That the deliberate purpose is formed, for however brief a period before the killing, is sufficient, under all our authorities. *State v. Dowden*, 118 N. C. 1145, 24 S. E. 722; *State v. Foster*, 130 N. C. 606, 41 S. E. 284, 89 Am. St. Rep. 876; and many others. Here, if the evidence is believed, the purpose was not only formed, but announced, by the prisoner. When premeditation is an inference to be drawn from other facts, it is for the jury. But when the jury find that the prisoner announced his intention to shoot, and ordered the deceased to hold up his hands, and that then, without provocation, the prisoner did fire and kill, there is no inference to be drawn. The jury find the fact of premeditation when they find that the prisoner announced his intention, already formed, to kill, and then, without provocation, did kill. Authorities can be cited, but no ruling of any court could add force to this simple statement of the facts which the jury found to be true.

(124 N. C. 439)

NEWTON et al. v. BROWN et al.

(Supreme Court of North Carolina. March 22, 1904.)

TRESPASS ON REALTY—INJUNCTION PENDENTE LITE.

1. Where plaintiffs, suing to restrain defendants from cutting timber on certain lands, showed possession under color of title for 30 years, defendants, claiming merely under an entry on the lands as vacant, entitling them to a grant from the state, were not entitled to an injunction pendente lite restraining plaintiffs from cutting timber.

Appeal from Superior Court, Pender County; Brown, Judge.

Action by H. B. Newton and others against H. A. Brown and others. From an order granting an injunction restraining plaintiffs from trespassing on the land in controversy pending suit, they appeal. Reversed.

Routree & Carr, J. D. Bellamy, and R. G. Grady, for appellants. Iredell Meares and Frank D. Winston, for appellees.

CONNOR, J. The plaintiff H. B. Newton alleges that he is the owner of a tract of land in Pender county containing more than 8,000 acres; that the plaintiff W. L. Parsley is the owner of all the timber, 12 inches and upwards in diameter, standing upon said land; that they and those under whom they claim have been for more than 21 years, and are now, in the open, notorious, adverse, and exclusive possession of said land, under

known and visible boundaries; that the defendants have entered upon said lands "without any color of title, and unlawfully, willfully, wantonly, and maliciously cut around or belted several hundred cypress trees, and left them in such a condition that they will die," etc.; and that they threaten to continue and are continuing to cut, injure, and destroy the timber standing on said land, and to commit other trespasses thereupon, etc. They ask that the defendants be enjoined from continuing further trespasses, etc., for damages, and other relief. The defendants deny the material allegations of the complaint, and, for a further defense, aver that the land claimed by plaintiff, or the portion thereof in controversy, was prior to January 1, 1903, vacant land, and title thereto was in the state; that on January 6, 1903, and on other dates named in the answer, certain entries were made, which are fully set out in the answer; one of said entries being by J. W. Rowe afterwards transferred to H. A. Brown, Jr.; another entry being made by H. A. Brown, Jr.; and the third by defendant A. W. Taylor. They allege that, in respect to the first entry, the defendant H. A. Brown has perfected the same, and is entitled to a grant therefor, and, having paid the money to the Secretary of State for said grant, is the equitable owner of the land described in said entry; with respect to the second entry, he has acquired an equitable interest therein. The same allegation is made in respect to the entry of A. W. Taylor. The defendants further say that, in respect to the last two entries named, the plaintiffs H. B. Newton and W. L. Parsley filed a protest, all of which is fully set forth in the record. They deny that the plaintiffs are the owners of the land, because the same was public land prior to said entries. They allege that the plaintiffs are cutting timber and otherwise injuring the land to their damage. They further allege that the plaintiffs claim title to the land under a deed from L. A. Hart and E. D. Hall to Jacob Roberts and C. L. Woodworth, dated 30th November, 1870, and by intermediate deeds to plaintiffs. Defendants allege that the plaintiffs have had no possession under such general description, and that their possession is limited, if they have had any possession thereto, under certain deeds from one Willey and others to said Hall, bearing date of December 12, 1850, and that said deed only conveys portions of said land; that the said Hart and others undertook to convey by the description set out in the complaint, and, in doing so, included some 9,000 acres of land, although by the conveyances to them they only acquired about 2,000 acres of that land, which has never been reduced to actual possession by the plaintiffs. In accordance with the prayer in the complaint, the judge on the 12th day of October, 1903, made an order enjoining and restraining the defendants from cutting timber or otherwise trespassing upon the

said lands. This order was made upon the complaint and certain deeds and affidavits introduced in evidence. From this order no appeal was taken. On the 9th day of November, 1903, his honor Judge Brown issued notice to the plaintiffs to show cause why they should not be enjoined from committing trespass on the land, and, upon the return of the notice, and on reading the affidavits introduced by the plaintiffs and defendants, he made an order on December 21, 1903, continuing said injunction against the plaintiffs until the hearing of said order. His honor recites as follows: "The defendants have already been enjoined from cutting or removing timber from said lands at instance of plaintiffs in this action. The cause was submitted on written brief, affidavits, and plats. Having considered the same, I am of opinion that the plaintiffs should be restrained pending this action. It is true that a considerable part of the land is claimed by defendants under entries. I am of opinion that they have acquired thereby, and by payment of the money to the state, such an equitable interest in the lands in controversy as should induce a court of equity to prevent the lands being denuded until the title is settled, and this may be done independent of the act of 1901, p. 900, c. 666. The spirit and purpose of that act covers, I think, this case also. Let the defendants give bond in the sum of \$1,000, with usual conditions, to indemnify plaintiffs, to be approved by the clerk of Pender county superior court, and then let the injunction be continued until the final hearing." From this order the plaintiffs appealed.

The order made by his honor continuing the injunction against the defendants is based upon the finding that the plaintiffs have made out a prima facie title to the land in controversy. We think his honor is fully sustained by the deeds, affidavits, and other exhibits filed before him. The only question presented by the appeal from the order restraining the plaintiffs from proceeding is whether the defendants have made out such a prima facie case as entitles them to the order made by his honor. Without discussing the conflicting affidavits in regard to the boundaries of the several tracts of land in controversy, we think there is sufficient evidence, if believed, to show that the plaintiffs and those under whom they claim have been in possession of the land in controversy since 1870. If that be true, the state had thereby become divested of its title by such possession, and the land was not subject to entry. While it is true that an entry made in accordance with the statute confers upon the party making it an equity to call for a grant upon paying the amount prescribed by the statute and otherwise conforming with the law, we do not think that he has such an interest in the land as of itself entitles him to interfere with the possession and use

of the land by those who show a possession for 30 years. The entry is not based upon any declaration by the state or its officers that the land is vacant. It is, on the contrary, the simple statement by the person making the entry that such land is vacant. He pays no money, and assumes no obligation by making the entry. He acquires nothing more than an option to complete his entry and call for a grant. At the time that this action was brought and the pleadings filed, no grants were issued for either of the tracts of land in controversy. On the 18th day of November, 1903, a grant was issued by the state for the tract of land entered on the 6th of January, 1903, containing 500 acres. In *State v. Bevers*, 86 N. C. 588, Ruffin, C. J., says: "It is notorious that grants are always issued at the instance of the grantee, and upon his suggestion that the land is vacant. The state does not warrant it to be so, or the liability of the land to entry. Nor is it any fraud in the state to grant land that is not so liable." We cannot think that one who simply declares that a body of land is vacant, and thereupon proceeds to lay an entry, acquires such an interest as entitles him to interfere by injunction with the possession of one who is found to be in possession. If he shall follow his entry by taking out a grant and paying his money, he has an adequate remedy to sue the person in possession upon his grant.

It will be observed that his honor does not base his order upon a finding of facts required by chapter 666, p. 900, of the Laws of 1901, but says expressly that independent of the statute the defendant is entitled to the injunction. It will be well to consider the case as if the defendants had brought the action, asking the court to restrain the plaintiffs from cutting the timber from the land until they could perfect the entries by obtaining grants from the state, and prosecuting their action for the recovery of the land. Their asserted right to affirmative relief is brought forward in the nature of a cross-bill or, in the language of the Code, a counterclaim. Their right to do so is recognized in *Lumber Co. v. Wallace*, 93 N. C. 22. When the defendant relies upon a counterclaim and demands affirmative relief, he becomes in that respect an actor, and takes upon himself the burden of proof, as if he were the plaintiff. Viewed from this standpoint, in the light of all the testimony, the plaintiffs are in the possession of certain lands, the boundaries of which are uncertain and in controversy; the defendants alleging that they are cutting timber beyond the boundaries covered by their deeds on lands belonging to the state; that they have made entries upon a portion of the lands, and thereby acquired an equity to call upon the state for grants by complying with the statute. The plaintiffs set up deeds which they claim cover the lands in controversy, and assert possession since 1870. We do not

think that the defendants would, in this view, be entitled to an injunction to restrain Newton and Parsley from cutting the timber. It is settled by the uniform decisions of this court that an entry of lands creates an "inchoate equity" in them, which entitles the enterer, upon payment of the amount fixed by the statute, to a grant. No case is cited in the defendants' well-prepared brief in which an action for any purpose has been sustained before the issuance of the grant. This court has expressly held in *Hall v. Hollifield*, 76 N. C. 476, that "the public lands of the state are open to entry by any of its citizens, and the first declaration of intention is made on the books of the entry taker in the county where the land lies, and this gives priority, called a 'pre-emption right.' No estate or interest in the land is thereby acquired. No consideration is paid, and none of the requisites for that purpose are performed, but simply the right to be preferred when the money is paid, and the other formalities required by the statute are complied with." That the court will by injunction protect the owner of an equitable estate from waste cannot be questioned. Whether one having an inchoate equity, or a bare right to call for a grant from the state, will be permitted to enjoin the person in possession from using the land for the purpose for which it is fit, is an entirely different question. We find no case in this state in which the court recognized the right of an enterer to maintain an action for any purpose. *Brem v. Houck*, 101 N. C. 627, 8 S. E. 365, is an express authority that he cannot have injunctive relief against the issuing of a grant to another person. Courts of equity prior to 1855 were very slow to interfere by injunction with the use and enjoyment of land by those in possession, and declined to do so unless the plaintiff had established, or was seeking in the law courts to establish, his legal title. It was necessary to allege and show that irreparable injury was threatened. Usually it was necessary to show insolvency. *Lyerly v. Wheeler*, 45 N. C. 267, 59 Am. Dec. 596; *Thompson v. Williams*, 54 N. C. 176; *Bogey v. Shute*, 54 N. C. 180; *Id.*, 57 N. C. 174; *Thompson v. McNair*, 62 N. C. 121. At the session of 1835 (page 664, c. 401) an act was passed declaring that "it shall not be necessary to allege the insolvency of the defendant," etc. The language of *Merrimon, J.*, in *Lumber Co. v. Wallace*, *supra*, is peculiarly appropriate to this case: "While we are of the opinion that the defendants are entitled to relief, we think that the plaintiffs ought not to be restrained from cutting, using, or selling timber until the action shall be heard upon its merits. No special or peculiar cause is alleged why the timber may not be cut and sold. This is not a case wherein a party aggrieved alleged irreparable injury. We can see no adequate reason why the defendants, if they succeed in this action, may not be fully compensated in damages, if adequate

means shall be afforded them for ascertaining the reasonable value of the timber. This may be done. It is against the policy of the law to restrain industries and such enterprises as tend to develop the country and its resources. It ought not to be done, unless in extreme cases, and this is not one." *Lewis v. Lumber Co.*, 99 N. C. 11, 5 S. E. 19, in which it is said: "It appears that the defendant is cutting and carrying away from the land ordinary forest timber, suited to the purpose of marketing lumber for the markets. Obviously the plaintiffs may be compensated in damages for this timber."

To the suggestion that the land covered by the defendants' entries is included in the Wheaton grant of 1795, and that the deed of the sheriff to the state under a tax sale vests the title in the board of education, and is therefore not subject of entry, it is sufficient to say that it is not necessary that we should express any opinion. It is worthy of consideration, at the proper time, whether lands thus granted by the state, and purchased for delinquent taxes, come within the terms "vacant and unappropriated lands belonging to the state." *Ruffin, J.*, in *State v. Bevers*, *supra*, says that they were subject to entry, but that by the act of 1872 (page 70, c. 40, § 30) they were ceded to the board of education. The affidavits tend to show that the lands in controversy are covered by the Wheaton grant.

Upon the whole record, we think that his honor should not have restrained the plaintiffs. Because the court will enjoin, at the instance of one in possession, a continuing and highly injurious trespass by one having an "inchoate equity" not based upon anything more than his "laying an entry," it does not follow that it will at his instance interfere with the use and possession of one who has made out a prima facie case of a possession under color of title for more than 30 years. If the defendants are so advised, they may move the court to require the plaintiffs to file a bond to indemnify them against loss by cutting the timber if they shall finally make good their intention. It will be within the sound discretion of the judge to make such orders in that respect as he may deem to be proper. The injunction order, appealed from should be vacated. Let this opinion be certified to the superior court of Pender county. Error.

(134 N. C. 447)

PORTER v. ARMSTRONG et al.

(Supreme Court of North Carolina. March 22, 1904.)

DRAINAGE — PROCEEDING FOR DITCH — JURY TRIAL — QUESTIONS FOR COMMISSIONERS — ESTOPPEL — PLEADING — APPEALABLE ORDER.

1. Summary statutory proceedings are not within Const. art. 1, § 19, declaring that in all controversies at law respecting property trial by jury ought to remain inviolable.

2. Questions as to necessity of a drainage ditch are for commissioners when appointed under Code, § 1297.

3. An estoppel should be pleaded with such certainty that it may be seen from the pleadings what facts are relied on. If a contract is relied on, its terms should be fully set forth, and if it is a judgment the suit in which it was rendered should be shown.

4. An order in a proceeding under Code, § 1297, for a drainage ditch, which directs matters which are properly for the determination of the commissioners to be referred to a jury, is within Code, § 548, authorizing an appeal from an order or determination of a superior court judge involving a matter of law which affects a substantial right.

Douglas, J., dissenting.

Appeal from Superior Court, Pender County; Ferguson, Judge.

Proceeding by Elisha Porter against T. J. Armstrong and others. From an order plaintiff appeals. Reversed.

The plaintiff instituted this proceeding against the defendants by filing his petition in the office of the clerk of the superior court and issuing a summons in accordance with the provisions of chapter 30, § 1297, of the Code, alleging ownership of a tract of "swamp, flat, or low land" particularly described, known as the "Pigford Farm"; that the defendants were the owners of said land adjoining and "below the said Pigford farm"; that a portion of his land was ditched, cleared, and under cultivation, and was subject to inundation and sog. It could not be drained except by clearing or cutting out a canal known as the "Strawberry Canal," etc., which was cut through the defendants' land, etc., and constitutes the only natural outlet to the waters of Pigford farm. The plaintiff prayed that commissioners be appointed pursuant to chapter 30 of the Code. The defendants Armstrong and Mrs. Durham's answer, admitting the ownership of the land by the plaintiff and defendants, denies that the plaintiff's land is "swamp, flat, and low land." They deny that the plaintiff's land is subject to inundation, and that it cannot be conveniently drained except in the manner pointed out by the petitioner. They also deny certain averments in regard to the use of the canal. They aver that the canal is not cut through their land; that it stops some distance before it reaches the plaintiff's land. They allege that the plaintiff has diverted his water, and has violated certain contracts, and they say that the plaintiff "has been harassing these defendants with suit after suit in court, and the said suits have been appealed to the Supreme Court of North Carolina and it has been decided more than once that the petitioner has no right to drain into the Strawberry Canal; and these defendants plead the same as an estoppel against the petitioner having any relief herein." They further say that the petition is not filed in good faith, and for the bona fide purposes as alleged in said petition, but for the purpose of obtaining for the petitioner the

right to drain the Strawberry Canal—water which the plaintiff has diverted from its natural course, and thereby injured the defendants—and that the petition is filed for no other purpose than to harass and annoy the defendants, etc.; that the plaintiff has other means of draining his land than through the defendants' land. When the cause came on for hearing upon the petition and answer the defendants made a motion that the cause be sent to the superior court, and placed upon the trial docket, to try the issues of fact raised by the answer. They also insisted that a plea in bar had been set up in the answer, which was to be passed upon before any commissioners could be appointed. The clerk allowed the motion, and transferred the cause to the civil issue docket of the court, and the plaintiff excepted, and appealed to the judge. At January term, 1904, of the superior court, the judge presiding affirmed the judgment of the clerk, denied the plaintiff's motion that commissioners be appointed, and ordered certain issues to be submitted to the jury. The plaintiff excepted and appealed.

John D. Bellamy, Stevens, Beasley & Weeks, and Shepherd & Shepherd, for appellant. E. K. Bryan and J. T. Bland, for appellees.

CONNOR, J. It is a source of regret and surprise that the procedure prescribed by the drainage laws (the first of which was enacted at the session of the General Assembly of 1795, c. 436) should continue to be in doubt and uncertainty, resulting in delay and expense. The difficulty has doubtless arisen from the changes wrought in our judicial system and mode of procedure. The substantial features of the law have been retained in the several Codes of the statute law of the state. Chapter 40 of the Revised Statutes was brought forward in the Revised Code. No change in the procedure was made until 1868. The original statute required the petition to be filed in the county court, and provided for the appointment of 12 jurors, who were required to make their report to the county court, "which shall be recorded in said court." The construction of the act in regard to the power and duty of the court and the right of the party dissatisfied to appeal, came before this court in *Collins' Heirs v. Haughton's Heirs*, 28 N. C. 420. The court, adopting the principle announced in *Railroad v. Jones*, 23 N. C. 24, regarding the construction of statutes providing for the condemnation of land for railroads, said that the county court could "only direct the verdict to be recorded or order a new jury, and from its action no appeal could be taken." Nash, J., said: "The jury, thus constituted, is the special tribunal to whom, by the act, the power exclusively belongs to say whether the land does need to be drained, and, if so, what ditches shall be dug, and the amount of the damage to be paid to the owners of the land

through which they may pass." The court held in *Railroad v. Jones*, supra, that the general law in regard to appeals had no application. It was, however, in that case, said: "In denying the parties the right of appeal in cases of this kind, we do not deny them the privilege of having their cases heard before a superior tribunal. Any error which may be committed by the county court in its action may be revised and corrected in the superior court through the instrumentality of a writ of error, or a certiorari in the nature of a writ of error." The practice, under the provisions of the act permitting the condemnation of land for the site of a public mill (Code, c. 43, Acts 1777, c. 122), was considered by the court in *Brooks v. Morgan*, 27 N. C. 481. It was held that the general provisions for appeals did not apply to "summary and peculiar proceedings not according to the course of the common law, but prescribed by statute under peculiar circumstances." The language of Gaston, J., in *Railroad v. Jones*, supra, is: "The mode of procedure was intended to be cheap and expeditious, all which purposes would be frustrated by allowing either party the unlimited right of appeal."

This construction of the drainage act was uniformly followed by this court prior to the change in our judicial system in 1868. Upon the filing of the petition the county court appointed the jury. They went upon the land, decided upon personal inspection the necessity of the ditch, located it, and assessed the damage to be paid by the petitioner. They made their report, and after the adoption of the amendment made by the Revised Code, c. 140, the court "confirmed the report, unless good cause be shown to the contrary." *Stanly v. Watson*, 33 N. C. 124. In *Skinner v. Nixon*, 52 N. C. 342, Pearson, C. J., examines the provisions of the act, and discusses them at length, saying that the action of the county court was subject to be reviewed in the superior and supreme courts, "not by way of unlimited appeal, which would vacate as well the report of the commissioners as the judgment of the county court, and make it necessary for the superior court to proceed de novo, but by way of writ of certiorari in the nature of a writ of error, which would be, in effect, a limited appeal—in other words, an appeal restricted to the questions which the county court was authorized to pass upon—leaving the report of the commissioners open to be confirmed or set aside, according to the decision reviewing the action of the county court." In *Shaw v. Burfoot*, 53 N. C. 344, the petition was dismissed because it did not conform to the provisions of the statute. In *Brooks v. Tucker*, 61 N. C. 309, the report was set aside because it failed to conform to the statute. These cases were reviewed for error apparent on the record. They were brought up to the appellate court by a limited appeal as pointed out by Pearson, C. J., in *Skinner v. Nixon*, supra. *Norfleet v.*

Cromwell, 70 N. C. 634, 16 Am. Rep. 787, was a "civil action upon a covenant," and not under the drainage law. The able and interesting discussion of Mr. Justice Rodman is upon the rights of the parties in regard to the easement. In *Gamble v. McGrady*, 75 N. C. 509, the proceeding was brought under the provisions of chapter 39, Battle's Revisal, being chapter 137, p. 179, Laws 1869-70. Rodman, J., noted that chapter 40 of the Revised Code had been omitted from the revisal, and the act of 1869-70 substituted therefor. This, however, did not operate to repeal chapter 40 of the Revised Code. This chapter, with all its amendments and other drainage laws, is re-enacted in chapter 30 of the Code of 1883. The petition, with the same averments required by the act of 1795, must now be filed in the "superior court"—that is, before the clerk—and a summons issued and served. Upon the hearing of the petition the court shall appoint commissioners. Sections 1298 and 1299 prescribe the duties and method of the procedure of the commissioners. Section 1324 enacts that "the proceeding is made the same as prescribed in other special proceedings." This court undertook to harmonize the several statutes relating to the practice in these cases in *Durden v. Simmons*, 84 N. C. 555. While it was there held that the answer did not raise any issue as to title, it is said that, if it had done so, such issue should be tried before proceeding to the appointment of commissioners. The reason is obvious, as pointed out by Smith, C. J. It would seem that if, in cases of this kind, the answer raised an issue of fact, the decision of which in favor of the plaintiff was essential to the further prosecution of the petition, the clerk would stay proceedings until such issue was decided in accordance with the practice in other special proceedings. If questions of law are presented and decided by the clerk before the appointment of the commissioners, an appeal directed to the judge may be taken, and his decision will be certified to the clerk, who will proceed in the cause as directed. This course harmonizes the language of the statutes with the construction put upon section 1892 of the Code regarding petitions for partition. This practice should be strictly confined to defenses which lie at the threshold of the cause and pleas in bar. In respect to questions the decision of which are committed to the "special tribunal" provided by the statute, the clerk should proceed to appoint commissioners. When the report of the commissioners comes in, exceptions to it may be filed, and heard by the clerk. An appeal may be taken from his judgment, and his rulings reviewed, as was said by Pearson, C. J., in *Skinner v. Nixon*, supra, being an appeal restricted to questions which the (clerk) county court was authorized to pass upon, leaving the report of the commissioners open to be confirmed or set aside according to the decision reviewing the ac-

tion of the court (clerk). In this way, while the rights of the parties to have the action of the clerk reviewed are secured, useless and expensive delays are avoided, and effect is given to section 1324 of the Code. We do not find in chapter 30 the language contained in section 1946, construed in *Railroad v. Newton*, 133 N. C. 136, 45 S. E. 549, prescribing the procedure in petitions for condemning rights of way for railroads. It is there expressly enacted that "upon the coming in of the report exceptions may be filed, and upon the determination of the same either party may appeal." This court has uniformly held that in proceedings under that statute no appeal can be taken until the coming in of the report. *Tel. Co. v. Railroad*, 83 N. C. 420; *Railroad v. Newton*, supra.

The defendant contends that the cases decided by the court in regard to the right of the defendants to have a jury trial should not be followed, because the present Constitution expressly secures to him the right to trial by jury. We do not perceive any difference between the language of section 14 of the Declaration of Rights of 1776 and section 19, art. 1, of our present Constitution. They are in identically the same words. It is true that the court has held that controversies at law include all civil actions, "suits in equity" having been abolished by the Constitution. This principle has never been understood to extend to proceedings "not according to the course of the common law" or to summary statutory proceedings.

Guided by the principles and procedure which we think correspond to the provisions of the statute and the decisions of this court, we proceed to consider the defendants' answer to ascertain whether any issues of fact are raised which must be determined by a jury at a regular term of the court. Referring to matters set up in the answer in *Durden v. Simmons*, supra, of a character similar to much of the answer in this case, Smith, C. J., says: "We give all the effect to which the answer is fairly entitled in construing it as a denial of the relations between the lands and the necessity and propriety of burdening the one for the other, and this, under the statute, is the appropriate function of the commissioners from the words of the act." We gather from this language that the allegations regarding the necessity for the ditches to drain the plaintiff's land were proper to be submitted to the commissioners when appointed, and was the basis for issues to be tried by a jury. In *Winslow v. Winslow*, 95 N. C. 24, no objection was made to the issues submitted. Merrimon, J., said: "No question is made as to the regularity and propriety of submitting to the jury the issues set out in the record, and we advert to them for the purpose of saying that it may be questionable whether it is proper to submit such as they are." In *Railroad v. Ely*, 101 N. C. 8, 7 S. E. 476, no objection was made to the issues submitted. In *Railroad v. Par-*

ker, 105 N. C. 246, 11 S. E. 328, the appeal was taken after the coming in of the report. The court held that the party filing exceptions was not entitled to a jury trial. We are therefore of the opinion that the questions involved in the first, second, fifth, sixth, and seventh issues submitted by his honor should be passed upon by the commissioners when appointed, and do not present issues of fact to be tried by the jury.

The third and fourth issues are directed to an alleged estoppel growing out of an agreement made by one Levin Lane, a former owner of the defendants' land, and one Beery formerly owning the plaintiff's land; also a plea of *res judicata*, based upon suits heard and determined between the parties. We are not quite sure that we correctly interpret the language of the answer in respect to these matters. If, as we understand, it is sought to estop the plaintiff by the agreement referred to, the terms and extent of the agreement should have been fully set forth. If it was a personal license to drain through the defendants' land, it was not enforceable, and therefore could not work an estoppel to prosecute this petition. In regard to the suggestion that the matter set up in the petition is *res judicata*, we cannot see how, in the uncertainty of the reference to the alleged suits, an issue can be drawn. No reference is made to any particular suit. An estoppel which "shutteth a man's mouth to speak the truth" should be pleaded with certainty and particularity. 8 Enc. Pl. & Pr. 11. The court should be able to see from the pleadings what facts are relied upon to work the estoppel. The defendant's counsel in their well-considered brief make no reference to this part of their answer. If the defendant desires to set up the estoppel as a plea in bar, it is within the power of the clerk, if he shall think it in furtherance of justice, to permit him to do so by way of an amendment to his answer. We do not find anything in the decisions of this court, in the several cases which have come before us between the parties, which would estop the plaintiff from prosecuting his petition. Douglas, J., in *Porter v. Armstrong*, 129 N. C. 101, 39 S. E. 799, says: "While the question is not now before us, we see no reason, as at present advised, why the petitioner cannot proceed under chapter 30 of the Code." This petition is based upon the theory that the plaintiff has no easement or other right to drain through the defendants' land. If this is not true, he cannot maintain his petition.

We conclude upon the record that no plea in bar has been sufficiently pleaded; that the matters set up in the answer, other than those relied upon for the plea, are properly triable by the commissioners to be appointed by the clerk. We think the order of the court appealable under section 548 of the Code. It would be an idle and expensive thing to try this cause before a jury only to have the same questions submitted to the commission-

ers after verdict. It is one of the anomalies in the practical working of our laws that a statute passed more than a century since for the promotion of agriculture, the opening of swamp lands, and increasing the capacity of the earth to bring forth bread for the people, should be a subject of expensive litigation and almost hopeless delay. Without expressing any opinion in regard to the merits of this long-standing controversy, we are struck with the fact, as appears from the records of this court, that for nearly 30 years the owners of these lands have been in litigation in regard to their drainage. We cannot but indulge the hope that when three disinterested, intelligent freeholders shall view the premises and find the facts, both parties may find it consistent with their sense of justice and their own interests to abide the judgment.

Let this opinion be certified to the superior court of Pender county, to the end that further proceedings may be had in accordance therewith. Error.

DOUGLAS, J., dissents.

(68 S. C. 153)

BALLENTINE v. HAMMOND.

(Supreme Court of South Carolina. March 4, 1904.)

APPEAL—CASE-MADE—TRIAL—INSTRUCTIONS—RIPARIAN OWNERS—OBSTRUCTING STREAM.

1. Inadvertent failure to incorporate in a case-made the fact of the entry of judgment is not ground for dismissal.

2. Where a statute has been declared unconstitutional by the Supreme Court, the judge should not, on request, charge the same as law.

3. Under Const. 1895, art. 5, § 26, providing that the judge shall not charge in respect to matters of fact, the court cannot state the testimony in his charge.

4. A lower riparian owner cannot fight off flood water of a stream just as he would surface water when it has left its natural channel.

5. In an action to recover for damages caused to plaintiff's land by the obstruction of a stream by defendant, an instruction that if the obstruction placed in the ditch stopped the natural flow of water, and caused it to back on plaintiff's land, he could recover, was erroneous, as plaintiff could recover for injuries caused by defendant's obstructions at right angles to the stream, as well as for those caused by obstructions in the stream.

Appeal from Common Pleas Circuit Court, Anderson County; Townsend, Judge.

Action by Elizabeth Ballentine against W. Q. Hammond. From judgment for defendant, plaintiff appeals. Reversed.

Motion upon one day's notice was made to amend the "case" by inserting the fact that judgment had been entered up. Respondent claimed that four days' notice was necessary. The court held that the case should not be dismissed for failure to give the required notice or to insert said fact, but that it would be continued unless parties could agree as to the proposed amendment.

B. F. Martin, for appellant. Tribble & Prince and Bonham & Watkins, for respondent.

POPE, C. J. This action was begun on May 27, 1901, and it was tried before Judge Townsend and a jury at the fall term, 1901. While two causes of action were set out in the complaint, only one was actually tried, the other being abandoned. The following is the statement of the cause of action retained:

"(1) The plaintiff is, and at the time hereinafter mentioned was, the owner of the freehold and in possession of certain lands lying along the banks of Little Beaver Dam creek, in county and state aforesaid.

"(2) During the summer of 1898, the defendant, without the consent of plaintiff, built a rock dam in the channel of said creek on his freehold, a short distance below said land of plaintiff. At a subsequent date, without consent of plaintiff, he added to said dam, and he has also built levees to a considerable height, running from points in defendant's bottoms on each side of said creek to said creek near the dam, and thence down the stream.

"(3) Said dam at first was about two and a half feet in height, and after the addition it was about four and a half feet in height, very thick, and constructed of large heavy rock. It remained at that height until the defendant, as plaintiff is informed and believes, had heard of preliminary steps being taken by plaintiff and other parties to bring suit to have it removed. Then defendant took off about a foot of said dam, but he continues to maintain said dam and levees.

"(4) By reason of the erection and maintenance of said dam and levees the channel of said creek became blocked and filled with sand for a long distance above said structure, the fall of plaintiff's bottom ditches and creek channel was lost and destroyed, and plaintiff's drainage obstructed and clogged, so that slight freshets and ordinary rains overflowed and overflow a large part of plaintiff's land and cover a part of it with sand, rendering it wet, soggy, and unfit for cultivation and pasture, whereas before it was adapted to both. This permanently damaged part of plaintiff's land, and caused loss of returns and profits therefrom, and depreciation in value.

"(5) The defendant, well knowing that these structures would injure plaintiff as above set forth, deliberately, wantonly, willfully, and in reckless disregard of plaintiff's rights erected and maintained, and still maintains, the above-described nuisance, notwithstanding the fact that on the — day of April, 1899, he was given notice, signed by plaintiff and eight others, that signers were being damaged thereby, as hereinabove set forth; all to plaintiff's damage seven hundred and fifty dollars.

"Wherefore plaintiff prays judgment

against defendant for the sum of seven hundred and fifty dollars and costs of this action, for abatement of said nuisance, and permanent injunction against the maintenance thereof."

Defendant, in his answer, admits having built the levees on his own premises to prevent high waters from flooding his bottom lands; that, having gone to great expense in cutting canals to convey water through and from his bottom land on said creek, he placed rock there to obstruct the sand from being washed into said canals, but he denies that said obstruction of rocks raised the bed of the original channel of said creek any higher than it was when he began said work.

For a further defense he says: "That prior to the time alleged in said complaint the defendant owned considerable land on said creek; that said lands, as well as the lands immediately above defendant's, were practically worthless, in consequence of the waters having no certain channel, as it was shifted at nearly every high water; that this defendant at great expense dug canals to convey the water from his own premises, and cut said canals entirely on his own premises; that, knowing the condition of the creek above, defendant placed bags of sand in the channel of the old run on his own premises to prevent the sand from being washed into his new canal, when some evil-disposed person or persons, to defendant unknown, cut said bags of sand in defendant's absence, whereupon he placed rock to protect himself; and, after thus protecting his canal, the old channel of the creek was not raised any higher than it was when defendant began his work; and he denies that plaintiff has any right to complain of any acts of the defendant in the premises.

"(4) That by reason of the expense incurred defendant has brought into cultivation valuable bottom lands, and but for said obstruction the canals so cut by him would soon become choked with sand, and rendered valueless for farming purposes said bottom lands.

"(5) That before this suit, and after the alleged notice, and at various times, defendant has offered to allow the plaintiff and other persons owning bottom lands above him on the said creek to enter his canal, and take the same through their lands, provided they would take the proper steps to prevent the sand above from being brought in to fill up said canal, and he is still willing to allow them the benefit of said fall for said purpose.

"Wherefore, he demands that the complaint be dismissed."

Voluminous testimony was offered by each side to the controversy, plats of surveys, etc. By consent of both parties, the jury were carried down to Little Beaver Dam creek, and with a shower on each side inspected all the bottoms in question. After a full hearing, the jury brought in a verdict for the defend-

ant. Thereupon the plaintiff appealed to this court on the following exceptions:

"(1) His honor erred in charging in defendant's fifth request: 'That, if the old channel would not have taken the sand down before Hammond cut his ditches, plaintiff has no right under the law to use the new ditch cut by Hammond to convey away her accumulated sand from above.' This is a charge on the facts, and is in violation of Const. 1895, art. 4, § 26. It is clearly implied that Hammond cut a new ditch that plaintiff could use. This was strongly controverted in the testimony, and, if true, would properly and directly bear upon the question of injury or no injury.

"(2) His honor erred further, as a matter of law, in charging 'that, if the old channel would not have taken the sand down before Hammond cut his ditches, plaintiff has no right under the law to use the new ditch cut by Hammond to convey away her accumulated sand from above.' The testimony, convincing and undisputed, shows that the accumulation was due to defendant's obstructing the stream; and the law would be otherwise in cases where defendant himself causes the accumulation in plaintiff's channel. This error is material and hurtful.

"(3) It was error to charge in defendant's fifth request: 'That, if the jury find from the testimony that the old creek channel, in the course of time, had become filled with sand before our obstruction,' until the natural flow of the stream had spread out over the entire bottom, and had no certain channel in which to flow, and Hammond, as a prudent and thrifty farmer, saw proper to improve his own lands by cutting ditches to convey this water off of his own lands below, the fact that he stopped the ditch on his own land, and placed a dam there to keep the water from washing from the original channel the sand into the new ditch, does not give to the plaintiff any right to damages.' This is a charge upon the facts, and in violation of Const. 1895, art. 5, § 26. It is distinctly assumed as a 'fact' that the defendant put his dam in the stream 'to keep the water from washing from the original channel the sand into the new ditch.' This is extremely misleading. The undisputed and overwhelming evidence shows that it was not and could not be true that defendant's claim of 'new ditch' and 'acquired fall' therefrom was baseless, for the obvious reason that he had done no ditching on this stream when the dam and levees were built. Furthermore, this part of the charge leaves the impression that defendant ditched up to a certain point on his land and there put in the dam. The evidence is altogether otherwise.

"(4) His honor erred in charging defendant's fourth request to charge, as follows: 'That the flood water of a river or a creek may be fought as surface water, when it has left its natural channel, and if the jury find from the testimony in the case that the em-

bankments thrown up by Hammond on his own land to obstruct the surface water with a view to throwing it in the channel, and keep it from covering his own land, then he cannot be held liable in damages, unless the jury find from the testimony that Hammond did the work in a negligent manner, or that damage has resulted to the plaintiff from the natural and probable consequences of said acts. *Calro, Vincennes & Ch. Rs. Co. v. Brevoort*, 62 Fed. 129, 25 L. R. A. 527.' It is respectfully submitted that this is not the law; that the common-law rule is otherwise; and that a man cannot build banks or levees to dam back upon, and to the injury of, his upper riparian neighbor, the flood water of ordinary, usual, and expected freshets, flowing as nature intended it to flow. Furthermore, his purpose in constructing the embankments is not material, much less controlling, upon the question of liability for actual damages; and it was error so to charge.

"(5) His honor erred in charging upon defendant's third request: 'That he (Hammond) had a right under the law to dig a channel or ditch to collect the waters and convey them across his own land, and he was not bound to continue that ditch with what fall he had acquired to plaintiff's line.' This request contains a charge upon facts, and is in violation of Const. 1895, art. 5, § 26. It is assumed and impliedly charged that Hammond had dug a ditch, and thereby had acquired fall. This is denied, and is not shown, but is disputed, in the evidence; and it bears upon the question of damage.

"(6) Because his honor erred in charging defendant's third request to charge, because it assumed that the dam or obstruction was in a new channel, and is therefore a charge on the facts, and in violation of Const. 1895, art. 5, § 26. The fact assumed is denied, and the evidence is all otherwise.

"(7) Because his honor erred in charging the jury as the law of this case (see defendant's third request): 'That before they can find in favor of plaintiff they must be satisfied from the testimony in the case that the obstruction placed by Hammond in his ditch stopped the natural flow of water or sand, and caused it to back upon plaintiff's land.' For the jury could have found for plaintiff for injury caused by the levees or banks at right angles to the creek as well as for that caused by the obstruction in the stream.

"(8) Because his honor impliedly charged the jury in defendant's third request that the obstruction was in Hammond's ditch, whereas the evidence shows that it was built on the bed of the original creek channel. This is a charge on the facts, in violation of Const. 1895, art. 5, § 26.

"(9) Because his honor erred in refusing to read and charge upon plaintiff's request, sections 1273, 1274, Rev. St. 1893, on the ground that they had no bearing on the case. In the evidence defendant made a strong point of the proof that the stream was filling

up below the dam, seeking to show that the injury complained of would have resulted anyway from natural causes, or causes other than the obstructions complained of. Plaintiff sought to rebut this by proof of the existence of drifts below as the real cause of the filling up, and by the presumption that, in obedience to the law as laid down in those sections, they would be removed, and thus this trouble, which bears forcibly on plaintiff's case, removed. Therefore plaintiff's request should have been granted.

"(10) His honor erred in refusing to read and charge, upon plaintiff's request, St. at Large, vol. 23, p. 448 (Acts 1900). Although plaintiff might have failed to convince the jury by the proper quantum of evidence that plaintiff had received injuries for which defendant was responsible, yet the effect of this statutory law would be in this to entitle plaintiff to a verdict for nominal damages and an order for the removal of the dam."

In considering and passing upon the exceptions, we will first pass upon 9 and 10. We hold that it was not the duty of the circuit judge to pass upon these exceptions, so far as he refused to do so. Sections 1273 and 1274 and 1275 of the Revised Statutes of this state, made in the year 1893, have been declared unconstitutional (by this court), and therefore the circuit judge made no mistake in refusing to charge the same to the jury.

So far as the fifth exception is concerned, we will pass upon that. Too much care cannot be exercised by circuit judges in the matter of their charges to juries in respect to matters of fact or testimony. The following is the text of the charge of the circuit judge: "Fifth. That Hammond had a right under the law to clean up his own bottoms and ditch the same so as to convey off the waters for agricultural purposes; that while a natural water course cannot be obstructed by the landowner so as to back water upon the upper landowner, unless he has an easement either by grant or by prescriptive right, still the law does not give the upper landowner the right to dump his accumulated sand, which is a part of his freehold, upon the lower tenant, and thereby destroy the labor of the lower tenant by using the natural flow of the water to wash his accumulated sand into the ditches of the lower landowner; that, if the old channel would not have taken the sand down before Hammond cut his ditches, plaintiff had no right under the law to use the new ditch cut by Hammond to convey her accumulated sand from above; that if the jury find from the testimony that the old creek channel, in the course of time, had become filled with sand, before defendant's obstruction, until the natural flow of the stream had spread out over the entire bottoms, and had no certain channel in which to flow, and Hammond, as a prudent and thrifty farmer, saw proper to improve his own land by cutting ditches to convey this water off his own land below, the fact that

he stopped the ditch on his own land, and placed a dam there to keep the water from washing from the original channel the sand into the new ditch, does not give the plaintiff any right to damages. *Gray v. McWilliams* [(Cal.) 32 Pac. 976] 21 L. R. A. 593 [35 Am. St. Rep. 163]." What is the requirement of our present Constitution—that of 1895—on the subject of judges' charges upon facts? Article 5, § 26, reads as follows: "Judges shall not charge juries in respect to matters of fact, but shall declare the law." The language of Const. 1868, art. 4, § 26, is: "Judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law." Thus it appears that the inhibition of the present Constitution precludes judges from stating the testimony in their charges to the juries. It is permissible for them, in order to make clearer their statement of the law, to make hypothetical statements of facts. But in the present charge the circuit judge has stated alleged facts at issue between the parties, and in doing so failed to include any reference to the banks or levees constructed by the defendant, thus giving the defendant the benefit of his charge upon the effect of defendant placing a dam in the ditch cut upon his own land to keep the water from washing from the original channel the sand into the new ditch, and then declaring that in such an event it "does not give the plaintiff any right to damages." This is no hypothetical statement of facts. It is Hammond's case he is discussing. We were very much impressed with the statement of counsel that it is probable that, apart from this statement of the circuit judge that the jury would have rendered a verdict in favor of defendant. This is, however, an illustration of the danger of ignoring the requirements of the present Constitution, for it is fatal to the verdict. We are obliged to enforce this provision of the Constitution upon an exception preferred by the plaintiff. The first, second, and third exceptions must be sustained.

So, too, exceptions 5, 6, and 8, must be sustained, as charges upon the facts were made by the circuit judge, as pointed out in these exceptions.

Exception 4 must be sustained. It was error in the circuit judge to hold that the defendant could fight off flood water just as he could surface water when it has left the natural channel. Such is not the law. See *Lawton v. South Bound R. R.*, 61 S. C. 548, 39 S. E. 752, where the late Chief Justice McIver pointed out the distinction between surface water and a natural water course, and the difference existing in the power of a riparian proprietor in regard thereto. We confine our decision to the case here made.

Exception 7 refers to the declaration of law by the circuit judge in response to the third request of defendant. He should have included in his charge the whole law on this

subject, including the effect of the levees constructed by the defendant on his own land below that of plaintiff. This exception must be sustained.

We must therefore order a new trial in this case. It is the judgment of this court that the judgment of the circuit court be reversed, and the action remanded to the circuit court for a new trial.

(68 S. C. 201)

MOORE v. CATAWBA POWER CO.
(Supreme Court of South Carolina. March 11, 1904.)

INJURY TO EMPLOYE—PLEADING—DEFECTIVE APPLIANCES.

1. In an action for injuries to a servant, alleged to have been caused by defects in certain machinery or appliances, plaintiff should not be required to amend the complaint so as to state the particulars in which the machinery was defective.

Appeal from Common Pleas Circuit Court of York County; Townsend, Judge.

Action by John B. Moore against the Catawba Power Company. From an order requiring the complaint to be made more specific, plaintiff appeals. Reversed.

Plaintiff alleged:

"(5) That the injury to the plaintiff from said blast and explosion was due to the gross negligence and carelessness of the defendant, its agents and servants, in furnishing to the plaintiff defective, unsafe, and unsuitable means, machinery, and appliances for said work, and failing to inspect and keep said machinery and appliances in safe and suitable condition for its said work, in that: the said defendant furnished to and for the said work a battery for the purpose of exploding the blast, which battery was imperfect, defective, unsafe, and worn; and the lead wire from the battery to the blast was defective and imperfectly insulated, and the insulation was off said wire in a number of places, and the wire was too small to carry the current of electricity necessary to discharge the blast, and the same was second-hand, badly used, and worn; moreover, the fuse wires leading from the lead wires to the blast holes and loads were defective, were kinked, and broken, and the insulation thereof was imperfect; and, by reason of the foregoing facts, some of the loads which were placed in the holes for the purpose of making the blast failed to explode when operated for that purpose, and it became necessary to clean out those holes which had exploded and those which had not, with a view to carrying on the work; and while so engaged an explosion of one of the holes which had failed to explode at the proper time occurred, causing the injuries above mentioned to the plaintiff."

The defendant moved that the complaint

be made more definite and certain in the following particulars:

"(1) That the lines 4 and 5 of paragraph 5 thereof, alleging that the plaintiff was furnished with 'defective, unsuitable, and unsafe means, machinery, and appliances,' be so amended as to show what machinery, means, and appliances were unsafe, or unsuitable and defective, and the particulars or respects wherein they were so.

"(2) That further down in said paragraph, where the plaintiff alleges that the battery furnished him for exploding the blasts was 'defective, unsafe, imperfect, and worn,' be so amended as to show in what respect the said battery was imperfect, unsafe, and defective and worn.

"(3) That further down in said paragraph, where the plaintiff alleges that the wires leading from the battery to the blasts were defective, and also where he alleges that the fuse wires were defective, the said complaint be amended so as to state any defects to said wires, and the respects wherein they were defective; and in case no other defects are claimed as to said wires except those already stated, then the complaint be so amended as to limit the allegations to those already alleged and stated.

"(4) For such other and further relief as may be just."

The circuit court granted the motion on the second and third grounds, in the following words:

"It is therefore ordered that the defendant's second and third grounds of motion herein be granted, and that the plaintiff be required to amend the fifth paragraph of his complaint, where he alleges that the battery furnished to him was 'imperfect, defective, unsafe, and worn,' so as to set forth the respect wherein said battery was imperfect, defective, and so forth; that is, to set out the facts constituting such imperfections and defects. And also that he amend his said complaint further down in said paragraph, where he alleges that the lead wire and fuse wires were defective, and proceeds to set forth certain defects in said wires, by alleging any other defects that he may claim existed in said wires; or if no other defects in said wires are intended than those already alleged, then the plaintiff can so amend this portion of his complaint as to show that the defects he refers to and intends are those he has alleged."

Geo. W. Hart and D. W. Robinson, for appellant. A. G. Brice, for respondent.

WOODS, J. We do not think this case can be distinguished in principle from *Lynch v. Spartan Mills*, 60 S. C. 12, 44 S. E. 93. The views there expressed are in accord with the decisions of other courts. *Monahan v. Northwestern Contracting Co.*, 84 Wis. 596, 54 N. W. 1025; *Carey v. Ry. Co.*, 67 Wis. 608, 31 N. W. 163; *Ry. Co. v. Templeton*, 87 Tex. 42, 28 S. W. 1066; *Cox v. Providence Gas Co.*,

¶ 1. See *Master and Servant*, vol. 34, Cent. Dig. § 525.

17 R. I. 199, 21 Atl. 344; Preston v. R. R. Co., 64 Vt. 280, 25 Atl. 486. The motion to make the complaint more definite and certain should have been refused.

The judgment of this court is that the judgment of the circuit court be reversed.

(68 S. C. 129)

PACOLET MFG. CO. v. GANTT, Secretary of State.

(Supreme Court of South Carolina. March 10, 1904.)

CORPORATIONS—INCREASE OF STOCK—FEES.

1. Under Civ. Code 1902, §§ 1851, 1888, prescribing that a corporation increasing its capital stock shall pay the fees required on an issuance of a charter or a renewal thereof, the same fees, based on the increase of the stock, are to be paid as for an original charter.

Appeal from Common Pleas Circuit Court of Richland County; Townsend, Judge.

Petition for mandamus by the Pacolet Manufacturing Company against Jesse T. Gantt, as Secretary of State. From an order refusing the writ, the petitioner appeals. **Affirmed.**

Ralph K. Carson, for appellant. Asst. Atty. Gen. Townsend, for respondent.

JONES, J. The Pacolet Manufacturing Company applied for mandamus to compel the Secretary of State to issue a certificate of increase of capital stock from \$1,000,000 to \$2,000,000 upon the payment to him of \$252.50 as fees, the Secretary of State having refused to issue the certificate upon tender of said sum, demanding as fees the sum of \$552.50. The circuit court, Hon. D. A. Townsend, presiding, sustained a demurrer to the petition for insufficiency, and dismissed the same. This appeal therefrom involves the question as to the amount of fees authorized by statute in such a case.

Section 1851 of the Civil Code of 1902, after prescribing the method of procuring from the Secretary of State a certificate of an increase of capital stock of certain corporations, provides as follows: "The said corporation so increasing its capital stock shall pay to the Secretary of State the fees required by section 1888, which fees shall accompany the certificate of the board of directors." Section 1888 reads as follows: "The Secretary of State is hereby authorized and required to collect the following fees: Upon each charter issued or renewed to any corporation, payable when the said charter is issued or renewed, the sum of one mill upon each dollar of the capital stock authorized up to and including \$100,000; the sum of one-half of a mill upon each dollar of the capital stock exceeding \$100,000 and up to and including \$1,000,000, and the sum of one-fourth of a mill upon each dollar of the capital stock exceeding \$1,000,000. * * * Said section further provides for a recording fee

of \$2.50. Construing the two sections together, we think it is clear that the purpose was to require the same fees for an increase of capital stock as upon the issuance or renewal of a charter, said fees being based upon amount of the increase. The increase being \$1,000,000, the fees demanded by the Secretary of State were correct, as follows:

On first \$100,000 of increase, 1 mill..	\$100 00
On second \$900,000 of increase, $\frac{1}{2}$ mill	450 00

Total fee on capital stock.....	\$550 00
Recording amendment	2 50

\$552 50

It is true, as contended by appellant, that this construction would require a corporation increasing its capital stock from \$1,000,000 to \$2,000,000 to pay more in fees than would be required of a corporation originally chartered for \$3,000,000; but this is not unreasonable, as there is a difference between issuing an original charter alone and issuing a charter and thereafter amending or enlarging the same. On the other hand, the construction contended for by appellant would require a smaller corporation increasing from \$100,000 to \$1,000,000 capital stock to pay nearly twice as much as a larger corporation increasing from \$1,000,000 to \$2,000,000 capital stock, thus discriminating in favor of the larger corporation against the smaller for substantially the same service or benefit conferred. Equality is preserved by applying the schedule of fees to the "increase" of capital stock, just as if the amount of such "increase" constituted the whole capital stock. Such construction, we think, the terms of the statute require. The proper amount of fees not having been tendered, the Secretary of State was not in duty required to issue the certificate applied for, and the demurrer to the petition was properly sustained.

The judgment of the circuit court is affirmed.

(68 S. C. 196)

SPOOL COTTON CO. v. KING & TILLER.

(Supreme Court of South Carolina. March 9, 1904.)

'PARTNERSHIP—EVIDENCE.

1. Where an action is brought for the balance for goods sold to defendants alleged to be members of a firm, and the answer admits that defendants are partners in a limited sense, and defendants' attorney admits that he did not intend to plead that defendants were limited partners in a technical sense, the allegation of partnership is admitted; and, there being evidence that certain goods were bought by the firm, and a part returned to the seller, it is sufficient to show a partnership in the line of business alleged by the complaint.

Appeal from Common Pleas Circuit Court of Richland County; Klugh, Judge.

Action by the Spool Cotton Company against King & Tiller. From a judgment reversing a judgment of a magistrate, defendants appeal. **Affirmed.**

D. W. Robinson, for appellants. Barron & Ray, for respondent.

JONES, J. This action was brought in a magistrate's court for a balance alleged to be due plaintiff by defendants upon an account for goods—spool cotton—sold and delivered to defendants. The magistrate gave judgment in favor of defendants upon the ground that he found no testimony whatever as to partnership of the defendants, as alleged in the complaint. This judgment was reversed by the circuit court, and the case remanded for a new trial. Thereupon the defendants appeal to this court.

The main question is whether the answer of the defendants is an admission of the allegation of the complaint as to the partnership. The second paragraph of the complaint alleges "that J. B. King and W. H. Tiller at the times hereinafter mentioned were copartners, trading as King & Tiller." The answer of W. H. Tiller was as follows: "(2) Denies each and all of the allegations contained in paragraphs 2, 3 and 4 of the complaint, except to admit that J. B. King and W. H. Tiller were partners in a special and limited sense, and limited line of business, in April, 1901. This defendant denies any indebtedness to the plaintiff."

On the trial before the magistrate, the attorney for defendants stated that he did not mean to allege that defendants were partners in the limited sense alluded to in the statutes (Code 1902, § 1680 et seq.), but that they were partners in a limited sense, as contemplated by the common law. Relying upon the admission in the answer and the statement of counsel for defendant, the counsel for plaintiff offered no further evidence of the second allegation of the complaint as to the partnership. The record before us does not show what testimony was offered in support of the other allegations of the complaint, but the magistrate's report states that counsel for plaintiff introduced evidence which consisted entirely of depositions, and that defendants introduced no evidence, and that he (the magistrate), holding that there was an utter lack of proof as to the allegations of partnership, gave judgment against the plaintiff on this ground, without trying the case on its merits. We agree with the circuit court in construing the answer as admitting the fact of partnership. It is true, the admission is qualified by the statement that the partnership was in a limited line of business, but that is nothing more than could be said of any ordinary partnership. In 22 Ency. Law, 60, it is stated: "A general partnership may be defined as one where the business includes all transactions of a particular class, as where several persons agree to carry on as partners the business of bankers, grocers, etc. Practically all partnerships are limited to some extent, but they are nevertheless general partnerships. To constitute a general partnership, nothing

more is necessary than that the parties agree to carry on or conduct a specified business, and to share in its profits and losses. The business may be of a general nature, or it may relate and be confined to certain designated transactions. In either case the partnership is general." Whether the partnership admitted to exist was such as would embrace the buying of spool cotton within its limitations was a matter of evidence, but when the plaintiff, as we must assume, offered evidence of the other allegations of the complaint, viz., that on the 27th day of April the plaintiff sold and delivered to said defendants, at their request, spool cotton to the value of \$102.30, and that on the 12th day of July, 1901, the defendants returned to the plaintiff a portion of these goods, to the value of \$34.27, that afforded some evidence that the goods ordered and received in the name of the partnership was within the scope of the partnership business.

We do not think the circuit court committed any error in remanding the case to the magistrate for a new trial. This renders it unnecessary to consider the other exceptions.

The judgment of the circuit court is affirmed.

(68 S. C. 304)

STATE v. SANDIFER et al.

(Supreme Court of South Carolina. March 11, 1904.)

RES JUDICATA—ACTION ON OFFICIAL BOND.

1. Where the sureties on an official bond have been sued for a specific breach thereof, and a judgment is entered therefor, but not for the penalty of the bond, and the judgment is paid, the state cannot thereafter sue the same sureties for breaches not alleged when the first suit was brought.

Woods, J., dissenting.

Appeal from Common Pleas Circuit Court of Barnwell County; J. E. McDonald, Special Judge.

Action by the state against P. W. Sandifer and others. From a judgment of dismissal, the state appeals. Affirmed.

Upon the defenses of estoppel and statute of limitations, the circuit judge said:

"As I understand it, gentlemen, this former action that resulted in the judgment here was in the name of the state against the identical and same parties, with the exception of Mrs. Mayfield. I may state, before rendering the decision, that the counsel for defendants, who did not interpose this plea of limitation and plea of estoppel by former judgment, asked leave to amend their answers, and, believing it would be the furtherance of justice that the amendments be made, I will allow the amendments, and will sign an order to that effect later. The action here is brought by the state of South Carolina against certain sureties, who are bondsmen of Allen F. Free, late treasurer of Barnwell county. In the complaint it is alleged that he gave three separate bonds, covering

the three terms of his office as treasurer, the dates of the bonds being set forth in the complaint, and various breaches of the respective bonds are alleged during the three terms set forth in the complaint. The answer of the defendants set up several defenses, the principal defense being, however, the plea of the statute of limitation to all of the breaches of the bonds, except as to the last one; and, also, the plaintiff is estopped by judgment rendered in a former action between the same parties, with the exception of Mrs. Mayfield, who is made party in the present action, who is an heir at law of one of the deceased sureties, who was a defendant in the former suit.

"First, as to the statute of limitation, it seems to me that, under the doctrine of *nul- lum tempus occurrit regi*, the statute of limitations cannot be pleaded against the state, except in an action brought for the recovery of the land, and in that kind of action there is a special provision of the Code. The general doctrine of the common law is that no statute of limitation can be pleaded against the state. I overrule the plea of limitation.

"As to estoppel of former judgment, I am not so sure, and have some doubt, but believe that plea should be sustained. The liability was a continuing one, and the sureties who were sued in this case and who were sued in the former action were liable for all breaches for all of the bonds at the time he went out of office. I think all of these matters are included in the other case, and I think they are good as to the plea of estoppel, and should be allowed, and sustain the motion. I think it is proper to dismiss the complaint."

The court thereupon made the following order: "The defense of the bar of the statute of limitation and estoppel by judgment in a former action came up as preliminary issues in this case. After hearing argument, I am of the opinion that the statute does not apply, the state being protected by the doctrine of *nul lum tempus occurrit regi*. This plea is therefore overruled. As to the plea of estoppel, I think it should be allowed, and is a bar to the action. This without prejudice to any rights under the former judgment. It is therefore ordered that the complaint be, and hereby is, dismissed."

From the judgment entered thereon the plaintiff appeals on the following exceptions: "(1) That his honor the presiding judge erred in holding and concluding that the matters here complained of—breaches occurring under the official bonds of the county treasurer, given on January 20, 1891, January 3, 1893, and March 13, 1895—were included in the former action brought to recover for breaches occurring under other official bonds of the same officer, subsequently given on February 26, 1897, and February 8, 1899, and that the plaintiff is estopped by the recovery of the judgment in the former action from maintaining this action. (2) That his honor the

presiding judge erred in not holding and concluding that the causes of action in this action were different from the causes of action in the former action of *The State v. E. M. Kennerly et al.*, and in not concluding that the plaintiff's right to maintain this action is unaffected by said former action on different causes of action."

Asst. Atty. Gen. Townsend, for the State.
J. O. Patterson, Izlar Bros., and Jno. R. Bel-
linger, for respondents.

POPE, C. J. This action was commenced in the court of common pleas for Barnwell county, in this state, on the 4th day of September, 1901, and came on for trial at an extra term of said court before Hon. J. E. McDonald, as special judge, on the 5th May, 1903. The complaint set out three causes of action, each cause of action being bottomed upon breaches of the bonds of Allen F. Free, deceased, as county treasurer of Barnwell county, with these defendants as sureties thereto. The first bond was dated 20th January, 1891, the second bond was dated the 3d day of January, 1893, and the third bond was dated — day of January, 1895; and each of said bonds was in the penal sum of \$20,000, and conditioned that if the said Allen F. Free, as county treasurer of Barnwell county, should ever and truly perform the duties of said office, as thereafter required by law, during the whole period he might continue in office, then the above obligation should be void and of no effect, or else should remain in full force and virtue. The term of office of said Allen F. Free ran from January, 1891, to January, 1897. At the annual settlements made by the Comptroller General of this state with the said Allen F. Free, as said county treasurer, the sum of \$66.91 was allowed the said Allen F. Free as a credit on his account, because the said sum of \$66.91 escaped detection and correction by the Comptroller General, and which said sum has never been paid out nor accounted for by said Allen F. Free, said county treasurer. This sum of \$66.91 is the basis of the first action. Further, at the annual settlements made by the Comptroller General with the said Allen F. Free, as said county treasurer, the Comptroller General in his annual settlements with said Allen F. Free, as said treasurer, in the years 1893 and 1894, allowed the said county treasurer credit, through the failure of the Comptroller General to detect and correct errors, in sums aggregating \$929.35, which is the basis of the second cause of action. And, further, because on the annual settlements of said county treasurer and the Comptroller General on the 28th June, 1895, and on the — day of —, 1896, errors amounting in the aggregate to \$1,347.17 were allowed, because the Comptroller General failed to detect and correct the same. This is the basis for the third cause of action. Demand is for judgment for \$60,000,

the penalties in the aggregate for the three bonds against these defendants.

The answers of the defendants set up the plea of the statute of limitations, and also that another action by the plaintiff was heretofore brought in the court of common pleas for Barnwell county against these defendants, as sureties on the three bonds set up in the complaint, each bond being in the penalty of \$20,000, and was prosecuted to final judgment in favor of the plaintiff herein against these defendants.

At the hearing, it having been agreed that the matter of estoppel by reason of the former action and judgment between the plaintiff and these defendants should be first determined, the first judgment was produced in court, showing that the plaintiff had recovered a judgment against these defendants for the three bonds sued on in the present action, because of breaches of said bonds, in the sum of \$8,140.64, which sum had been actually paid to the plaintiff. It should be stated, also, that Mrs. Lida K. Mayfield was a privy of her mother, Mrs. E. M. Kennedy, a widow, who departed this life after the foregoing judgment—she being her only child and inherited her whole estate, amounting to \$20,000, without administration.

His honor J. E. McDonald sustained the plea of estoppel, and by his decree ordered the complaint dismissed, but refused to sustain the statute of limitations. Let this decree of Special Judge McDonald be reported, and also the exceptions. The plaintiff appeals from this decree on the question of estoppel, though he presents his objections in two forms.

We do not think there can be any question as to the soundness of the decree of the circuit judge. While we admit that under the decisions of *State v. Moses*, 18 S. C., at page 373, it was the duty of the plaintiff, in its first action against these sureties of Allen F. Free, as county treasurer of Barnwell county, because of breaches of his official bonds, to have entered up judgment against these sureties, as defendants, in the penalty of the last bond, yet the state, as plaintiff, entered its judgment for the actual breaches of the bond, to wit, the sum of \$8,140.64, and this court has repeatedly held that such payments, unappealed from, were the law between those parties and their privies. The plaintiff, the state of South Carolina, has actually collected every dollar due to it under that judgment. Now, is the state estopped from any action on those bonds because of breaches thereof? As we have before remarked, we think and hold that the state, as plaintiff, is estopped. Lord Coke said: "Touching estoppels, which are a curious and excellent sort of learning, it is to be observed that there be three kinds of estoppel, viz., by matter of record, by matter of writing, and by matter in pais." The ground of holding a matter of record to act as an estoppel is that a record imports such

absolute verity that no person against whom it is producible shall be permitted to impeach it. Page 804 of *Smith's Leading Cases* makes this statement, quoting Lord Tenterden: "The authorities are clear that a party cannot be received to aver as error in fact a matter contrary to the record. In Just. 260, Lord Coke says: 'The rolls, the records, or memorials of the judges of the courts of record import in them such uncontrollable credit and verity as they admit of no averment, plea, or proof to the contrary. * * *' It should be recalled, in passing, that this very Lord Coke, in defining estoppel, quaintly said: "An estoppel is where a man is concluded by his own act or acceptance to say the truth." Very much of the learning on the subject of estoppel will be found by those anxious to look fully into it by consulting pages 798 et seq. of *Smith's Leading Cases*. Our own case of *Spoon v. Smith*, 36 S. C. 588, 15 S. E. 800, refers to the conclusiveness of a judgment against the parties thereto. All these rules are based upon considerations which appeal to all men interested in upholding the law and right. Grant that sureties are liable to respond for losses occasioned by the breaches of bonds which they have signed, yet when the obligee of a bond has instituted an action to collect for its breaches, it is his duty to bring forward in that action all the breaches for which he wishes judgment. It will not do to allow him to sue and get judgment against the sureties this year, collect the judgment, then the next year, or the next, or the next, to sue the same parties because he overlooked some breaches. There should be an end of litigation. This plaintiff has sued and obtained judgment against these very sureties; they have paid such judgment; now the plaintiff seeks to sue again for breaches of these very bonds.

Again, it is suggested that possibly only the last two bonds were sued. Any funds in the hands of Allen F. Free under the first bond were lawfully in his hands under the second bond, and were therefore included in the first suit.

It is the judgment of this court that the judgment of the circuit court be affirmed.

WOODS, J. (dissenting). I am unable to concur in the opinion of the Chief Justice. This is an action by the state on three official bonds of A. F. Free, as treasurer of Barnwell county. The defenses before this court are estoppel by former judgment and the statute of limitations. A judgment was heretofore obtained against the same parties, except Peacock, on two other official bonds of Free, both given after the bonds involved in this suit. The plea of estoppel is based on this judgment. It is not claimed that the defaults here alleged were actually set up in the suit from which the former judgment resulted, but only that they might have been set up. In the former suit the judgment was not entered for the penalty of

the bonds, but for the actual supposed default under them. It is true in that suit, on the last two bonds, judgment might have been entered for the entire penalty, under which all claimants might have proven their demands, and it is also true that the sureties on those bonds were liable for continuing defaults standing against the treasurer when they were given. But sureties on the bonds in force when the default first occurred are also liable. *State v. Moses*, 18 S. C. 372. We know of no rule of law which requires the state to sue all the bonds in one action. Even if judgment had been entered for the entire penalty on the last two bonds in the former suit, the state could still have sued the first three bonds, for they were not annulled by the giving of the last two bonds, nor merged in any judgment recovered on them.

The vice in the argument of the respondent is in assuming that the state could not elect to collect actual defaults occurring under the first three bonds by suit on those three bonds, even after judgment on the last two. If an official bond is not nullified or merged in a subsequent one, then it is not for the sureties to say that the state as an injured party may not sue the first bonds for a default occurring under it because the state has either from choice or mistake not proved its claim in a suit on the last, when it might have done so. If the sureties were the same on all the bonds, we do not see how that could be any reason for denying to the state the right to enter judgment for the penalties of all the bonds in one action or several; but in this case the sureties are not all the same, and cases may arise where it would be of the utmost practical importance to enter a separate judgment for the penalty of each bond in a separate action. I can discover no principle upon which the right to do so can be denied. The period of limitation of an official bond is 20 years, and this action is therefore not barred by the statute.

I think the judgment of the circuit court should be reversed.

(68 S. C. 124)

RICE v. BAMBERG.

(Supreme Court of South Carolina. March 8, 1904.)

WIDOW—ELECTION—DECEDENT'S LAND—SALE—DIRECTING VERDICT—LOST PAPERS.

1. Where, under a will, a wife was a devisee of a life estate in certain property and a devisee of the rest of her husband's lands in fee simple, and she elected not to take under the devise, but to claim homestead and dower, and these were set off to her by a decree, the balance of the land was free from her claim of dower and homestead.

2. Where a husband devised certain property to his wife for life, with remainder to his children, and the wife renounced under the will, and homestead and dower were set apart to her, and thereafter the property was sold to pay debts on the petition of the wife as executrix,

in which proceedings the children were not made parties, the wife had no interest in the property so sold, and when thereafter one of the children died, and the mother inherited one-half of his interest in the land and died, such interest of the surviving child was not affected by the sale to pay debts.

3. A half-brother cannot inherit while his mother and a sister of the whole blood are alive.

4. Where property of a decedent was sold under a decree of court to pay debts, a claim that the sale was made under a power of the will is without foundation.

5. Where there are no issues of fact, the judge should direct the verdict.

6. Where a paper is alleged to be lost from a record, statements of an attorney, who does not recollect having seen it, that if he had not seen it he would not have given certain advice which he is said to have given, is not sufficient proof of the existence of such paper.

Appeal from Common Pleas Circuit Court of Barnwell County; Gary, Judge.

Action by Eugenia M. Rice against F. M. Bamberg. Judgment for plaintiff, and defendant appeals. Affirmed.

Jno. R. Bellinger, for appellant. H. F. & B. T. Rice, for respondent.

POPE, C. J. John M. Whetstone departed this life in the year 1870, leaving a wife, Mrs. Susan H. Whetstone, and her two children, Eugenia M. Whetstone (now Mrs. Rice) and Adam Whetstone, as well as John Whetstone, the only child of a predeceased wife, as his only heirs at law and next of kin. He left a will of full force at his death. Mrs. Susan H. Whetstone alone qualified as the executrix thereof. By the terms of this will it was provided that the executors should sell his steam sawmill for cash and pay his debts, but, if it should turn out that the proceeds of the sale of such steam sawmill were insufficient to pay his debts, he gave the executors power to sell as much of his real estate from the western portion of his plantation, known as "China Grove," as will satisfy said debts. By the second clause of his will he gave and devised to his widow, Susan H. Whetstone, for and during her natural life, all his China Grove plantation, whereon was the dwelling house. After her death he devised all of his China Grove plantation to his children begotten of the said Susan H. Whetstone, but, should such children die without lawful issue, the same, after one-fourth part of the value of said lands had been paid to testator's sister-in-law, Miss Elizabeth Arnold, should vest in his son John Whetstone, and his heirs, forever. By the fourth clause of his will he devised all the balance of his lands to his widow, Susan H. Whetstone, and her heirs, forever.

Unfortunately for the plans developed in his will by the testator, his debts were far greater than could be paid off by the sale of his steam engine and mill, even when aided by the sale of the western portion of his plantation, known as "China Grove." Hence his widow and executrix Mrs. S. H. Whetstone, filed her complaint in the court of common pleas for Barnwell county, in this state,

praying that suits against her as such executrix by individual creditors might be enjoined, and all such creditors be required to establish their claims under her action; that she might be allowed to account for her actings and doings as said executrix; that the lands of her testator might be sold to pay debts after claim for dower and homestead had been adjusted and provided for. She stated that her testator was seised of 1,100 acres of land. She named as parties defendant to her said action testator's three children, including the two she had borne him, and one or more of his creditors. The service of the summons and complaint was accepted by the creditors, also by John Whetstone, who was an adult, and Mrs. Susan H. Whetstone accepted service for her minor children, Eugenia and Adam. The judgment was by consent, allowing the widow, Susan H. Whetstone, to have set apart to her, as her dower and homestead, 200 acres of land, with the dwelling house, and requiring the balance of the land, about 900 acres, after being divided into 100-acre lots or parcels, to be sold by the sheriff, and the proceeds, after the payment of costs and counsel fee, to be applied to the payment of debts. The son Adam died in the year 1896, unmarried and childless. Then the mother, Mrs. Susan H. Whetstone, died in 1898. In the year 1899, the plaintiff, Eugenia, who had intermarried with one Thomas S. Rice, brought her action against F. M. Bamberg, as defendant, to recover some 182 acres of land, on the ground that she was not a party to the suit of her mother, just above described, and as a devisee under her father's will she was entitled to the same; the life tenant, her mother, being dead, and her brother, Adam, having died before her mother, unmarried and without issue. The defendant admitted that he was in possession of the land, but invoked the protection of the statute of limitations, and also that there must be some mistake in the judgment roll of the action of Susan H. Whetstone, executrix, as plaintiff, against John Whetstone et al., as defendants, of August, 1872, as to the service upon the infants, Eugenia and Adam Whetstone, of the summons and complaint therein; also, that the power of sale in the will conferred upon Susan H. Whetstone should be considered as exercised when she obtained the sale thereof through the court of common pleas. There was a trial of these issues before Judge Gage and a jury, which resulted in a verdict for the defendant; but the Supreme Court of this state ordered a new trial on account of the mistake of the circuit judge in ordering the jury to pass upon the documentary evidence without first passing upon and construing said documents himself. See *Rice v. Bamberg*, 59 S. C. 498, 38 S. E. 209. The action came on for trial before Judge Ernest Gary and a jury at the spring term of 1903. When the plaintiff closed her testimony, a motion was made for nonsuit, which was re-

fused. At the conclusion of the testimony the presiding judge directed the jury to return the following verdict: "We find for the plaintiff the land in dispute"—which was done. After entry of judgment, the defendant appealed upon the following grounds:

"(1) Because his honor erred in refusing the nonsuit, and in directing a verdict for plaintiff, as under the will of John M. Whetstone, at the death of Adam, John C. Whetstone became a tenant in common with plaintiff, and she could not recover as sole plaintiff, the interest of John C. in Adam's interest having passed under the sale. (2) Because, under the will of John M. Whetstone, Adam took a vested interest in fee simple at the death of testator; and, dying without issue, at his death his interest went to his mother and the plaintiff in common, and under the sale in question the mother's interest passed to defendant. (3) Because, if the interest of Adam and that of plaintiff was a fee conditional, it was barred by the sale made by the life tenant. (4) Because, it being shown that the land in question was the western portion of China Grove, the sale should be referred to the power in the will, and upheld as a sale to pay debts. (5) Because the fact that the executrix went into court, seeking the aid of the court in carrying out the will, to sell these lands for the payment of debts, was not sufficient to prevent such sale from being referred to the power in the will. (6) Because the decree in *Whetstone v. Smith et al.*, having been made as a consent decree, was the act of the parties, and, being the act of the executrix, the sale under it was her sale, and should be upheld under the power in the will. (7) Because a verdict for plaintiff should be directed only in a case where there is no testimony to support a verdict for defendant; and Gen. Bamberg having testified that he was advised by Maj. Izlar that the title to this land was good, and Maj. Izlar having testified that if he so advised, which was quite probable, he did so after examining the record in *Whetstone v. Smith*, and finding it complete, by which he meant everything which a practicing attorney thought necessary, and Mr. Simms having testified that the record had been out of its proper place for a year or two, and had been called for and examined by various parties, this testimony, if believed by the jury, was sufficient to support a verdict for defendant, and his honor erred in directing one for plaintiff. (8) Because, under the foregoing testimony, the jury would have been warranted in finding that when Maj. L. T. Izlar examined the record he found evidence of personal service on the infants, and, if so, the verdict should have been for the defendant. (9) Because his honor erred in sustaining the objection to the question propounded to Maj. Izlar as to whether, if he had found the record as it now is, with the only reference as to the service of the summons the indorsement thereon, he would have advised that the title was good

and saying, 'No, sir, you can't impeach a record that way.' (10) Because this question was not intended to impeach a record, but to remedy a defect therein by supplying testimony from which the jury should infer that the evidence of proper service once existed and had been lost."

We will now examine these exceptions in the groups as set out in the argument of John R. Bellinger, Esq.

The first, second, and third grounds refer to the alleged error of the circuit judge in refusing the motion of defendant for a nonsuit at the close of plaintiff's testimony. We must recall the fact that the sale of the lands of John C. Whetstone, deceased, took place in the year 1872. Clearly, whatever estate Mrs. Susan H. Whetstone had at that time, or which she asserted she had, passed to the purchasers of such real estate at said sale. She was a devisee under the second clause of her husband's will of a life estate in his China Grove plantation for life only, and under the fourth clause of said will she was a devisee of all the rest of her husband's lands in fee simple. If she elected not to take these devises, but to claim homestead and dower, and these were provided for by the decree as 200 acres of land, the balance of the lands, some 900 acres, were free from her claim of dower and homestead. It must be remembered that the remainder of said China Grove plantation was vested in her two children, Eugenia and Adam. She had no interest in the vested estates of Eugenia and Adam at that time. The old maxim is that no one is an heir of a living person. But when Adam died, in the year 1898, she, with Eugenia, her daughter, were seised of any estate that Adam had. The brother John Whetstone, being only a half-brother of Adam, could not inherit from Adam while his mother and sister of the whole blood were alive. Then, at the death of Mrs. Susan H. Whetstone, her daughter, Eugenia, alone inherited any estate she had as derived from Adam. But it is suggested in argument that any share Susan H. Whetstone had would be cast to the purchasers at the sale in 1872. We have just answered this by showing that Mrs. Whetstone at the time had no interest or estate in the remainder in Eugenia and Adam. Indeed, she had renounced all claims under her husband's will. These exceptions are overruled.

Exceptions 4, 5, and 6 relate to the defense that the defendant, having become the owner, through succession or purchase, of the lands now sought to be recovered, as the western part of the China Grove plantation, which the executrix was authorized to sell in the event the sale of the steam sawmill did not provide funds enough to pay the debts, has the right to claim the sale by the court as the exercise of the power of sale by Susan H. Whetstone, as executrix. The record of the action instituted by Mrs. Susan H.

Whetstone, as executrix, against the creditors and the children of John C. Whetstone, deceased, as defendants, shows that not only the western part of the China Grove plantation was sold, but all the lands of testator, some 1,100 acres, were sold under the judgment in that action. Thus it is manifest that defendant's contention is these particulars cannot be sustained. These exceptions are overruled.

We will next consider the seventh and eighth exceptions, referring, as they do, to alleged assumption of power by the circuit judge to direct the jury to find a verdict for the plaintiff. In *Evans v. Chamberlain*, 40 S. C. 104, 18 S. E. 213, this court held that, if there was any pertinent testimony for the plaintiff, the case must go to the jury. Again, this court held in *Nicholls v. Hill*, 42 S. C. 28, 19 S. E. 1017, that, where no issues of fact were involved, the judge may direct a verdict. There were no issues of fact here presented—only issues of law. It was the duty of the circuit judge to direct a verdict. There were no contests as to parties. There was no question as to the lands in defendant; no question as to documentary evidence, except as we shall hereafter refer to Major Izlar's testimony, which we will hereinafter show was utterly incompetent. These exceptions are overruled.

Lastly, we will pass upon the ninth and tenth exceptions, relating, as they do, to the alleged error of the circuit judge in refusing to allow Maj. Izlar, a witness for the defendant, to answer the question whether, if he had found the record as it now is, with the only reference as to the service of the summons as that indorsed thereon as accepted by Mrs. Whetstone, he would have advised that the title was good. It will be observed that in Maj. Izlar's testimony he nowhere says that he remembers having examined this record. All he says is that, if the defendant says he did, he probably did so. Now, can a witness, who has no recollection of this record, testify as to its condition? Such a paper as defendant wished to establish was one that showed that the two infants, Eugenia and Adam, were served personally with summons. No witness has testified that any such paper ever existed. It was necessary to prove that such paper once existed. On the contrary, the only service proved by the record was that accepted by Mrs. Susan H. Whetstone, their mother, while they were infants. The former decision in this very case (59 S. C. 498, 38 S. E. 209) expressly decides how the service of a summons upon an infant should be made, viz., personally upon the infant. Maj. Izlar disclaimed any knowledge. Defendant sought to substitute Maj. Izlar's inferences in the place of knowledge. This he could not do. These exceptions are overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(68 S. C. 212)

PARK v. CITY OF LAURENS.

(Supreme Court of South Carolina. March 11, 1904.)

CITIES—LIABILITIES—SERVICES OF ATTORNEY—PRIVITY OF CONTRACT.

1. Where a citizen of a city employed an attorney to sue to compel performance by city officers of certain duties neglected by them, and the suit resulted in bringing funds into the city treasury, it did not create an implied contract on the part of the city to pay such attorney for his services.

Appeal from Common Pleas Circuit Court of Laurens County; Benet, Special Judge.

Action by James B. Park against the city of Laurens. From an order overruling a demurrer, defendant appeals. Reversed.

The following was the complaint:

"The complaint of the above-named plaintiff respectfully shows unto the court:

"(1) That the plaintiff herein is now, and was at the times hereinafter named, an attorney at law, residing at Greenwood, in the county of Greenwood, in the state of South Carolina.

"(2) That the defendant herein is now, and was at the times hereinafter named, a municipal corporation created under the laws of the state of South Carolina, and is known as and called the 'City of Laurens.'

"(3) That on or about the 1st day of November, 1898, this plaintiff, as the attorney of J. H. Garrison, a citizen and taxpayer of the said the city of Laurens, commenced an action or proceeding in the Supreme Court of the state of South Carolina, for the benefit of the said J. H. Garrison and all other citizens and taxpayers of the said the city of Laurens, against the municipal officers of the said the city of Laurens and the city of Laurens and the Laurens Cotton Mills, a corporation situate within the corporate limits of the said the city of Laurens, wherein the said J. H. Garrison, among other things, sought to have an ordinance or resolution theretofore passed by the city council of the city of Laurens, exempting the Laurens Cotton Mills from taxation for a period of twelve years, declared unconstitutional and void, and for a writ of mandamus against the corporate officers of the said the city of Laurens, compelling them to collect the back taxes at that time due by the said Laurens Cotton Mills, and thereafter levy and collect from the said Laurens Cotton Mills each year the taxes that should become due upon its property situate within the corporate limits of the said the city of Laurens.

"(4) That thereafter such proceedings were had in the said action in the Supreme Court as resulted in a decision declaring the said ordinance or resolution void, and compelling the municipal officers of the said the city of Laurens to levy and collect from the Laurens Cotton Mills the unpaid taxes for the years 1896 and 1898, and to levy and collect each

year thereafter for the balance of the twelve years taxes upon the property of the Laurens Cotton Mills situate within the corporate limits of the city of Laurens.

"(5) That in the said proceedings the plaintiff asked that, inasmuch as all the citizens and taxpayers of the city of Laurens would be benefited by the said action, a reasonable attorney's fee be allowed this plaintiff for the bringing of the said action; but, before the said action was ended and a decision rendered, W. R. Richey, Esq., then the mayor of the city of Laurens, and also attorney of record for the municipal officers of the city of Laurens and said the city of Laurens in the before-mentioned action or proceeding in the Supreme Court, charged with the management and in full control thereof, assured this plaintiff that if he would abandon his claim for a fee by the Supreme Court, and would present a claim for services rendered to the city council of the city of Laurens, a reasonable fee would be allowed this plaintiff for the bringing of the said action.

"(6) That, in bringing the said action or proceeding in the Supreme Court, the said J. H. Garrison, suing for the benefit of himself and all other citizens and taxpayers of the city of Laurens, was the representative of the city of Laurens, and the said action was brought by the said J. H. Garrison, a citizen and taxpayer, because of the refusal, neglect, and failure of the corporate officers of the said the city of Laurens to perform the duties imposed upon them by law, and levy and collect the taxes due by the Laurens Cotton Mills.

"(7) That the city of Laurens, as a direct result of the said action or proceeding, has received as taxes from Laurens Cotton Mills for the years 1896 and 1898 more than \$2,000, and for the years 1899, 1900, 1901, and 1902, since the decision in the said action or proceeding, more than \$8,000, and will receive at the same rate for the exempted period over \$10,000 more, so that as a result of the said action or proceeding the city of Laurens, for the benefit of her citizens and taxpayers, will receive more than \$20,000.

"(8) That, relying upon the assurances of W. R. Richey, Esq., the then mayor of the city of Laurens, and the authorized attorney of record for the said municipal officers of the city of Laurens and said the city of Laurens, this plaintiff abandoned his claim for the allowance of a fee by the Supreme Court in the said action or proceeding, and, in accordance with the said assurances, demanded of the proper officers of the city of Laurens a reasonable fee for the said services, and the same has been refused.

"(9) That the sum of \$2,000 is a reasonable fee to this plaintiff for the services rendered the said the city of Laurens.

"Wherefore the said plaintiff demands judgment against the said defendant the city of Laurens for the sum of \$2,000 and the costs of this action."

The defendant demurred on the ground that the complaint does not state facts sufficient to constitute a cause of action, in that:

"(1) The complaint shows on its face that the plaintiff was never employed to perform the services set out therein by the city of Laurens.

"(2) No contract, either express or implied, is shown in the complaint between the plaintiff and the city of Laurens, but, on the contrary, the complaint shows that the services therein alleged were performed by the plaintiff at the request of his client, J. H. Garrison, in an action against the mayor and aldermen of the city of Laurens.

"(3) That the complaint does not show any promise on the part of the defendant to pay for the services rendered, but simply alleges that W. R. Richey, Esq., who was then mayor, promised to see plaintiff paid, which was entirely without consideration, and in no event could bind the defendant."

A. O. Todd, for appellant. F. B. Grier (J. F. J. Caldwell, of counsel), for respondent.

WOODS, J. The city of Laurens undertook to exempt the Laurens Cotton Mills from taxation. J. H. Garrison, a resident and taxpayer of the city, filed his petition in this court, alleging such exemption to be unconstitutional, and asking for a writ of mandamus compelling the city council to collect the taxes. The city council and the cotton mill both opposed the granting of the relief sought. After litigation, the writ of mandamus was issued. The plaintiff in this action, who was employed by Garrison as his attorney, and conducted the litigation for him in that proceeding, now brings his action against the city of Laurens for his reasonable fees, alleging, first, that the city expressly, through its mayor and attorney, agreed to pay his fees; and, second, that his client, J. H. Garrison, suing for the benefit of himself and all other citizens and taxpayers of the city, was in the litigation the representative of the city, because of the neglect and refusal of the city council to perform the duty of collecting the tax required of it by law, and that through his efforts large sums have come into the city treasury. The defendant demurs on the ground that the complaint does not state facts sufficient to constitute a cause of action, in that it does not state an express contract with the city, but with its mayor and attorney, which was not binding on the city, because made without authority and without consideration, and in that it does not state an implied contract with the city, but, on the contrary, that the plaintiff's services were rendered to his client, Garrison, in an action against the mayor and aldermen of the city and the city itself. The complaint and the demurrer are set out in full by the reporter. The circuit judge overruled the demurrer.

The allegations of the complaint as to the

express contract are contained in the fifth paragraph:

"That in the said proceedings the plaintiff asked that, inasmuch as all the citizens and taxpayers of the city of Laurens would be benefited by the said action, a reasonable attorney's fee be allowed this plaintiff for the bringing of the said action; but, before the said action was ended and a decision rendered, W. R. Richey, Esq., then the mayor of the city of Laurens, and also attorney of record for the municipal officers of the city of Laurens and the said city of Laurens in the before-mentioned action or proceeding in the Supreme Court, charged with the management and in full control thereof, assured this plaintiff that if he would abandon his claim for a fee by the Supreme Court, and would present a claim for services rendered to the city council of the city of Laurens, that a reasonable fee would be allowed this plaintiff for the bringing of the said action."

The consideration alleged is adequate. It is quite immaterial whether the plaintiff would or would not have been allowed his claim in this court under the mandamus proceeding. The settlement of pending litigation was a valuable consideration.

The act incorporating the city of Laurens is a public act, and the court must take judicial cognizance of it. The charter of the city does not confer upon the mayor the power to make a contract for services, and therefore his agreement in that capacity could not be sustained as a valid exercise of official authority, binding on the city. We do not think there is any allegation of special authority conferred upon him by the city council. Reliance is placed on the statement in the complaint that Mr. Richey, the mayor and attorney of record of the city council and of the city of Laurens, was "charged with the management and in full control" of the mandamus proceeding; but it plainly appears from the context that this is no more than an allegation that by virtue of his office as mayor, and as attorney of record for the city council and for the city, he was charged with the management and full control of the proceeding. These relations do not imply authority to make a contract to settle the cause, or allow attorney's fees to opposing counsel. Special authority from the city council to Mr. Richey should have been alleged.

It is well settled that there is no ground to imply a contract where the parties have agreed upon an express contract covering the same subject-matter. *Wood v. Ashe*, 1 Strob. 407; 15 Am. & Eng. Ency. of Law (2d Ed.) 1078. Having found, however, that no express contract with the city of Laurens is alleged, it is necessary to consider the allegations as to implied contract. The conclusion as to the allowance of attorney's fees drawn from all the decisions in this state is that there must be a contract, express or implied, with the party to be charged, or with his representative. *Nimmons v. Stewart*, 13 S. C.

445; *Hand v. R. Co.*, 21 S. C. 162; *Westmoreland v. Martin*, 24 S. C. 239; *Ex parte Lynch*, 25 S. C. 200; *Hubbard v. Camperdown Mills*, 25 S. C. 496, 1 S. E. 5; *Ex parte Fort*, 36 S. C. 25, 15 S. E. 332. See, also, *Rives v. Patty* (Miss.) 20 South. 862, 60 Am. St. Rep. 510; *Attorney General v. North American Life Insurance Co.*, 43 Am. Rep. 648; *Grant v. Lookout Mountain Co. (Tenn.)* 28 S. W. 90, 27 L. R. A. 99; *Trustees v. Greenough*, 105 U. S. 533, 26 L. Ed. 1157. The difficult questions are, who is a representative, and what circumstances imply a contract?

All cases here and elsewhere in which fees have been adjudged to an attorney on the ground of representation were equity causes, where the court had actual charge of the money or other property from which the fees were allowed. We have not been able to find any cause where the action of an attorney for fees against an individual or a corporation has been sustained on the ground that such individual or corporation had an interest in, and was benefited by, a suit instituted at the instance of another person and in his name. When municipal officers refuse to perform their plain ministerial duty, any citizen interested is allowed to put the machinery of the courts in motion to require the performance of such duty, because of his own interest in its performance; but it would be stretching the doctrine of representation very far to hold that in such case he was the representative, agent, or trustee of the corporation, in the sense that his attorney could bring a direct action against the city for his services. This would be equivalent to holding that the municipality, and, through it, every one of its citizens, should be forced to accept the moving party as the municipal representative in an action which they might not sanction. We do not think it is a sufficient answer to this objection to say the attorney of the party instituting the proceeding should be paid by the city only when funds come into the city treasury, or it acquires property as the result of the proceeding. Even where there is a strict legal right, the municipal authorities may regard its enforcement injurious or impolitic, and may be supported in this view by the citizens generally. In that case one interested may nevertheless set the machinery of the law in motion to enforce his right as a citizen to have the council perform a legal duty, and the judgment of the court, made in recognition of the rights of such citizen to have the legal duty performed, may confer, from the legal standpoint, great benefit on the municipality, and through it on its citizens; but it does not follow from this that the city is legally bound to recognize the actor in such proceedings as its representative in the litigation, whose reasonable contracts for attorney's fees and other expenses of the litigation would be the city's contracts. To sustain such a proposition would be taking a very long step in advance of any precedent on the subject of im-

plied representation that has been cited in argument, or that we have been able to find. We do not say that no case could arise where a citizen would be entitled to reimbursement from the city of funds expended as attorney's fees or otherwise in maintaining a suit for its benefit. The sole question we are called upon to decide in this case is whether the conduct of this litigation by the plaintiff under contract with Mr. Garrison implied a contract between the city and the plaintiff upon which he could bring a direct action. We are obliged to hold that there was no privity of contract between the city and the plaintiff, and therefore the action cannot be sustained.

To avoid misunderstanding, it may be well to say the right of Garrison to bring his action for counsel fees and other expenses, on the ground that he made these disbursements in securing a public municipal right which the city council refused to enforce, is not here involved. Such an action would in no wise depend upon any claim to represent the city of Laurens or its council, such as is alleged in this complaint, but, if it could stand at all, would have to rest on the principle thus laid down in *Keener on Quasi Contracts*, 341: "Where an obligation is imposed by law upon a person to do an act, because of the interest which the public has in its performance, it would seem that, on the defendant's failure to perform, a person performing the same with the expectation of receiving compensation should be allowed to recover against the defendant." We allude to this subject merely to make clearer the views expressed as to this case, and with no intention of intimating an opinion as to whether the facts of this transaction would sustain such an action.

The judgment of this court is that the judgment of the circuit court be reversed, with leave to the plaintiff to move in the circuit court to amend his complaint by alleging express authority in Mr. Richey, the mayor and attorney, to make the contract set out in the fifth paragraph of the complaint, or to amend the complaint in any other particular as he may be advised.

(55 W. Va. 226)

DORR v. CAMDEN.

(Supreme Court of Appeals of West Virginia.
March 8, 1904.)

DUTIES OF AGENT—INFORMATION ACQUIRED— CONTINGENT FEE—COMPENSATION —NEW TRIAL.

1. Neither agents or subagents nor attorneys or assistants thereto can withhold from principal or client information acquired by them in the exercise of such agency or attorneyship, and use the same to extort an increased compensation from such principal or client, or coerce such principal or client into a contract he would not enter into upon full information.

2. To sustain a contingent fee it must be shown that no unfair advantage was taken of

¶ 2. See *Attorney and Client*, vol. 5, Cent. Dig. § 351.

his client by the attorney, but that the same was entered into by the client, after full knowledge of the facts and circumstances, for legal services of skill, judgment, and ability of a character to justify a contract for such contingent fee. Ordinary services requiring no legal ability are not a sufficient consideration for such fee wholly disproportionate thereto.

3. When the services rendered are not of such character as to furnish consideration for a contract for a contingent fee unfairly obtained from a client, the attorney may recover for the value of his actual services rendered his client upon pleadings and proofs justifying such recovery.

4. When the court has improperly instructed the jury as to the law governing the facts as shown in evidence, a verdict in accordance with such instructions should, on motion of the prejudiced party, be promptly set aside, and a new trial granted.

(Syllabus by the Court.)

Error to Circuit Court, Wood County; L. N. Tavenner, Judge.

Action by C. P. Dorr against J. N. Camden. Judgment for defendant. Plaintiff brings error. Affirmed.

Van Winkle & Ambler, S. V. Woods, W. E. Haymond, and John H. Holt, for plaintiff in error. George E. Price, for defendant in error.

DENT, J. C. P. Dorr, plaintiff, complains of the judgment of the circuit court of Wood county bearing date on the 12th of January, 1903, in favor of Johnson N. Camden, defendant, setting aside the verdict of a jury in favor of the plaintiff for the sum of \$15,972.61, and granting the defendant a new trial. The gist of the action is stated in the declaration as follows, to wit:

"And for this, also, that heretofore, to wit, on the — day of —, 1890, the said defendant claiming a right to certain lands, the legal title to which was in one William S. Dewing, which lands lie in the counties of Greenbrier, Nicholas, and Webster, in the State of West Virginia, and lying within the boundaries of certain lands known as the 'Caperton Lands,' and the said plaintiff then and there being an attorney at law duly licensed and practicing under the laws of West Virginia, having a knowledge of the facts and circumstances connected with the transactions as to said land, and the rights thereto, which were of value to the said defendant, the said defendant then agreed with the plaintiff that he (the plaintiff) should furnish him the said information and certain assistance in proceeding for the recovery of the said land, to wit, should furnish the said defendant information of certain facts which were necessary in the preparation of the proper pleadings in such proceeding, and information as to obtaining the proof necessary in such proceeding, and that he (the said defendant) would pay the said plaintiff the sum of one dollar per acre for every acre that he (defendant) should recover of the said land; and he (the defendant) then and there faithfully promised the plaintiff to pay him the said sum of one dollar per acre for

every acre so recovered, in consideration of the said assistance and information."

This undoubtedly shows a good cause of action free from maintenance or champerty. It is for compensation for services to be rendered, and for information to be given in support of defendant's suit, to be contingent upon and measured by the extent of defendant's final recovery, and, if plaintiff had sustained it by proof limited to such allegations, his right of recovery would have been unquestionable. He was to have no share or portion in the thing to be recovered, but his compensation was to be in proportion to the extent thereof; and it must be viewed as alleging, in effect, a contract between an attorney and his client for a fee contingent in amount on the extent of the recovery. *Anderson v. Caraway*, 27 W. Va. 385.

This action is a sequence to the suits of C. P. Dorr v. Dewing & Sons, 36 W. Va. 466, 15 S. E. 93; *Dewing & Sons v. Hutton*, 40 W. Va. 521; *Hutton v. Dewing & Sons*, 42 W. Va. 691, 26 S. E. 197; *Dewing & Sons v. Hutton*, 48 W. Va. 578, 37 S. E. 670; and *Camden v. Dewing & Sons*, 47 W. Va. 310, 34 S. E. 911, 81 Am. St. Rep. 797. The principal actors in all this comedy of errors, of which this seems to be the last scene or postlude, are A. H. Winchester, Elihu Hutton, Bernard J. Butcher, and C. P. Dorr, plaintiff, acting as attorneys and agents for Dewing & Sons and Johnson N. Camden, defendant. A. H. Winchester was the confidential and secret agent of Dewing & Sons, of Kalamazoo, Mich., sent into the state of West Virginia to buy timber lands for his principals. When it came to purchasing what is known as the "Gauley Lands" he took into partnership with him Elihu Hutton and Bernard L. Butcher. This partnership, finding Mr. Camden, the defendant, engaged in taking options upon and acquiring lands in the Gauley region, where they designed to make their purchases, entered into a contract with the defendant, for the purpose of avoiding competition and securing their lands at a very low rate, that if he would turn over to them his options, and abandon the region to them, they would purchase for him certain large tracts of land containing 13,366 acres, now involved in the suit, and lying within what is known as the "Caperton Survey," and charge him therefor only the actual price and expense of obtaining the same. Mr. Winchester employed the plaintiff as attorney and agent to assist in buying and securing the title to these lands, both for the partnership and for the defendant. He was fully aware that these lands were being purchased for the defendant. The defendant faithfully complied with his partnership contract, and the partnership, by reason thereof, with the aid and assistance of their attorney, the plaintiff, were enabled to purchase in this Gauley region about 55,000 acres of land, including defendant's, at a little more than one dollar per acre. Excluding their purchases

for defendant, they amounted to over 40,000 acres. After these purchases were completed, Butcher having withdrawn from the partnership, Dewing & Sons take the place of Winchester, pay the purchase money for these lands, and then buy out Hutton by agreeing to pay him the rate of 50 cents per acre. William S. Dewing, acting in behalf of Dewing & Sons, agreed to take the place of Winchester, and to carry out all agreements, contracts, and understandings, in good faith, of the former partnership. Having purchased Hutton's interest, Dewing & Sons insisted that all these lands should be conveyed to them, and that they would hold the defendant's lands in trust for him, and to be conveyed to him on payment of the purchase money and expenses. The plaintiff, not having been paid for his services in full by Winchester, sued Dewing & Sons for the balance due him, and obtained a decree therefor amounting to \$7,100, which decree was affirmed by this court. The defendant, not having received his portion of the lands according to his contract, and having learned that the title thereto had been invested in Dewing & Sons, demanded the same from Dewing & Sons, and, they refusing to convey the same, was preparing to institute suit to enforce the contract between himself and Winchester, Hutton, and Butcher, and of which they and Dewing & Sons had received the full benefit, enabling them to make thousands of dollars that they might not otherwise have made. The plaintiff, being employed by Winchester, Hutton, and Butcher to assist them as agent and attorney in carrying out their contract with and for the defendant, and having received a handsome compensation for his services in behalf of the defendant, approached the defendant in company with Mr. Hutton, and proposed to the defendant, to use his own language: "If you will give me two dollars an acre, I will see that you get the facts sufficient to recover this land"—meaning the land that he had assisted Mr. Winchester, Mr. Hutton, and Mr. Butcher in acquiring for the defendant, and for which service he had been paid by Dewing & Sons. According to the plaintiff's testimony, the defendant replied to this proposition: "Other people are interested with me, and I would have to pay the purchase money, and I will give you one dollar an acre for all the land I will recover in a case of that kind." He says, "I will take it." Plaintiff then told Mr. Hutton, in defendant's presence, that he would give him one-half the amount if he would aid him, to which Mr. Hutton assented. This is the contract on which this suit is brought. It is simply an agreement by an attorney to furnish the facts to secure a recovery, provided he receives compensation proportionate to such recovery. It is, in other words, a proposition by defendant's agent and attorney to furnish him information that this agent and attorney had acquired while acting as his agent

in procuring these same lands for him, and for which he had received full compensation, but which had not vested according to contract, such information to be used in completing such contract according to the true tenor and effect thereof.

This proposition is innocent enough in itself, but it has no consideration to support it. This information, possessed by his agents and acquired by them in complying with this very contract, belonged to the defendant as a matter of law, and these agents had no right to charge him therefor, or make merchandise thereof at his expense. It may be said that the agency, especially that of Dorr, was at an end. Agency never ceases, in so far as the knowledge and information acquired by the agent in carrying out the same is concerned, until the contract which rendered the agency necessary is fully consummated, or the purpose which gave rise to the agency has been attained. While Dorr was not a party to the contract, nor obligated to see that it was fully carried out, yet, having been employed by Winchester as attorney and agent to aid in carrying it out, to the full extent and scope of his employment, he became as fully the defendant's agent as Winchester, Hutton, and Dewing, and the information thus acquired by law belonged to his principal without money or reward other than he had already received for his services rendered. As shown in evidence, the only testimony that Dorr proposed to produce besides his own, for which he had no right to charge, was that of Winchester, Hutton, and Butcher, defendant's agents to carry out this very contract, all of whom were under obligation, and had been fully compensated, to see that it was consummated. Therefore, neither the testimony of plaintiff nor of these other agents furnish any consideration for plaintiff's alleged contract.

"Assumpsit will not lie to recover money promised for doing that which it was the parties' duty to do without reward, for it is extortion and illegal." "So this action, being an equitable one, cannot be supported where the assumpsit arises from an unconscientious demand." 2 Tuck. 134, 135. In obtaining these lands for the defendant, Dewing & Sons, Winchester, Hutton, Butcher, and Dorr all acted as agents for the defendant and received compensation therefor, and now Dorr, one of these agents, demands a further compensation to furnish the necessary information growing out of the agency to enable the principal to compel the other agents to fulfill the contract under which they were all acting. This is an unconscientious demand unsupported by a good legal consideration. 6 Am. & En. En. Law (2d Ed.) 752. Not only is this true, but this alleged contract was obtained by open collusion between Dorr and Hutton, both of whom had been acting as agents for the defendant and under contract to secure these lands for him. By open collusion I mean they went together into the defendant's

presence, and while the proposition was not made jointly to him, yet he was informed that Hutton was to participate in the additional compensation to the extent of one moiety thereof. Hutton had all the information the defendant needed, and he was under legal obligation to furnish it to him, and to see that he obtained the title to his lands from the parties whom Hutton had constituted trustee thereof for defendant's benefit, and, if it took any additional compensation to obtain the lands, Hutton was in duty bound to pay it in order to carry out the contract in good faith.

All the knowledge of the agent belongs to the principal, and he has no right to use it for his own benefit to extort money or other thing from his principal. 1 Perry on Trusts, § 206. This same rule applies to attorneys at law. In 1 Perry on Trusts, § 202, it is said: "The client is so completely in the hands of the attorney in relation to the subject-matter of litigation that it would be almost impossible for him to enter into a free and fair contract in regard to it." "This disability of an attorney continues as long as the relation of attorney and client continues, and as much longer as the influence of the relation can be supposed to extend. If the relation has ceased, but the influence of the relation continues to affect the minds of the parties, all contracts made under the influence will be avoided." Also, in section 206: "Whatever an agent may be employed to do, he cannot use his position, nor the knowledge obtained by his employment, to obtain a bargain from his principal." If he does, such bargain will be held invalid for undue influence. 27 Am. & En. En. Law, 477. In the present case, the plaintiff and Hutton, having been agents to acquire these lands for the defendant, and without giving him the information with regard to the lands he was entitled to have through Dorrr alone, advised the defendant they had the necessary information to acquire these lands for him, which he had already fully compensated them for acquiring, if he would agree to pay Dorrr one dollar per acre for every acre recovered, to be divided between himself and Hutton. By this proposition, under the circumstances, defendant was placed in a very unfair position. He knew his case depended upon the evidence of these, his agents, together with his other two agents, Butcher and Winchester, to some extent at least, unknown to the defendant. If he rejected their proposal outright, they could give him much trouble, and probably succeed, if they made up their minds to do so, in depriving him of his lands altogether. They seemingly already having broken faith with him, he was placed in the quandary of accepting an unjust contract or of running the risk of losing his lands, and he might have been thereby driven to say such things as led them to believe that he accepted their proposition, and which, as between strangers dealing at arm's length, would make a valid contract.

Subagents and assistant attorneys are the agents and attorneys of the principal and client, it matters not by whom they are employed, and are subject to all the obligations of agency or attorneyship toward their principal or client, in so far as the information acquired by them during the exercise of the agency is concerned. Neither agents nor attorneys can withhold information acquired by virtue of and in the discharge of the duties of such agency or attorneyship, and use it for the purpose of extorting from principal or client, to whom such information belongs as a matter of right and law, an increased compensation for doing that for which they had already been fully compensated.

It may be urged that there is included in the contract the future service of Dorrr as attorney, as Mr. Hutton says, in setting up the proof and getting the same in shape so a recovery might be had, which would furnish a sufficient consideration to sustain the contract for a contingent fee. In 5 Am. & En. En. Law (2d Ed.) 827, the principle of law governing contingent fees is given as follows: "It may be stated as a well-grounded rule that a contract for a contingent fee must be made in good faith, without suppression or reserve of fact or apprehended difficulties, or undue influence of any sort or degree; and the compensation bargained for must be absolutely just and fair, so that the transaction is characterized throughout by all good faith to the client." Where an attorney suppresses the facts of the case, or uses any unfairness in securing a contract of this character, it will be held invalid, and, if he has rendered any service in carrying out such contract, he will be remitted to a recovery on a quantum meruit. *Chester County v. Barber*, 97 Pa. 455; *Stewart v. Houston & R. Co.*, 62 Tex. 248. A contingent fee is only permitted to attorneys as reward for skill and diligence exercised in the prosecution of doubtful and litigated claims, and is not allowed for the rendition of mere minor services which any layman or inexperienced attorney might perform. It is the skill, diligence, ability, experience, judicial knowledge, and judgment of the attorney that is thereby rewarded, and the performance of duties that require no such qualities is wholly insufficient to sustain such fee, as the true measure of such services can be ascertained on a quantum meruit.

The evidence of this case clearly shows that the only duty the plaintiff was to perform was to furnish the evidence of himself, Winchester, Butcher, and Hutton, and the record and decision in the case of *Camden v. Dewing* shows the case wholly depended on the evidence of Winchester, Butcher, and Hutton, all of whom were under obligation to the defendant, as his fully compensated agents; to furnish him their evidence free of charge or compensation of any kind whatsoever. It is therefore clear from

the proofs that the plaintiff did nothing requiring skill, diligence, experience, ability, legal knowledge, or judgment, entitling him to a contingent fee for legal services, and, as before seen, the contract, if entered into at all, was coerced from the defendant by the unfair advantage taken of him by his agents withholding from him information that belonged to him.

This brings forward for consideration the question as to whether the contract as alleged is supported by a preponderance of the evidence. To constitute a contract there must be free, mutual assent. 7 Am. & En. En. Law (2d Ed.) 110. As heretofore shown, defendant was placed in an unfair position by the proposers, and was not dealing with them at arm's length. Even with this unfairness it is hard to say that he assented to the proposition made by one of them. The beneficiaries, plaintiff and Hutton, say that he did. He denies, and says he did not, but answered them diplomatically by referring them to his attorney, Mr. Mollohan, who had been engaged to manage the suit for him. The beneficiaries say that after he accepted, and while they were considering the matter as to whether he should sign the writing prepared by the plaintiff, Mr. Mollohan came in, and the matter was referred to him, and he advised against signing any writing, for the reason that they would all have to be witnesses in the case, and it would be dangerous for them to have such contract brought out in evidence. Mr. Mollohan is an attorney of skill and ability, of long experience and high standing in his profession. He testifies that, when the plaintiff offered to show him the writing, he refused to have anything to do with it, and advised the beneficiaries that such contract was not legal, and he then went and advised his client not to enter into or make any such contract. On such points, the beneficiaries on one side, and the defendant and his attorney on the other, plainly contradict each other, while the facts and circumstances plainly preponderate in favor of the latter.

The plaintiff in his evidence, in detailing his conversation with the defendant, starts out with the idea that the defendant knew nothing about the matter, while the fact is at least presumable that he had full information from his agents, Winchester, Butcher, and Hutton, all about the matter, and, if he did not, Hutton was in position to furnish him, and was in duty bound to do so, such information at any time demanded. All he needed to sustain his case was for Winchester, Butcher, and Hutton to stand by him, and he had other lawyers to perform the heavy legal duties of his case. Hence there was not the least necessity for him to enter into such contract, unless it was to prevent his agents from becoming false to him. He was afraid of his agents, and therefore he had to treat them diplo-

matically. It is therefore very plain that both Mr. Mollohan and Mr. Camden, the defendant, testified fully to the truth of the transaction as they understood it, and the facts and circumstances bear them out. Nor can we say that the beneficiaries testified falsely, though contradicted. They went to the defendant to secure a certain contract from him for the information they had acquired about his business. He treated them diplomatically. From his diplomacy they may have inferred assent to their proposition.

But such inference on the consideration proposed will not justify or sustain a contract for a contingent fee, although it might sustain an action for services rendered by reason thereof upon a quantum meruit. It is therefore very plain that plaintiff is not entitled to recover on the special count under an express contract for a contingent fee, as set out in his declaration, and which he has endeavored to sustain in his evidence, but he may be entitled to recover under a general count for the value of the services actually rendered by him. Such invalid contract furnishes no criterion as to the amount that plaintiff will be entitled to recover, if anything. 5 Am. & En. En. Law (2d Ed.) 828.

From what has been said it is plain that the court instructed the jury under a mistaken view of the law, as applicable to the facts, and the court should have sustained the motion of the defendant to exclude the evidence, and direct a verdict for the defendant on the grounds that it did not sustain the special contract set out in the declaration, nor as set forth in the bill of particulars. The circuit court therefore committed no error in setting aside the verdict of the jury and in granting the defendant a new trial. As the plaintiff cannot recover on his alleged contract for a contingent fee, this court would probably be justified in entering a judgment for the defendant were it not that the plaintiff may be entitled to recover in this action, on proper allegations and proofs, for the actual services rendered by him under his invalid contract, or attempt to make a contract, being the actual services rendered by him for the defendant, and of which the defendant enjoyed the benefit.

The judgment is therefore affirmed.

(55 W. Va. 255)

RORER v. HOLSTON NAT. BLDG. & LOAN ASS'N.

(Supreme Court of Appeals of West Virginia. March 8, 1904.)

INJUNCTION—SALE UNDER TRUST DEED—USURY.

1. The grantor in a deed of trust conveying real estate to secure the payment of a usurious debt may, in a suit in equity instituted by him to purge the debt of its usury, after having conveyed the land to a third party by deed with

a covenant of general warranty, enjoin the sale of the property under the deed of trust pending the suit.

2. In such case the jurisdiction to enjoin rests upon the inherent power of the court to maintain its jurisdiction to give full and complete relief between the parties to the main cause of action by preventing either of them from interfering with or obstructing it by proceedings in pais or in a forum other than the one having jurisdiction, and also upon the lack of of any other remedy by which the plaintiff can prevent the defendant from fixing upon him inevitable liability to an innocent third party for a demand which, as between the original parties, may be resisted and defeated on the ground of utter invalidity.

3. In such case it is error to dissolve the injunction in advance of the hearing, unless it appears that the allegations of the bill cannot be, or probably will not be, sustained, or that the plaintiff is not prosecuting his suit with due diligence.

(Syllabus by the Court.)

Appeal from Circuit Court, Mercer County; J. M. Sanders, Judge.

Action by Ernest Rorer against the Holston National Building & Loan Association. Decree for defendant, and plaintiff appeals. Reversed.

Anderson & Easley, for appellant. W. Walter McClaugherty, for appellee.

POFFENBARGER, P. Ernest Rorer borrowed \$800 from the Holston National Building & Loan Association of Bristol, Tenn., on the 15th day of February, 1893, on eight shares of stock in said association, subscribed for by him, executing his bond for said sum of \$800 and a deed of trust upon certain real estate to secure the payment thereof. The bond contained the following condition, which conforms to the provisions of the by-laws of the association, respecting the payment of premium: "Now if I pay promptly the monthly interest on said sum of \$800.00-100 and the monthly premium of \$4.00 bid by me for said loan, and the monthly payments on said shares of stock and any fines assessed under the rules of said association, and the taxes accruing on the lot of land described in the mortgage securing this obligation and the premiums necessary to keep the house on said lot insured in such sum as said association may require (not exceeding \$800.00-100) until the said stock becomes fully paid in and of the value of \$100 per share, then it is understood that, upon the surrender of said stock to said association, this note shall be deemed fully paid and canceled." Rorer paid the dues, interest, premium, and other charges until April 30, 1895, amounting to \$358. In April, 1895, he conveyed the land on which the loan was secured to G. H. Wade, by deed with a covenant of general warranty, for the sum of \$2,500, of which sum Wade agreed, according to the recitals of the deed, to pay \$600 on the building association debt in monthly installments as Rorer had agreed to pay them. After having paid \$739.50 to the building and loan association, Wade ceased to make payments, and the trustee in the deed

of trust advertised the land for sale to satisfy a balance due on the loan of \$567.02. Thereupon Rorer brought this suit to enjoin the sale, charging in his bill usury in the debt, and praying that it be expunged therefrom, and on the 4th day of October, 1902, on motion of the defendant, the injunction was dissolved. The appeal is from the order of dissolution.

The bill treated the property as still owned by the plaintiff, making no mention of the sale to Wade, and the order dissolving the injunction stands upon the answer of the building association, fully proven, showing the conveyance by Rorer to Wade, in consideration of \$2,500. The deed recites that \$600 of the purchase money was to be paid to the building association, and the balance to Rorer in three equal installments secured by deed of trust on the property, but the answer avers an assumption by Wade of Rorer's contract with the building association. It further appears from an exhibit filed with a deposition that Rorer had made a general assignment for the benefit of his creditors on the 23d day of April, 1898. The record does not show any deed of trust from Wade to Rorer, nor, if it did, is there any allegation or proof that any of the purchase money due to Rorer remains unpaid. Wade's affidavit is filed in resistance of the motion to dissolve, and in it he says, "Affiant does not owe the plaintiff anything at all on account of the purchase money mentioned in said Exhibit Deed."

That Rorer may maintain a bill to purge the debt of usury, if it be usurious, is undeniable, and the only question presented is whether he can enjoin the sale. He has no title, either legal or equitable, to the property, nor any lien upon it, so far as appears from this record. Can he enjoin the sale of another man's property for the satisfaction of a usurious debt? No authority for or against such a proceeding has been furnished or found. It is urged, however, that as the plaintiff will be liable to Wade for any sum which he may be compelled to pay on account of this debt in excess of the \$600 which he agreed to pay on it, he ought to be permitted to prevent the sale. But his liability to refund is not an interest or estate in the property, the sale of which is threatened, and he has his remedy against the building association to recover back any usurious interest which he may be compelled to pay. This court held in *Jackson v. Kittle*, 34 W. Va. 207, 12 S. E. 484, that: "As a general rule, a party cannot maintain a suit to remove a cloud or a bill quia timet, who has no other interest than the fact that he has sold the property with a covenant of general warranty; but in a case where evidence is about to be lost, or the party's inertia would result in the perfecting of an adverse title, he is not bound to lie by, but may bring his bill of quia timet." But this case is not within the rule. There a stranger set up, or threatened to assert, an adverse title with which the warrantor had

no connection whatever, and which emanated from no act of his. Here the thing sought to be removed is not a cloud having the semblance of a strange and adverse title, but an incumbrance on the land by act of the warrantor which he has the right, and which it is his duty, to remove, and for which, in case he fails to do it, he must respond in damages to the extent of any excess over the agreed amount which his warrantee may be compelled to pay. Though he has no title to the land, nor any sort of claim upon it, there is a liability upon him in respect to it, which arises out of two acts of his own, the execution of the deed of trust to secure the usurious debt, and the subsequent conveyance to Wade, and from which he can only relieve himself by paying the debt or demonstrating its invalidity or nonexistence. That he seeks to do by this bill. Should he prosecute it to a finality, and obtain an adjudication that the debt has been fully paid, before any sale under the deed of trust, can it be possible that the building association could then sell the land, or that, in the event of an attempt to do so, Wade could not enjoin the sale by proving the adjudication made upon Rorer's bill? That he could do so is too plain and just to call for argumentative support. Having the right to pay the debt, and obviously the incidental right to have the amount of it settled before payment, and the aid of a court of equity to that end in the manner invoked by this bill, namely, by purgation of the usury from the debt, all independently of his grantee, it is manifestly just to allow him to prevent an attempt to sell the property, and cast upon him, in advance and anticipation of the settlement, the very liability from which he seeks to escape, and ought to be relieved, according to the allegations of his bill. It is only in respect to the land conveyed that any liability can be fixed upon the plaintiff, and the only mode of fixing it is by compulsory payment of the usurious debt, and the only method of compelling it is actual or threatened sale under the deed of trust. By enjoining the sale, therefore, the plaintiff interferes with the alleged right of no person except the creditor, and he must either enjoin or permit the usurious interest to be collected, and that from himself, not directly, but indirectly.

The jurisdiction for injunction does not necessarily rest upon irreparable injury to result from the sale of the land, however. Equity has properly taken jurisdiction of the controversy between Rorer and the building association, and, having taken jurisdiction of it, neither party would be permitted to resort to another forum for the determination of any matter involved in that controversy. A resort to a court of law by the building association for any action which would interfere with or obstruct full and complete administration of the equity jurisdiction of the subject-matter would be promptly enjoined, and obedience

to the injunction enforced by attachment for contempt if necessary. *State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153, 94 Am. St. Rep. 932. A sale under the deed of trust, pending the suit to purge the debt of its usury, though not a resort to another forum, is a proceeding in pais which would have all the effect of judgment and execution in another court. As shown by the foregoing observations, it would virtually nullify and defeat, by way of anticipation, the relief sought by the plaintiff in his bill. Without the aid of the injunction, he would be without any remedy at all to prevent the fixing upon him by the building association of a liability in favor of Wade, although not "irreparable injury" in the ordinary sense of those terms, for the injury might be compensable in damages. But it is clearly a case of want of adequate remedy at law, as regards the fixing of this liability.

The case assimilates itself also to that of an injunction to prevent the transfer, before maturity, of negotiable instruments fraudulently acquired. In such case the injury would not be irreparable any more than in this case, perhaps, as the injured party might have his action at law against the payee after having satisfied the notes in the hands of an innocent purchaser for value. But he is without remedy at law to prevent the use of the notes to fix upon him a liability which has no just or legal foundation. Therefore he is allowed to enjoin the transfer and cause the notes to be delivered up and canceled. *Dickenson v. Bankers' Loan & Investment Co.*, 93 Va. 498, 25 S. E. 548; *Devries v. Shumate*, 53 Md. 211; *Hullhorst v. Scharner*, 15 Neb. 57, 17 N. W. 259; *Jervis v. White*, 7 Ves. Jr. 413; *Brumley v. Holland*, 7 Ves. Jr. 20. The settlement of this controversy between the plaintiff and defendant, if the case made by the bill shall be sustained, will put it beyond the power of the defendant to make any sale of the land under the deed of trust, for, if the debt be fully paid, as the bill alleges, then the court, by its final decree, will order a release of the deed of trust. These views show that the circumstance of one man's enjoining the sale of another's land is merely incidental to the exercise of the plaintiff's right to invoke the aid of equity jurisdiction and not the foundation of the right itself. In one aspect of the case, the injunction is a mere process in aid of the court's jurisdiction to give full relief in the main cause. In another, it is a writ to which the plaintiff is entitled on the ground of want of any other adequate remedy.

Though Wade might properly have joined in the prayer for the injunction in view of his ownership of the property, or could have been made a defendant, he had no direct interest in the real controversy between Rorer and the building association,

and it is not perceived that he is a necessary party to the bill for the preliminary injunction. In *Harper v. Middle States Loan, Building & Construction Co.* (decided at this term) 46 S. E. 817, the owner of the property, incumbered by a similar deed of trust, filed a bill for injunction, making the debtor a defendant along with the trust creditor, and the debtor, by her answer, joined in the prayer of the bill, and averred an assignment of her claim for usury to the plaintiff, and this court affirmed a decree expunging the usury, prohibiting the sale, and giving a recovery of money paid in excess of the debt. But the facts in the case were different from those we have here. Wade claims to have paid the association all he agreed to pay, and on his theory there is no necessity for any action on the part of the plaintiff to prevent him from paying over on the usurious debt anything left in his hands for the purpose, as in the case above cited. The answer alleges an assumption on his part of the plaintiff's entire contract with the building association, but there is a right of retraction in the plaintiff as to this. As he may recover the money back after payment, he may prohibit the payment. If, however, Wade should be bound by the final decree so as to settle the rights of all parties interested, which would accord with the general rule that all persons interested in the subject-matter should be parties to a suit in equity, as well as the principle of giving full relief when jurisdiction attaches for one purpose, the failure to make him a party in the first instance was insufficient ground for dissolving the injunction, under the circumstances of the case. It is not too late, however, to bring him in for that purpose at the instance of either party.

Upon the foregoing views, the conclusion is that the court should have overruled the motion to dissolve, and retained the injunction until final hearing, causing all proper amendments to be made as to parties or otherwise. The order appealed from will therefore be reversed and set aside, the injunction reinstated, and the cause remanded for further proceedings.

(55 W. Va. 238)

**L. ROSENTHAL CLOTHING & DRY
GOODS CO. v. SCOTTISH UNION
& NATIONAL INS. CO.**

(Supreme Court of Appeals of West Virginia.
March 8, 1904.)

**INSURANCE—ACTION ON POLICY—BREACH OF
CONDITIONS—PLEADING.**

1. In an action on a fire insurance policy under the declaration prescribed by section 61, c. 125, Code 1899, if the defense is because of failure of the insured to comply with, or his violation of, any clause, condition, or warranty of the policy, though a precedent condition to recovery, no evidence is required of the plaintiff of his compliance therewith, unless the defendant file the statement required by section 64 of said

chapter, specifying the clause, condition, or warranty not kept or violated. When such statement of defense is filed, the burden of proof to show compliance with the clause, condition, or warranty specified in it, if a condition precedent to recovery, is upon the plaintiff. Point 15 of *Schwarzbach v. Protective Union*, 25 W. Va. 622, 52 Am. Rep. 227, overruled.

2. A statement under Code 1899, c. 125, § 64, specifying a clause, condition, or warranty of a policy of fire insurance not complied with or violated by the insured, is not a plea, governed by strict principles, but only a specification, and is not open to demurrer for insufficiency. If too vague, evidence under it may be excluded.

3. A clause in a fire insurance policy binding the insured to furnish for examination books of account, bills, invoices, and other vouchers is a promissory warranty, and compliance with it in case of loss is a condition precedent to recovery, unless waived, or compliance with it is impossible.

(Syllabus by the Court.)

Error from Circuit Court, Tucker County;
John Homer Holt, Judge.

Action by the L. Rosenthal Clothing & Dry Goods Company against the Scottish Union & National Insurance Company. Judgment for defendant. Plaintiff brings error. Affirmed.

C. O. Strieby, for plaintiff in error. Cunningham & Stallings and Will C. Guenther, for defendant in error.

BRANNON, J. In an action of assumpsit in the circuit court of Tucker county by the L. Rosenthal Clothing & Dry Goods Company against the Scottish Union & National Insurance Company to recover for the loss by fire of a stock of goods insured by a policy issued by said company, the court directed a verdict and gave judgment for the defendant, and the clothing company brought the case to this court.

The insurance company claims that there was no evidence given by the plaintiff to warrant a verdict, because the policy contained certain promissory warranties, with which the plaintiff failed to comply, and thus lost its right of action. Warranties in insurance law are of two kinds—affirmative and promissory. Affirmative warranties consist of a representation in the policy of a fact. Promissory warranties are those that require that something shall be done or not done after the policy takes effect. If the one is false, it avoids the policy; and, if a promissory warranty be not executed, this also avoids the policy. 15 Am. & Eng. Ency. L. (2d Ed.) 919, 920; 1 May on Ins. § 157. One warranty in this policy is that, before it should go into effect, the insured should make an inventory of the stock of goods; and another is that they should keep books of account, correctly detailing the purchases and sales. The insurance company claims that the clothing company failed to observe both these covenants, but it cannot have that matter considered, because it did not specify any default as to those covenants in the circuit court. Turning to the Code of 1899, c. 125, § 61, we find a short form of declaration on a policy of insurance, and that was used in this case. In section 64

we see that, under such declaration, "if the defense be that the action cannot be maintained because of the failure to perform or comply with, or violation of any clause, condition or warranty in, upon or annexed to the policy or contained in or upon any paper which is made by reference a part of the policy, the defendant must file a statement in writing specifying by reference thereto, or otherwise, the particular clause, condition or warranty in respect to which such failure or violation is claimed to have occurred." No statements were filed, pointing out failure to comply with the two warranties above specified; but the insurance company would meet this trouble with the argument that, as the making of the inventory and the keeping of books of purchases and sales are conditions precedent to recovery, proof thereof is essential to the plaintiff's case, and compliance with those warranties falls on a plaintiff to prove, and that no statement pointing out noncompliance with them is necessary. It is, no doubt, true that if a common-law declaration is filed, or, rather, by common-law pleading, the plaintiff must allege and prove compliance with those warranties, because they are conditions precedent, and the declaration must aver that the plaintiff complied with them. 11 Ency. Pl. & Prac. 411, 413; May on Ins. § 589. But the statutory form contains no such averment, and dispenses with it, and section 64 plainly renders proof of compliance with them not necessary on the part of the plaintiff, unless a statement is filed by the defendant that those warranties have not been complied with. When such statement is filed, the plaintiff is told wherein he has failed to observe the policy, and then he must prove such observance. The statute does not shift the burden of proof, but it does dispense with proof of observance of a clause or condition when there is no statement calling that particular clause or condition in question. Looking at the broad words of section 64, we cannot say that it applies to some clauses, and not to others. Common-law pleading did require the declaration to aver compliance with conditions precedent, but this statute changes that. It is a remedial statute, and must be liberally construed. Pleadings in insurance cases by common law were complicated and difficult, owing to the many stipulations in policies, and the object of the statute is to simplify. The statute allows the simple form of declaration, and it then provides for a plain plea that the defendant "is not liable to the plaintiff as in said declaration is alleged." That is the general issue, but it does not put the plaintiff on proof of his compliance with all the conditions precedent of his policy. They are very numerous, and, for this reason, in order to eliminate all conditions and clauses not really in issue, and narrow the controversy to those conditions and clauses actually in issue, the Legislature required the insurance company to file a statement as a

specification of the particular clause or condition violated by the insured. All other conditions and clauses not thus brought into actual issue are out of the case. This is just, and the statute should be given such construction. It is the insurance company which complains of default, and it should specify wherein such default consists, and not compel the other party to produce a host of witnesses and ramble over the numerous clauses of the policy. The statute does not change the burden of proof; the plaintiff still carries that as to contested conditions; but it does dispense with all conditions not brought into issue by the defendant, by requiring it to specify the broken clause, condition, or warranty. The case of *Schwarzbach v. Protective Union*, 25 W. Va. 622, 52 Am. Rep. 227, does support the position of the defendant that the plaintiff must prove the making of an inventory, and keeping books of purchase and sales, as on indispensable call of his case, though the defendant has not filed any statement that the clause requiring such inventory and books had not been complied with; but, with great reluctance, we are compelled to overrule point 15 of that case, because it is in the teeth of the statute and emasculates its vigor and effect. To what does the statute apply? To what does it amount, under that decision? That decision is all right under common law, as proof of loss is a condition precedent to recovery, and the declaration must aver it; but the statute dispenses with that averment by the statutory declaration, and no proof of it is required until the plaintiff is warned by a specification that he has failed in complying with the clause requiring it. The case of *Flanagan v. Phoenix Ins. Co.*, 42 W. Va. 426, 26 S. E. 513, by no means supports the position that the plaintiff must prove the precedent condition complied with, without a statement calling for it. It held, as we hold now, that the burden of proof of delivery of proof of loss is on the plaintiff when a statement demands it of him, but not otherwise. There was a statement in that case. I find the case of *Adkins v. Globe Fire Ins. Co.*, 45 W. Va. 384, 32 S. E. 194, holds that the plaintiff need not show proof of loss until the defendant has pleaded failure to furnish it. Here we have two conflicting decisions. Which shall we follow? We think the *Adkins* Case the preferable one, in view of the statute. The same may be said of the iron-safe clause, which the defendant for the first time in this court relies upon.

The defendant filed a statement of the violation of a warranty in the policy that the insured "shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company, and shall permit extracts and copies thereof to be made." The plaintiffs say that this statement did not call for proof of compliance

with this clause, because it simply says, by reference to the lines of the policy containing it, that the plaintiffs did not produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, in case the originals were lost, and did not permit extracts or copies thereof to be made; failing to say that those papers were demanded, and there was a failure to produce them at a reasonable time and place. This argument treats the statement under section 64 as if it were a formal plea, but plainly it is not to be so treated. Look at the section. It will be seen that a formal plea is not contemplated, since all that it requires is a simple statement specifying the particular clause, condition, or warranty violated or not complied with, and it does not require further specification, or that legal certainty required by formal pleading. The office performed by such statement is to tell the plaintiff what particular warranty he must show to have been complied with. It tells him what he must prove according to the common law. By common law he would have to prove compliance with clauses of the policy creating conditions precedent to recovery, and this statute is designed simply to point out the particular one of the many clauses with which he must prove compliance. This is the view taken in *Cappellar v. Queen Ins. Co.*, 21 W. Va. 578, where it is held that such statements are not pleas, and that they cannot be rejected for defects as if pleas, but that, if too vague, advantage is to be taken of such defects by excluding evidence under them. The statement involved definitely specifies the lines of the policy containing the warranty now under discussion, and plainly indicated its substance, and thus called on the plaintiff to prove compliance with that particular warranty singled out by the statement as required by the common law. The *Cappellar* Case holds that such statement cannot be rejected for defects.

Did the plaintiff fail to prove compliance with the warranty requiring the plaintiffs to produce books and papers for examination? The plaintiff firm was composed of Rosenthal, Hillelson, and Kaplan. Hillelson & Kaplan constituted a firm doing business at Buckhannon, and they and Rosenthal formed a new firm—the plaintiffs in this case—to do business at Davis. The stock of goods of the new firm was composed of the goods owned by Hillelson & Kaplan, removed from Buckhannon to Davis, and put into the new firm, and of new goods purchased by Rosenthal as his capital in the firm, and sent to Davis, and united with the goods furnished from Buckhannon by Hillelson & Kaplan, and of additions of new goods purchased at different times. There was no inventory of the goods sent from Buckhannon, amounting to \$5,716. The insurance company demanded inspection of books, bills, and other papers relating to the stock. Rosenthal says he put into the firm upwards of \$6,000 of goods—

exactly \$6,135—and in the proof of loss he says that the three firms of which he bought these goods had gone out of business, and no verification or certification of them could be gotten. Why, he does not say. The firms yet had their books, it is supposed. In his deposition he states that he sent the original bills from the houses to his partner, Hillelson, at Davis. When Hillelson was asked for them, he said that he would not send them to the company, because he was afraid that it might destroy them; that they were valuable papers for the firm, and must be retained for reference. When asked for copies, they furnished only part of them—about half. As to the large fraction of goods in the store furnished by Hillelson & Kaplan from the Buckhannon stock, Hillelson, under oath, admitted that it was impossible to get copies of bills from the parties of whom they bought, and it would entail great labor and expense to get copies of all the goods they had in stock, and from some wholesale houses it would be impossible to get copies at all. Now, here are thousands of dollars for which they furnished no bills, invoices, or inventory for examination. They claimed the stock to amount to \$14,015.50. Of these, only 34 per cent. were purchased of disinterested parties, the balance being furnished by Rosenthal, claimed to be \$3,542.39, leaving more than \$6,000 for which no bills were furnished for examination or on the trial. The bulk of these goods were furnished by interested parties, and, without exhibiting the bills of purchase, they might put their own valuation upon them. No bills for the Hillelson & Kaplan goods were produced for examination. Moreover—what is very important—they did not produce them at the trial, showing that they were unable to comply with this warranty. They were experienced merchants, and knew that due course of business, under policies of insurance requiring the production of bills of purchase when called for, imperatively required, fairly and honestly required, the preservation of bills of purchase, so that in case of fire the insuring company might have some means, from disinterested sources, the wholesale houses, by which to ascertain with reasonable certainty the extent of the loss. The plaintiffs made no efforts to get these bills. They do not show that they were lost. They give no sufficient excuse for nonproduction. They seem to think that the company must pay the loss as fixed by their own estimate, which, at best, under the evidence—under their own evidence—is but guesswork, as they kept no good books or accurate inventory. This appears from the whole evidence in the case. Their evidence is unsatisfactory and discrepant. How material it is that the company, when loss occurs, should have these bills of purchase to go by, in protecting themselves from fraudulent claim or overvaluation by interested parties! This covenant is surely the essence of the con-

tract. None could be more material to the insurance company. The insured party must be always ready to show his loss. Papers that were the best evidence of value were absent when called for, and absent at the trial. The plaintiffs refused to send what appears they had to Cleveland for examination by the company, but demanded that a place in West Virginia be fixed for examination of such as it appears they could present, although the policy gave power to the company to designate the place; but what does that matter, when we know that they did not have such papers to prove the full sum they demanded, since they did not produce them in the circuit court of Tucker county—that is, as to a very large portion of the valuation claimed? The company seems to have suspected foul play in the destruction of the goods, and overvaluation. The business began November 1st, and in November and December the firm took out policies from several insurance companies to the extent of some \$10,000. The policy in question is for \$1,500, dated 5th December, 1893. The fire was 12th January, 1894. The warranty in question was not complied with. Being a promissory warranty, this defeats recovery. *O'Brien v. Commercial Ins. Co.*, 63 N. Y. 108; 2 May on Ins. § 465; *Farmers' Ins. Co. v. Mispelhorn*, 50 Md. 180. In the latter case the court said: "The very object of this eighth condition is to put means in the power of the insurer to scrutinize the claims of the insured, and to protect itself against fraud. The provision is such as the parties were competent to make, and, having made it a part of their contract, the courts have no dispensing power over it." For want of these papers, there was not such preliminary proof of loss, or proof of loss on the trial, as the policy demanded—as justice demanded—because the burden of proof of compliance with this necessary requirement of the policy was on the plaintiff. It was a promissory warranty, compliance was a condition precedent to recovery, and the burden of showing it was on the plaintiff. *Flanagan v. Phenix Ins. Co.*, 42 W. Va. 426, 28 S. E. 513; *Adkins v. Globe Ins. Co.*, 45 W. Va. 384, 32 S. E. 256; 4 *Joyce on Ins.* § 3790. The evidence to meet this requirement of the policy being thus short, and insufficient to warrant a verdict, the court was justified in directing a verdict for the defendant. *Ketterman v. Dry Fork R. Co.*, 48 W. Va. 606, 37 S. E. 683. It is hardly necessary to say that the exceptions because of refusal of the court to allow certain questions to be answered by Hillelson cannot be sustained, because it does not appear what the witness would answer, or what he was expected to answer, so that we could see whether the answer would be material. *Jackson v. Hough*, 38 W. Va. 237, 18 S. E. 575; *Brock v. Bear (Va.)* 42 S. E. 307. See *Sesler v. Coal Co.*, 51 W. Va. 318, 41 S. E. 216.

Decree affirmed.

(35 W. Va. 245)

HENRY C. WERNER CO. v. CALHOUN et al.

(Supreme Court of Appeals of West Virginia.
March 8, 1904.)

SALE OF BUSINESS—CONTINUANCE OF BUSINESS NAME—LIABILITY OF FORMER OWNER —NOTICE OF SALE—INSTRUCTIONS.

1. A retail merchant, who, after conducting his individual business as such merchant under a name and style similar to those commonly used by copartnerships and corporations, sells his store to another, who continues to carry it on under the same name and style, purchasing, in the name under which the business is conducted, goods from the former dealers of his predecessor, must give such former dealers notice of his retirement from the business, to avoid liability for the purchase money of goods so purchased after his retirement, unless, before such subsequent sales, such former dealers had knowledge of the change of proprietorship of the store.

2. A former dealer is, in such case, entitled to actual notice; and publication thereof in a newspaper, and changing the name of the proprietor on the sign at the place of business, do not constitute notice to him.

3. On an issue as to whether or not actual notice was given in such a case, notoriety of the fact of the change of proprietorship in the town in which the business is carried on is not admissible evidence, unless connected with other facts which, together with it, form a sufficient basis for a finding by the jury of actual knowledge on the part of the former dealers; nor is it permissible to show that, before the retirement, checks given in payment of bills bore the signature of the proprietor of the store, and, after the sale, the name under which the business was carried on for signature.

4. It is proper for the trial court to refuse instructions so framed as to direct inquiries by the jury as to facts not material or relevant to the issue, as their tendency is to mislead and confuse the jury.

5. A verdict will not be disturbed for want of a proper instruction, unless it was requested and refused, nor for failure of the trial court to so modify an improper instruction requested as to make it proper, and then give it, unless it can be seen that such failure, for some reason, such as other incomplete instructions given, may have prejudiced the party requesting it.

(Syllabus by the Court.)

Error to Circuit Court, McDowell County; J. M. Sanders, Judge.

Action by the Henry C. Werner Company against A. L. Calhoun and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Rucker, Anderson & Hughes and Strother, Taylor & Strother, for plaintiffs in error. D. E. Johnston and R. C. & B. McClaugherty, for defendant in error.

POFFENBARGER, P. A. L. Calhoun, doing business at Keystone, McDowell county, under the name and style of "Union Bargain House," which name, together with the addition, "A. L. Calhoun, Proprietor, H. A. Womack, Manager," was displayed on a sign on the front of the building in which the business was carried on, began to purchase boots and shoes from the Henry C. Werner Company, of Columbus, Ohio, in June or July, 1898, at the solicitation of W. T. Watkins, its traveling salesman, and continued to do so at

intervals, and also to run and operate the said store, until the 1st day of September, 1899, on which date he sold the store to C. Womack, a brother of H. A. Womack, who seems to have been about the store prior to that time, and, just before that transaction, as well as afterwards, as late as December 27, 1899, goods were bought of the Werner Company and put into the store, without any notice, as the company claims, of the sale by Calhoun to Womack. This action was brought against Calhoun to recover the balance due on account of the purchase money of a part of the goods, and a judgment was rendered in the plaintiff's favor for the sum of \$465.95, from which Calhoun seeks relief on the ground of alleged errors committed by the court in overruling his motion to set aside the verdict, in refusing to give two instructions asked for by him, in admitting certain testimony on behalf of the plaintiff, objected to by him, and in sustaining objections on the part of the plaintiff to certain evidence offered by him.

The two instructions refused form the basis of the principal part of the argument in the brief for the plaintiff in error. They read as follows:

"(2) The court instructs the jury that, before they can find for the plaintiff in this case, they must believe from the evidence in this case that H. A. Womack, at the time of the purchase of the goods, the price for which this action is instituted, was the agent of A. L. Calhoun, and, as such agent, had authority to purchase the said goods, or that said Calhoun received and accepted said goods; and, unless they do believe from the evidence that the said Womack was the agent of said Calhoun, and had authority to purchase the said goods, or that the said Calhoun received the goods and accepted them, then they must find for the defendant.

"(3) The court instructs the jury that if they believe from the evidence in this case that the Henry C. Werner Company, or W. T. Watkins, the salesman of said company, knew that said H. A. Womack was the agent of said A. L. Calhoun, and that the goods were purchased by said Womack, it was the duty of the plaintiff to ascertain the extent of the agency of said Womack; that they dealt with said Womack at their own risk; and, if they believe from the evidence that the said Womack exceeded his authority as agent for said Calhoun, then they must find for the defendant in this case, even though they may believe that said Calhoun was the owner of the Union Bargain House at the time of the purchase of said goods."

Some of the goods were purchased before, and some after, the sale by Calhoun to Womack. It will be observed that instruction No. 2 says the jury must find for the defendant unless they believe that, at the time of the purchase of the goods, Womack was the agent of Calhoun, with authority to purchase the goods, or that Calhoun received and accepted

the goods. It being conceded by the plaintiff and admitted by the defendant that the sale had been made on or about the 1st day of September, 1899, prior to the purchase of a large portion of the goods, for the price of which this suit was brought, it is clear that, in strictness of law, Womack was not the agent of Calhoun then, and that Calhoun did not receive the goods. But it does not follow, as will be shown, that he could not be liable for the price of the goods, notwithstanding these facts. Hence the instruction, if given, would have tended to mislead the jury, by directing their inquiries to immaterial facts. Instruction No. 3 is bad for the same reason. The real question involved, and the one decisive of the case, is not want of agency in Womack, nor the extent of his agency at the time of the purchase. The instruction suggests the ownership of the store by Calhoun at the time of the purchase of the goods—a matter admittedly not true—and presents to the jury the inquiry as to whether Womack was his agent, as such owner, and the extent of that agency. A proper instruction, directing an inquiry by the jury as to what were Womack's powers, as agent of Calhoun, before September 1, 1899, and a finding in favor of the defendant as to the purchase money of goods bought after that date, if they believed from the evidence that the plaintiff or its agent knew Womack had had no authority to purchase goods for the store while the defendant owned it, could have been so framed as not to have been objectionable on the ground of tendency to mislead or confuse the jury; and the court would, no doubt, have given it, had a request therefor been made. On that issue evidence for both parties was introduced, but it is well-settled law that a verdict will not be disturbed for want of a proper instruction not asked for. Nor is the court bound to modify an improper instruction asked for, so as to make it good, and then give it. *Gas Co. v. City of Wheeling*, 8 W. Va. 320; *Rosenbaum v. Weeden*, 18 Grat. 785, 98 Am. Dec. 787.

The only real issue in the case is whether, upon retiring from the business of the Union Bargain House, Calhoun gave notice to the dealer from whom he had been buying goods before the severance of his relations with that store, so as to relieve himself from liability for goods sold to it thereafter. Counsel for plaintiff in error do not deny that it was his duty to give such notice, but they insist that sufficient notice was given, but what is relied upon as notice is not such as is customary under the circumstances. According to his own testimony, Calhoun published notice of his sale in a local newspaper, and the sign in front of the store was changed so as to read, "Union Bargain House. C. Womack Proprietor, H. A. Womack Manager," after which, and before some of the sales were made, Watkins was frequently at the store, but is not shown to have read the sign. Then he says he had a conversation with Watkins

in the month of September, 1899, on a train between Welch and Keystone, in which Watkins made inquiries about the financial standing and reliability of the Womacks. In addition to this, John Cobbs testifies that Watkins came to him about a month after the sale and asked him about the Womacks; wanting to know if he would be safe in selling to them. He further says Watkins asked him if Calhoun was with them, and was told that witness did not think he was, as they had changed the sign. Watkins does not deny the conversation on the train, or the conversation with Cobbs, but he says they occurred in July, 1900, long after the making of the last sale of goods, and that his first information of the sale of the store was derived from Calhoun the day he met him on the train. Another witness (H. A. Womack) says he notified Watkins of the sale soon after it was made. But Watkins denies it.

Calhoun testifies that, while he owned the store, he paid the plaintiff by his personal checks; and the proof is that, after the date of the sale thereof, checks were sent to the plaintiff, signed, "Union Bargain House." He offered to introduce in evidence one of the checks sent by him to the plaintiff, but the court excluded it. The court also refused to allow one of his witnesses to answer the following question: "Do you know whether or not it was generally known in that town at that time that A. L. Calhoun had sold out?" These rulings are excepted to. Whether the court erred, and, if so, whether the error is prejudicial, calling for a reversal of the judgment, depends upon the character of the notice which the law requires in such cases. The same principle governs here as in the case of the dissolution of a copartnership. "The law says that actual notice must be brought home to former customers of the firm, and notice by publication to the other persons. The meaning of these loose phrases will be discussed hereafter. The reason of them is as follows: One class of persons has become acquainted with the firm, and, by presumption of law, with its membership, so far, at least, as this is not dormant. These are entitled to the same certainty of notice of dissolution as they had of its existence, which is actual knowledge. The rest of the world, i. e., that part of it which has not given credit to the firm, became acquainted with the fact of its existence from reputation, hearsay, or their own observation. And this is to be counteracted by a publicity of the same sort, and at least measurably as widely spread, viz., proper publication, generally by advertisement in the proper newspaper. It is true that the latter class may be as much misled by want of actual knowledge of dissolution as the dealer class, yet the partners cannot know who such persons are, and, if more than constructive notice were required, a partner would, in the often-quoted language of Lord Kenyon in *Abel v.*

Sutton, 8 Esp. 108, 'never know when he was to be at peace, and freed from all the concerns of the partnership.'" Bates on Part. § 606. "One who has previously sold goods to the firm on credit is undoubtedly entitled to actual notice. All the foregoing phrases—'actual dealer,' 'former customer,' 'creditor,' or 'one who has trusted'—will include him." Id. § 613. "If a partner contracts in the name of a firm with a third person after the partnership is dissolved, but that fact is not made public or known by such third person, the law considers the contract as being made with the firm, and upon their credit, and they are all bound." *Dickinson v. Dickinson*, 25 Grat. 321.

Though this is not the case of a retiring partner, the rule in such case governs it. "Where one who has carried on business alone under a firm name sells the business to his son, who continues the business under the same name, the former is liable for goods purchased by the latter from an actual dealer with the former, who has no knowledge or notice of the transfer." *Elverson v. Leeds*, 97 Ind. 336, 49 Am. Rep. 458. An analogous case is that of *McGowan v. American Tan Bark Co.*, 121 U. S. 575, 7 Sup. Ct. 1315, 30 L. Ed. 1027, in which the following instruction was approved as having correctly stated the law: "If the jury find, from the evidence, that the defendants were, prior to June 23, 1881, doing business as partners under the name of 'The McGowan Pump Company,' or 'McGowan Pump Co.,' and that plaintiff dealt with them before said date as such partners, and had no knowledge of any change in said business, then said contract is the contract of defendants, and defendants cannot avoid or escape liability thereon, even if on that date a corporation existed called 'The McGowan Pump Company,' with which defendants may have been connected, and to which they had turned over their entire partnership business and assets."

What is actual notice to which the dealer is entitled, and admissible evidence thereof, are questions now to be determined. The former is one of fact, and not of law. No particular form or method of giving such notice is prescribed by law, although the usual mode is by letter to the dealer, apprising him of the fact of retirement. *Vernon v. Manhattan Co.*, 17 Wend. 523. In the same case, on appeal (22 Wend. 194), Senator Wager said: "As to persons having prior dealings, notice is usually given by a circular sent to all correspondents of the house, or in some other mode by which knowledge of the dissolution may be brought to the creditor." *Dickinson v. Dickinson*, 25 Grat. 321, holds: "Though a public notice of dissolution may be sufficient as to persons who have had no prior dealings with the firm, a person who has had such dealings must have notice or actual knowledge of the dissolution, to release the partners who

did not make or authorize the making of the note." In the opinion, Judge Staples said: "If actual knowledge of the dissolution is brought home to the party, he will be concluded, although no notice whatever may have been given. Whether, in such case, the evidence is sufficient to justify the inference of actual knowledge, is a question of fact for the consideration of a jury, under the supervision of the court. *Irby v. Vining*, 2 McCord, 379; *Coddington v. Hunt*, 6 Hill, 595; *Collyer on Partnership*, § 332." But manifestly the evidence must be more than sufficient to raise a mere suspicion of notice. It must be at least presumptive notice, calling for rebuttal. Accordingly it has been held that notoriety among business men and in the trade, much less in a community, is no evidence of actual notice, and is therefore inadmissible on the issue of actual knowledge of retirement. *Central National Bank v. Frye et al.*, 148 Mass. 498, 20 N. E. 325; *Pitcher v. Barrows*, 17 Pick. 361, 28 Am. Dec. 306; *Goddard v. Pratt*, 16 Pick. 412, 28 Am. Dec. 259. In *Pitcher v. Barrows* it seems to have been held inadmissible on even an issue of constructive notice, which is binding except as to former dealers. Upon this view of the law, it is apparent that the court did not err in excluding the check. The change in the signature from "A. L. Calhoun" to "Union Bargain House," if noticed, would have imported nothing more than a change in the form of the bank account, or that Calhoun had two such accounts, either of which theories would have been clearly consistent with his continued ownership of the store. An inquiry from the plaintiff as to the reason for the change would have been an impertinence. The proposed evidence of notoriety of the change of ownership in the town of Keystone was no evidence, as has been shown, of actual knowledge or notice to the plaintiff of the fact, although its agent was frequently in the town, without direct evidence of his knowledge of the currency of the rumor, which might possibly have sufficed to put him on inquiry, but there is no evidence of such knowledge.

On the two issues of the extent of Womack's agency while Calhoun owned the store, and notice of the sale by Calhoun to C. Womack, the evidence is conflicting, and the credibility of the witnesses is involved. On a motion to set aside a verdict, the trial court has a wider discretion than has this court. *Miller v. Insurance Co.*, 12 W. Va. 116, 29 Am. Rep. 452; *Ruffner v. Hill*, 31 W. Va. 428, 7 S. E. 13; *Grayson's Case*, 6 Grat. 712. But even there the power should be cautiously exercised, and this court will reverse the action of the court below in granting a new trial, "when the evidence is contradictory, if, when most favorably considered in support of the verdict, it does not still appear that the verdict was plainly not warranted by the evidence." *Gwynn v.*

Schwartz, 32 W. Va. 487, 9 S. E. 880; *Reynolds v. Tompkins*, 23 W. Va. 229; *Johnson v. Burns*, 39 W. Va. 658, 20 S. E. 686. Where there is conflicting testimony, and a jury has to decide on the credit of witnesses, the power of the court to grant a new trial ought to be very cautiously exercised. *Brugh v. Shanks*, 5 Leigh, 598. Whether there was actual notice depends upon questions of veracity between Watkins and Womack, Watkins and Calhoun, and Watkins and Cobbe; and, although there were three against one, the transactions were separate, and the demeanor of the witnesses on the stand, in the presence of the jury, enters into the question. The preponderance or weight of evidence is not determined by the number of witnesses on the one side, as against those on the other. Moreover, Watkins is corroborated by at least one circumstance. He wrote to his principal, July 6, 1900, saying, "I find to-day for the first time that A. L. Calhoun sold out to Womack Brothers last Sept. on the 30th and took a deed of trust on the stock to secure himself." This was not evidence manufactured on the witness stand, nor does it bear the impress of manufactured evidence at all. It carries on its face probability of truth as to the date of discovery, for even then his information was inaccurate.

On the question of the extent of Womack's agency, the evidence is equally conflicting and the proof dependent upon the credibility of the witnesses; Watkins being corroborated by circumstances, and Calhoun's testimony more or less inconsistent. Watkins says he never saw Calhoun but once, but sold to Womack on several occasions; and part of his testimony was delivered while holding in his hands the original orders which showed that he had made the sales at the store. Calhoun says he notified the company about six months before he sold out not to sell anything more to him, except upon his personal order; but he had not paid for all the goods that were put into the store prior to the date on which he sold out, and he does not specify any bill that was ordered by Womack without authority. At the same time he protests that he has paid all the bills he owes the plaintiff. The goods had been put into the store, presumably with his knowledge, and sold by him along with the balance of his stock. Upon this state of the evidence, the court cannot disturb the finding of the jury.

For the reasons aforesaid, the judgment will be affirmed.

(55 W. Va. 220)

FIRST NAT. BANK OF HUNTINGTON v. COOK et al.

(Supreme Court of Appeals of West Virginia. March 8, 1904.)

EQUITY—BILL—PARTIES—COSTS.

1. Syllabus in case of *Kellam v. Sayre*, 3 S. E. 589, 30 W. Va. 198, reaffirmed.

2. In a suit in chancery erroneously brought by A. for the use of B., and B. not being a party to the suit, an order of the circuit court directing the costs to be taxed against the beneficiary, B., and not against A., is void as against B., and does not make him a party to the suit.

(Syllabus by the Court.)

Appeal from Circuit Court, Wyoming County; J. M. Sanders, Judge.

Bill by the First National Bank of Huntington against G. D. Cook and others. Decree for complainant, and defendant Mary M. Cook appeals. Reversed.

Watts & Ashby, for appellant. J. B. Ellison, Col. Childers, and J. W. Arbuckle, for appellee.

McWHORTER, J. At the May rules, 1897, the First National Bank of Huntington, a corporation suing for the use and benefit of C. F. Cook (of Jacob), filed its bill in equity against G. D. Cook, Mary M. Cook, Jacob A. Cook, J. R. Robinson, special commissioner, Ida Sanders, administratrix of the estate of J. O. Sanders, deceased, J. R. Robinson, trustee, W. G. Cook, and W. E. Justice, in the clerk's office of the circuit court of Wyoming county, to enforce the lien of its judgment against G. D. Cook for \$1,271.95, recovered by it in the circuit court of said Wyoming county, with interest and costs, and subject thereto the surface of several small tracts of land described in the bill as being owned by said G. D. Cook, and also to subject a tract of 123 $\frac{3}{4}$ acres alleged to have been purchased at judicial sales and paid for by said G. D. Cook, and which he caused to be conveyed to his wife, the defendant Mary M. Cook, for the purpose of hindering, delaying, and defrauding his creditors in the collection of their debts, and especially the plaintiff, and that the defendant Mary M. Cook accepted said conveyance with full knowledge of such fraudulent intent and for the purpose of assisting said Cook in his fraudulent act, and praying that the conveyance so made to Mary M. Cook be declared fraudulent and void as to plaintiff's judgment, and that the same, together with the other lands described, be sold for the satisfaction of the debts set up in the plaintiff's bill, and for general relief. On the 30th of September, 1898, on motion of plaintiff the cause was remanded to rules "for the purpose of making new parties and making such other amendments as it may be advised." The defendants G. D. Cook and Mary M. Cook filed their separate demurrers and answers to said bill. The demurrers were argued and overruled, depositions taken, and the cause referred to a commissioner to ascertain the liens, by judgment or otherwise, against G. D. Cook, and other matters set out in the order, and a report was made by the commissioner in response to said order. On the 1st day of April, 1898, the cause was heard, when the First

National Bank of Huntington, by its attorney, moved to dismiss the suit upon the ground that said bank had received the judgment described in the bill as therein shown, and was unwilling to be liable for the costs of the suit. The court overruled the motion to dismiss the case, and directed that the costs be taxed against the beneficiary, C. F. Cook, and not against said bank, and again overruled the demurrers of the defendants G. D. Cook and Mary M. Cook, and overruled the exceptions to the report of the commissioner reporting the liens upon the property, and ascertained and decreed the several liens upon the lands of G. D. Cook as reported by the commissioner, and set aside the deed to defendant Mary M. Cook for the 123 $\frac{3}{4}$ acres of land as fraudulent as to plaintiff and other lienholders named in the commissioner's report, and decreed the sale of the said lands to pay the said liens, from which decree the defendant Mary M. Cook appealed.

It is shown by the bill that on the 15th of May, 1895, the plaintiff assigned its said judgment against G. D. Cook to the defendant William E. Justice for value, and that on the 10th day of August, 1895, the defendant W. E. Justice, for value, assigned the said judgment to C. F. Cook (of Jacob). Although the bill was remanded to rules for new parties to be made thereto, the bill was not so amended, and it does not appear that C. F. Cook (of Jacob) was ever made a party to the suit. It is claimed by appellee that this defect is cured by the decree of the court entered on the 1st day of April, 1898, overruling the motion to dismiss the case, and directing that the costs be taxed against the beneficiary, C. F. Cook, and not against the bank, that this was in effect substituting C. F. Cook as plaintiff, and decreed that he should prosecute the suit in his name and at his costs. C. F. Cook not being a party, the court had no jurisdiction to make an order or decree requiring him to pay costs. A decree or judgment affecting the rights of a person not before the court is a nullity as to such person. This cause falls clearly within the rulings of this court in *Kellam v. Sayer*, 30 W. Va. 198, 3 S. E. 589, where it is held (Syl., point 1), "A suit in equity cannot be brought in the name of one party for the use of another;" and (point 2), "Where a judgment at law was recovered in the name of A. for the use of B., and afterwards A. brought a chancery suit in his own name for the use of B., the judgment creditor, and B. was not a party to the suit, and a decree was rendered enforcing said judgment lien, it was reversed for want of proper parties, and remanded for proper parties to be made." See, also, *Grove v. Judy*, 24 W. Va. 294, and *Neely v. Jones*, 16 W. Va. 625, 37 Am. Rep. 794.

The demurrer should have been sustained. Therefore the decrees entered in this cause are set aside and held for naught, the demurrer to the bill sustained for want of proper parties, and the cause remanded to the cir-

¶ 2. See Equity, vol. 19, Cent. Dig. § 267.

cult court of Wyoming county, with leave to plaintiff to amend its bill by making proper parties thereto, and for further proceedings to be had therein.

ELBON v. HAMRICK et al.

(Supreme Court of Appeals of West Virginia.
March 8, 1904.)

ERROR—DISMISSAL—CONTEST AS TO OFFICE— EXPIRATION OF TERM.

1. When, pending a writ of error, without fault of a party, an event occurs rendering it impossible for the appellate court, if it should decide in favor of the plaintiff, to grant him substantial relief, the court will not decide the merits and give formal judgment, but will dismiss the writ of error without awarding costs.

2. When a writ of error involves a contest as to an office, and while it is pending the term of the office ends, the writ of error will be dismissed without decision of the case, and without judgment as to costs.

(Syllabus by the Court.)

Error to Circuit Court, Webster County;
W. G. Bennett, Judge.

Certiorari by W. W. Elbon against Benjamin Hamrick and others. Judgment for defendants, and plaintiff brings error. Dismissed.

Linn & Byrne and W. T. Talbott, for plaintiff in error. Morton & Wysong and H. O. Thurmond, for defendants in error

BRANNON, J. W. W. Elbon was elected councilman of the town of Addison, Webster county, but upon contest before the town council he was declared ineligible because not a freeholder, and then he sued out a writ of certiorari to reverse that decision, but the certiorari was dismissed by the circuit court as improvidently granted. Elbon obtained a writ of error.

The case now presents to this court for decision only a moot or useless question, for the reason that the term of office has expired, and, if Elbon were successful, he could not take the office. Our case of *State v. Lambert*, 52 W. Va. 248, 43 S. E. 176, fully discusses this, holding that if, pending a writ of error to a judgment awarding a mandamus commanding a town clerk to place a candidate's name on an official ballot, the election has been held, the writ of error will be dismissed "When pending an appeal, without any fault of defendant, an event occurs which renders it impossible for the appellate court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief, the court will not proceed to a formal judgment, but will dismiss the appeal." *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 298. There a party sought a right to vote, but the election was over. *Taylor v. Maynor*, 46 W. Va. 588, 33 S. E. 260, is decisive of this case, holding that, where a case involves right to town offices, and the term ends during pendency of a

writ of error, the writ of error will be dismissed. Only a question of costs is left in the case. The subject is fully stated in 2 Cyc. 533. There we find that the court will not hear the case merely to adjudge costs. The principles above stated, and as to costs, will be found in *Ferguson v. Millender*, 32 W. Va. 30, 9 S. E. 38. Having no controversy on which to base a decision, how can we adjudicate costs? Costs depend on decision of the merits. We cannot award them in favor of the plaintiff in error without determining that he has right, or against the defendant, without finding him wrong.

Therefore we dismiss the writ of error, without costs.

MEMORANDUM DECISIONS.

ATKINSON v. RICKS. (Supreme Court of North Carolina. August Term, 1903.) Winborne & Lawrence, for plaintiff. Mason, Harris & Barnes, for defendant. No opinion. Motion for new trial denied. Judgment below affirmed.

BANK v. MANUFACTURING CO. (Supreme Court of North Carolina. August Term, 1903.) Crawford & Hanna, for plaintiff. Mr. Ferguson, for defendant. No opinion. Affirmed.

BARROW v. COTTON MILLS. (Supreme Court of North Carolina. August Term, 1903.) Douglass & Simms, for plaintiff. Battle & Mordecai, for defendant. No opinion. Affirmed.

BLAND v. PURCELL. (Supreme Court of North Carolina. August Term, 1903.) Clarkson & Dula, for plaintiff. McCall & Nixon, for defendant. No opinion. Affirmed by a majority of the court. CONNOR, J., dissents. WALKER, J., did not sit.

BREWER v. BATCHELOR. (Supreme Court of North Carolina. August Term, 1903.) Jacob Battle and Shepherd & Shepherd, for plaintiff. Mr. Spruill, for defendant. No opinion. Affirmed.

BRUMMETT v. LIFE ASS'N. (Supreme Court of North Carolina. August Term, 1903.) Shaw & Shaw, for plaintiff. No opinion. Motion to docket and dismiss under rule 17 (39 S. E. vi) allowed.

BUMGARDNER v. RAILROAD. (Supreme Court of North Carolina. August Term, 1903.) Furches, Coble & Nicholson, for plaintiff. Mr. Caldwell, for defendant. No opinion. Affirmed.

BURKE v. RAILROAD. (Supreme Court of North Carolina. August Term, 1903.) Furches, Coble & Nicholson, for plaintiff. Mr. Caldwell, for defendant. No opinion. Affirmed.

BURKS v. TELEGRAPH CO. (Supreme Court of North Carolina. August Term, 1903.) Mr. Wright, for plaintiff. Jones & Tillett, for defendant. No opinion. Affirmed.

CAMPBELL v. LIFE ASS'N. (Supreme Court of North Carolina. August Term, 1903.) McIntyre & Lawrence, for plaintiff. No opinion. Motion to docket and dismiss under rule 17 (39 S. E. vi) allowed.

CARMICHAEL v. EVERETT. (Supreme Court of North Carolina. August Term, 1903.) Pou & Fuller, for plaintiff. Mr. Gash, for defendant. No opinion. Dismissed for failure to file brief.

CARTER v. COMMISSIONERS. (Supreme Court of North Carolina. August Term, 1903.) Mr. Sinclair, for plaintiff. Mr. Rose, for defendant. No opinion. Affirmed.

CHEMICAL CO. v. LEACH. (Supreme Court of North Carolina. August Term, 1903.) Mr. Cook, for plaintiff. Mr. McCormick, for defendant. No opinion. Appeal dismissed.

COZART v. RAILROAD. (Supreme Court of North Carolina. August Term, 1903.) Kitchen & Carleton, for plaintiff. Mr. Guthrie, for defendant. No opinion. Affirmed.

In re ENTRIES OF DRURY. (Supreme Court of North Carolina. August Term, 1903.) Perkins & Justice, for appellant. Mr. Avery, for appellee. No opinion. Affirmed.

FAY v. CAUSEY. (Supreme Court of North Carolina. August Term, 1903.) Morehead & Scott, for plaintiff. Mr. Barringer, for defendant. No opinion. Affirmed.

FLEMING v. RAILROAD. (Supreme Court of North Carolina. August Term, 1903.) Mr. Nicholson, for plaintiff. Mr. Caldwell, for defendant. No opinion. Affirmed.

FRAZIER v. FRAZIER. (Supreme Court of North Carolina. August Term, 1903.) Mr. Lindsay, for plaintiff. Mr. Morrill, for defendant. No opinion. Affirmed. CONNOR, J., having been of counsel, did not sit.

FURR v. RAILROAD. (Supreme Court of North Carolina. August Term, 1903.) Mr. McOall, for plaintiff. Mr. Bason, for defendant. No opinion. Affirmed.

HARRINGTON v. RAWLS. (Supreme Court of North Carolina. August Term, 1903.) Jarvis & Blow, for plaintiff. Fleming & Moore and Skinner & Whedbee, for defendant. No opinion. Affirmed.

HAWKINS v. LUMBER CO. (Supreme Court of North Carolina. August Term, 1903.) D. L. Ward and Isler & Shaw, for plaintiff. Simmons & Ward and T. C. Wooten, for defendant. No opinion. Affirmed.

HAWKS v. HAWKS. (Supreme Court of North Carolina. August Term, 1903.) Pittman & Kerr, for plaintiff. Green & Polk, for defendant. No opinion. Affirmed.

HAYES v. STAFFORD. (Supreme Court of North Carolina. August Term, 1903.) Mr. Linney, for plaintiff. Mr. Bower, for defendant. No opinion. Appeal of defendant dismissed for failure to file record at proper term, and for failure to file brief in time.

HEGWOOD v. JOHNSON. (Supreme Court of North Carolina. August Term, 1903.) Mr. Bynum, for plaintiff. Mr. Morehead, for defendant. No opinion. Affirmed.

HILLIARD v. SIKES. (Supreme Court of North Carolina. August Term, 1903.) Adams & Jerome and Mr. Lemmond, for plaintiff. Redwine & Stack and Mr. Armfield, for defendant. No opinion. Affirmed.

HOUSE v. RAILROAD. (Supreme Court of North Carolina. August Term, 1903.) Mr. Spruill, for plaintiff. Day & Bell, for defendant. No opinion. Dismissed for failure to print brief.

HOWARD v. TELEGRAPH CO. (Supreme Court of North Carolina. August Term, 1903.) D. L. Ward and T. C. Wooten, for plaintiff. W. W. Clark and F. H. Busbee & Son, for defendant. No opinion. Affirmed.

HUITT v. RAILROAD. (Supreme Court of North Carolina. August Term, 1903.) Self & Whitener, for plaintiff. Mr. Erwin, for defendant. No opinion. Affirmed.

HURLEY v. RAILROAD. (Supreme Court of North Carolina. August Term, 1903.) Mr. Mangum, for plaintiff. Busbee & Son, for defendant. No opinion. Affirmed.

JONES v. RAILROAD. (Supreme Court of North Carolina. August Term, 1903.) Mr. Sinclair, for plaintiff. Mr. Rose, for defendant. No opinion. Affirmed.

KEENER v. KELLY. (Supreme Court of North Carolina. August Term, 1903.) Shepherd & Shepherd, for plaintiff. Ray & Sisk, for defendant. No opinion. Affirmed, on authority of *Barcello v. Hapgood*, 118 N. C. 712, 24 S. E. 124.

LEIGH v. MANUFACTURING CO. (Supreme Court of North Carolina. August Term, 1903.) Mason & Daniel, for plaintiff. Day & Bell, Battle & Mordecai, and Mr. Calvert, for defendant. No opinion. Petition of defendant to rehear dismissed.

McINTYRE v. LIFE ASS'N. (Supreme Court of North Carolina. August Term, 1903.) McIntyre & Lawrence, for plaintiff. No opinion. Motion to docket and dismiss under rule 17 (39 S. E. vi) allowed.

McMANUS v. RAILROAD. (Supreme Court of North Carolina. August Term, 1903.) Mr. Bason, for defendant. No opinion. Dismissed for failure to print briefs, and for want of bond.

MAIN v. QUICKEL. (Supreme Court of North Carolina. August Term, 1903.) Mr. Wetmore, for plaintiff. Mr. Quickel, for defendant. No opinion. Affirmed.

MANUFACTURING CO. v. LUMBER CO. (Supreme Court of North Carolina. August Term, 1903.) Land & Cowper, for plaintiff. No opinion. Dismissed for failure to print brief.

MARION v. BANK. (Supreme Court of North Carolina. August Term, 1903.) Mr. Carter, for plaintiff. Mr. Holcomb, for defendant. No opinion. Affirmed, on the authority of *Jones v. Buxton*, 121 N. C. 285, 28 S. E. 545.

MILLER v. MCGUIRE. (Supreme Court of North Carolina. August Term, 1903.) Mr. Linney, for defendant. No opinion. Motion to docket and dismiss under rule 17 (39 S. E. vi) allowed.

MONTAGUE v. WILLIAMS. (Supreme Court of North Carolina. August Term, 1903.) Mr. Harris, for plaintiff. Mr. Bledsoe, for defendant. No opinion. Affirmed, upon the authority of *Stanley v. Baird*, 118 N. C. 75, 24 S. E. 12.

MOODY v. PHILLIPS. (Supreme Court of North Carolina. August Term, 1903.) Mr. Kelly and Jones & Johnston, for plaintiff. Mr. Ray, for defendant. No opinion. Affirmed, on authority of *Murchison v. Plyler*, 87 N. C. 79, and *Stern v. Lee*, 115 N. C. 428, 20 S. E. 736, 26 L. R. A. 814.

MOORE v. BECTON. (Supreme Court of North Carolina. August Term, 1903.) Mr. Sinclair, for plaintiff. Mr. Cook, for defendant. No opinion. Affirmed.

MOSES v. RAILROAD. (Supreme Court of North Carolina. August Term, 1903.) Burwell & Cansler, for plaintiff. Mr. Bason, for defendant. No opinion. Affirmed.

MOTZNO v. RAILROAD. (Supreme Court of North Carolina. August Term, 1903.) Mr. Munroe, for defendant. No opinion. Affirmed.

PATTERSON v. WHEELER. (Supreme Court of North Carolina. August Term, 1903.) Mr. Sinclair, for plaintiff. Mr. Broadfoot, for defendant. No opinion. Affirmed.

RANKIN v. HOTEL CO. (Supreme Court of North Carolina. August Term, 1903.) Merrick & Barnard, for plaintiff. Moore & Rollins, for defendant. No opinion. Affirmed, on authority of *Baxter v. Baxter*, 77 N. C. 118.

RAPER v. STIVERS. (Supreme Court of North Carolina. August Term, 1903.) Taylor & Wilson, for plaintiff. Mr. Barringer, for defendant. No opinion. Affirmed.

REED v. SUMNER. (Supreme Court of North Carolina. August Term, 1903.) Cowper & Barnes, for plaintiff. Winborne & Lawrence, for defendant. No opinion. Affirmed.

RICE v. POTTER. (Supreme Court of North Carolina. August Term, 1903.) Mr. Moore, for plaintiff. No opinion. Dismissed for failure to print record.

RUTLEDGE v. COTTON MILLS. (Supreme Court of North Carolina. August Term, 1903.) Mr. Mangum, for plaintiff. Mr. Mason, for defendant. No opinion. Affirmed.

SHUTE v. COTTON MILLS. (Supreme Court of North Carolina. August Term, 1903.) Mr. Redwine, for plaintiff. Mr. Jerome, for defendant. No opinion. Dismissed for failure to file printed record and brief.

SPRINKLE v. WELLBORN. (Supreme Court of North Carolina. August Term, 1903.) Mr. Finley, for plaintiff. Mr. Barber, for defendant. No opinion. Defendant's petition to rehear dismissed. See 43 S. E. 1005.

STANLY v. RASBERRY. (Supreme Court of North Carolina. August Term, 1903.) Pollock & Clark, for plaintiff. Rouse & Ormond, for defendant. No opinion. Affirmed.

STATE v. ARNETT et al. (Supreme Court of North Carolina. August Term, 1903.) The Attorney General, for the State. J. D. Kerr, for defendant. No opinion. Affirmed.

STATE v. LEWIS. (Supreme Court of North Carolina. August Term, 1903.) The Attorney General, for the State. W. A. Dunn, for defendant. No opinion. Affirmed.

STATE v. LONGMIRE. (Supreme Court of North Carolina. August Term, 1903.) The Attorney General, for the State. Pittman & Kerr, for defendant. No opinion. Affirmed.

STATE v. MARSH. (Supreme Court of North Carolina. August Term, 1903.) The Attorney General, for the State. Mr. Redwine, for defendant. No opinion. New trial.

STATE v. PAYNE. (Supreme Court of North Carolina. August Term, 1903.) The Attorney General, for the State. Sawyer & Leary, for defendant. No opinion. Affirmed.

STATE v. RATLIFF. (Supreme Court of North Carolina. August Term, 1903.) The Attorney General and Mr. McLendon, for the State. Mr. Bennett, for defendant. No opinion. Affirmed.

STATE v. SAWYER. (Supreme Court of North Carolina. August Term, 1903.) The Attorney General, for the State. W. J. Leary, Sr., for defendant. No opinion. Affirmed.

TAYLOR v. MEIVER. (Supreme Court of North Carolina. August Term, 1903.) W. W. Clark, for plaintiff. No opinion. Motion to docket and dismiss defendant's appeal under rule 17 (39 S. E. vi) allowed.

TEASTER v. LUMBER CO. (Supreme Court of North Carolina. August Term, 1903.) Mr. Lovill, for plaintiff. Mr. Newland, for defendant. No opinion. Motion to reinstate appeal denied.

TEW v. BLUE. (Supreme Court of North Carolina. August Term, 1903.) Mr. Cook, for plaintiff. No opinion. Motion to docket and dismiss under rule 17 (39 S. E. vi) allowed.

THOMAS v. LOUISE MILLS. (Supreme Court of North Carolina. August Term, 1903.) Montgomery & Crowell, for plaintiff. Jones & Tillett, for defendant. No opinion. Affirmed.

WILD v. ROBERTS. (Supreme Court of North Carolina. August Term, 1903.) Charles A. Moore, for defendant. No opinion. Motion to docket and dismiss plaintiff's appeal under rule 17 (39 S. E. vi) allowed.

YOUNG v. RAILROAD. (Supreme Court of North Carolina. August Term, 1903.) Douglass & Simms, for plaintiff. Day & Bell and Mr. Womack, for defendant. No opinion. Affirmed.

END OF CASES IN VOL. 46

